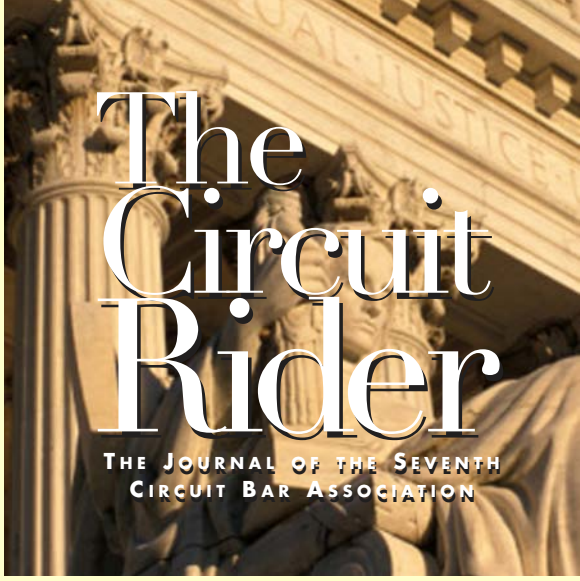
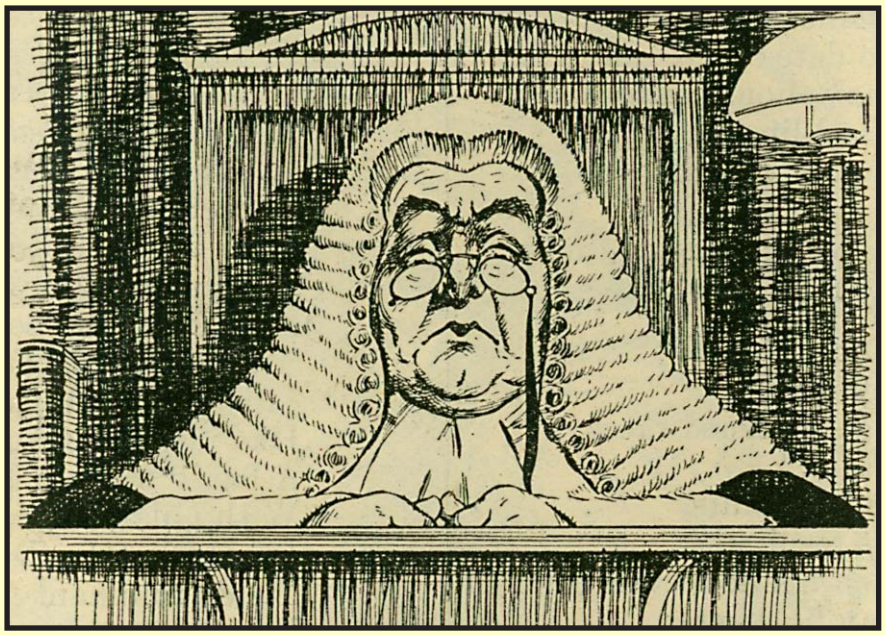
December 2011



Featured In This Issue

Legacies



In This Issue

Letter *from the* President

President Steven F. Molo
MoloLamken, LLP

This fall I was privileged to be part of a contingent of trustees of the American Inns of Court Foundation who paid an "Amity Visit" to the Middle Temple in London. I confess that when I received the invitation, I had to Google the term "Amity Visit" to learn what I might be getting into. It turns out that an Amity Visit is defined as a visit to promote "friendship or harmony between individuals and groups", and our trip was a great example of that.

Of the four English Inns of Court – Middle Temple, Inner Temple, Lincoln's Inn, and Gray's Inn – the Middle Temple has the strongest ties to America. Five Middle Templars signed the Declaration of Independence and seven signed the Constitution.

Our hosts could not have been more gracious. They organized a series of programs on topics ranging from legal issues emanating from the war on terror, to the "British Constitution", to promoting professionalism at the bar. We toured the law courts, visited the residence of the United States Ambassador to the Court of St. James, Louis Susman, himself a lawyer (and coincidentally a former client of mine when he ran Salomon Brothers in Chicago), and spent an afternoon at the relatively new Supreme Court.

While the professional programs were extremely well done, they actually were surpassed by the social events held in our honor. We were feted with cocktail receptions at Lincoln's Inn and in the Middle Temple's garden. We attended a special church service and performance of the renowned Temple Church Choir. And on several evenings, we dined in the Middle Temple's great hall – which bears on its walls the names of Inn leaders dating back to 1500 and features a table made from part of the ship of Sir Walter Raleigh, himself a Middle Templar. Our dinners were followed by entertainment including, on one evening, dancing to an Afro-pop band, and, on another, a one-act play performed by an avant garde theatre group formed by woman prisoners.

Of course, these evenings saw a fair amount of red wine, white wine, sherry, and port consumed – most charmingly, in connection with a toast following dinner. This toast was no informal, "off the top of the head" nod toward those in attendance. No, this was a well choreographed *pas de deux* that apparently has been danced for centuries.

The leader of the Inn is called the Treasurer, and is selected each year from the ranks of the masters – those members of the Inn who have been recognized for distinguished achievement at the bar or distinguished service to the Inn. The toast is performed through a wonderful exchange between the Treasurer and the "Master Junior", the member most recently to have achieved the station of master.

The two rise – the Treasurer at the center of the head table and the Master Junior several tables away – and the following colloquy ensues:

> "Master Junior, to the Queen"
> *"Master Treasurer, to the Queen!"*
> "Master Junior, to Domus."
> *"Master Treasurer, to Domus!"*
> "Master Junior, to absent members"
> *"Master Treasurer, to absent members!"*

Hearing it the first time I thought, "To the Queen, To absent members" – I get that. But Domus?

It turns out that "Domus" is another term used by members when referring to the Inn. Of course, in Latin, Domus means "home". To the uninitiated it might seem a little odd to refer to a place associated with ones's work as "home." However, it makes perfect sense once you spend any time at one of the Inns and see the members interact.

The Inn truly is the professional home for those called to the bar. By that I mean it is a place where association is based upon a shared heritage and purpose and not merely a commercial relationship. It is not about hours billed or fees collected. It is about being a lawyer.

The English Inns are not organized according to income, specialty, or social rank. Their members practice in all substantive areas of advocacy; they are bound together by a commitment to professionalism. The Middle Temple's current Treasurer, Dawn Oliver, is a law professor focused on comparative public law at University College London. Next year's Treasurer is The Right The Honorable Lord Clarke of Stone – Cum – Ebony (quite a moniker for a man who prefers to be called Tony Clark), a Justice of the Supreme Court and former admiralty lawyer. He will be succeeded by Christopher Symons, whose specialty is insurance and professional negligence. A young barrister specializing in commercial disputes is just as likely to dine with – or be mentored by – someone specializing in family law or criminal defense as she is someone who practices in her area. And it is the Inn that provides the home in which that can occur.

While the practice of law in America may not have quite the history and pomp found in the English Inns of Court, we can find our own "Domus" if we put a little effort into it.

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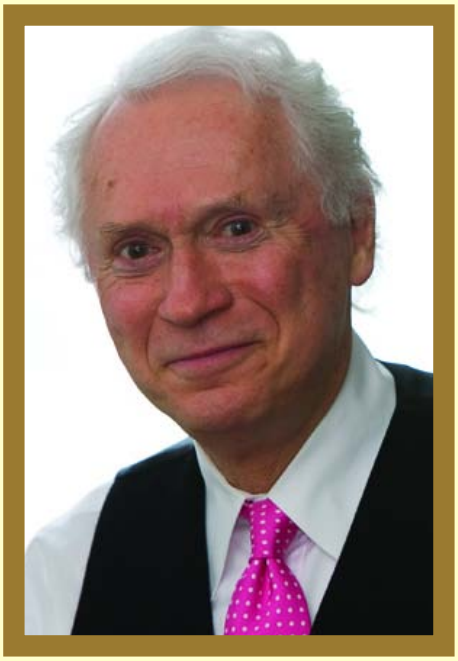
in Memoriam

The Honorable Terence T. Evans, Circuit Judge
United States Court of Appeals for the Seventh Circuit

by Diane S. Sykes *



On the last Sunday of October 1983 — the first semester of my 3L year at Marquette Law School — Judge Evans called to offer me a clerkship in his chambers after my graduation the following spring. It was Halloween Sunday, and rather than studying the law that afternoon, I had been out taking my stepdaughter trick-or-treating. When his call came, I was standing at the front door of my house handing out candy to neighborhood kids in costumes. Of course, there was no caller ID back then, so I was surprised to learn who was on the other end of the line. I had interviewed with the Judge the week before but was caught a bit off guard hearing from him over the weekend. Because it was late on a Sunday afternoon in the fall, he was no doubt calling between football games — or maybe it was halftime — but anyway, there we were, both in the midst of our normal weekend routines. For him, it was the seventh of 47 law-clerk job-offer calls he would make. For me, it was the first of the three most important phone calls of my professional life; the other two came from the Governor's office and the White House. I was absolutely thrilled to get that clerkship with the Judge, but back then I could not fully appreciate the significance of the opportunity he was giving me.

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** Circuit Judge Terence T. Evans died of a sudden illness on August 10, 2011. Judge Sykes's moving tribute to Judge Evans was delivered at a Special Session of the United States Court of Appeals for the Seventh Circuit and the United States District Court for the Eastern District of Wisconsin on September 23, 2011, in Milwaukee*

Terence T. Evans: *in* Memoriam

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What I learned from Judge Evans during my clerkship year made those other two important phone calls possible. For that and much more I am greatly in his debt.

Terry was everyone's ideal trial judge. For starters, he had that rare combination of a sharp legal mind, abundant common sense, and broad legal and cultural experience that made him perfectly suited to the work of the trial court. He was steeped in everything that is Milwaukee — its people, its traditions, and its institutions. Add to that his legendary sense of humor and his considerable powers of perspective and intuition and you've got a truly masterful trial judge. He could read the courtroom, size up each case really quickly, cut through the clutter, pull the story line from mountains of evidence, identify the real clash of interests, and articulate a concise and well-reasoned decision that everyone could grasp. He did all this with a clarity of expression and wit rarely found in the world that we lawyers and judges inhabit.

One opinion he issued during my clerkship year particularly illustrates these talents. The case had come in the year before, so I was not in the courtroom when the evidentiary hearing was held. That didn't matter, so vivid was the opinion he wrote. Most of us in this room have lived in Milwaukee all our lives. Those of us over 40 — okay, those of us over 50 — may remember Count Fuller, a colorful local oddity and erstwhile door-to-door salesman who used to roam the east side peddling household wares. His given name was Jeffrey Pergoli, and for a short time, he worked as a door-to-door Fuller Brush salesman until the company terminated him for writing a bad check. Company officials reported the matter to law-enforcement authorities, and Pergoli was charged with a couple of misdemeanors. The charges were eventually dropped, and Pergoli sued the Fuller Brush Company for malicious prosecution.

The company's lawyers responded to this minor litigation annoyance with the legal equivalent of a bazooka: They counterclaimed for trademark infringement, unfair competition, interference with business relations, and unfair trade practices. Their theory was that Pergoli was misrepresenting himself as a Fuller Brush salesman even though he had been terminated two years earlier. But here's the thing. In the meantime, Pergoli had legally changed his name to "Count Copy-Fuller," known to everyone as simply "Count Fuller." He went about town in crazy outfits — tights and capes and such — and carried on his door-to-door marketing in an unconventional way, all the while disclaiming any relationship with the Fuller Brush Company.

The Judge's decision became an instant classic.[1] He dismissed Count Fuller's malicious-prosecution claim in a couple of sentences, then turned his attention to the bevy of counterclaims filed by the Fuller Brush Company. He first noted the crucial fact that Count Fuller's sales materials contained the disclaimer. He then gave this description of the plaintiff:

> The Count wears wild costumes. At the court hearing on [the company's] motions he wore one of them, a bright green sportscoat and large dark glasses in the shape of butterflies. He had numerous small stuffed animals perched on his shoulders. . . . [T]he outfit borders on the outrageous. . . . [And here the Judge inserted a sketch made by his law clerk Rick Sankovitz.] [2]

Next, the Judge framed the issue: "[T]he company claims that Count Fuller[] . . . must be stopped. The issue presented is to what extent Count Fuller's activities are legally impermissible either as unfair competition or because they infringe on the Fuller Brush trademark."[3] He continued:

> The 'Fuller Brush Man' is a part of American lore. It is as if he exists in a Norman Rockwell painting, carrying samples of mops and bottles of cleaning solutions to the housewife, who answers the door while wiping her hands on her apron. Today, he is probably less folksy but no less respectable. To understate, Count Fuller does not fit the bill. In fact, the Count is so atypical that it is difficult to imagine why the Fuller Brush Company seems so threatened by his activities. I do not believe that any, or at least very many, could be deceived.[4]

Judge Evans concluded:

> Count Fuller states outright . . . that he is not a Fuller Brush Man. Why would a reasonable person think that he was? Dom DeLuise can squirm into bikini Jockey underwear and say he's Jim Palmer without causing Palmer or Jockey any anxiety. Exaggeration, hyperbole and parody have a place. It should not be the mission of the federal court to stomp them out.[5]

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[1] *Count Fuller v. Fuller Brush Co.,* 595 F. Supp. 1088 (E.D. Wis. 1984).
[2] *Id.* at 1091.
[3] *Id.*
[4] *Id.* at 1092.
[5] *Id.*

Terence T. Evans: *in* Memoriam

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During his 16 years in the district court, Judge Evans presided over many important trials, notably the organized-crime prosecution of Frank Balistrieri, the bribery prosecution of a powerful Milwaukee alderman, and a long-running legislative redistricting battle after the 1980 census.[6] He was ahead of his time in an early case about gays in the military.[7] He was a strong believer in individualized justice and chafed under the sentencing guidelines after they were implemented in 1987. He wrote several important opinions objecting to the grid system of sentencing for reasons of principle, efficiency, and the proper allocation of sentencing responsibility.[8] He ran a superb trial court. His pragmatic sound judgment, general good cheer, and incisive wit made him a favorite of lawyers, law enforcement, and others in the justice system who regularly appeared in his courtroom.

Even so, when he saw litigation foolishness, he would call it out. In a decision denying a routine motion for leave to amend a complaint, he dropped the following footnote [and I will omit the name of the offending law firm to protect the innocent]:

> (1) The story of the creation of the world is told in the book [of] Genesis in 400 words; (2) The world's greatest moral code, the Ten Commandments, contains only 279 words; (3) Lincoln's immortal Gettysburg address is but 266 words in length; (4) The Declaration of Independence required only 1,321 words to establish for the world a new concept of freedom. Together, the four contain a mere 2,266 words. On this routine motion to amend a civil complaint, [the law firm which shall remain nameless] has filed a brief . . . that contains approximately 41,596 words spread over an agonizing 124 pages. In this case, the term . . . "brief" is obviously a misnomer.[9]

The point was made.

This kind of good-natured ribbing endeared Terry to our legal community, but it had a broader purpose. He was teaching us that the law is serious business, but we're all in it together so let's be reasonable.

Once Terry arrived at the court of appeals, his pragmatism, his humor, his knack for getting right to the point, and his capacity for writing lucid, compelling opinions were on display in every case. On the bench, he did not pepper the lawyers with questions, but when he did jump in, it was to bring a meandering argument back to legal or factual essentials — and sometimes to bring his theoretically minded colleagues back down to earth. In the conference room, as elsewhere, he was quick with an interesting story that shed new insight on the discussion.

When we circulated draft opinions among our panel colleagues, he would often send amusing little editorial comments along with his vote. A few examples will illustrate the spice he brought to our judicial life:

In the summer of 2007, I circulated a draft opinion in a case concerning the surprisingly difficult question of what it means for an illegal immigrant to be "found in" the United States in violation of the illegal-reentry statute.[10] The opinion went on for several pages about the meaning of the statutory term "found in." Terry sent this response: "I approve Judge Sykes' proposed opinion in this case. And if you are looking for me at 9 a.m. tomorrow, I could probably be 'found in' the rough off the 5th green at the Western Lakes Golf Club in Waukesha County."

And this, in response to an opinion Mike Kanne sent to us in a case raising a question about liability for the improper use of tools rented from Home Depot.[11] In his draft, Mike had observed as an aside that "[w]e would all like to use tools perfectly."[12] Terry responded: "I approve this proposed opinion. P.S. May I suggest, on page 17, after the statement 'We would all like to use tools perfectly' that you add this: 'Judge Evans is the only member of this panel who always does so.' "

And this, in response to a draft opinion Dick Posner circulated resolving a particularly contentious appeal.[13] Dick had closed his opinion with this observation: "[I]t is time the war between these pertinacious antagonists was brought to a peaceful end."[14] Now, you know Terry was not going to let language like that go by without comment. He responded: "I approve Dick's proposed opinion in this case. Actually, I just read the opinion while watching, with one eye, CNN's coverage of the Iowa Caucuses. [This was in early 2008.] And Dick's last line, '[I]t is time the war

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[6] *Wis. State AFL-CIO v. Elections Bd.,* 543 F. Supp. 630 (E.D. Wis. 1982).
[7] *benShalom v. Secretary of Army,* 489 F. Supp. 964 (E.D. Wis. 1980).
[8] *United States v. Scott,* 757 F. Supp. 972 (E.D. Wis. 1991); *United States v. Anderson,* 782 F. Supp. 80 (E.D. Wis. 1992).
[9] *Marson v. Jones & Laughlin Steel Corp.,* 87 F.R.D. 151, 152 n.~ (E.D. Wis. 1980).
[10] *United States v. Are,* 498 F.3d 460 (7th Cir. 2007).
[11] *Rickher v. Home Depot, Inc.,* 535 F.3d 661 (7th Cir. 2008).
[12] *Id.* at 669.
[13] *Allan Block Corp. v. County Materials Corp.,* 512 F.3d 912 (7th Cir. 2008).
[14] *Id.* at 921.

Terence T. Evans: *in* Memoriam

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between these pertinacious antagonists was brought to a peaceful end,' would be good advice for Mitt Romney and Mike Huckabee." He offered a couple of additional observations about the candidates, which I am not going to share with you because this presentation is being recorded. He concluded: "I suppose you two Republicans wish you had someone like Herbert Hoover to rally around." Then he corrected himself: "Actually Dick always strikes me as a bit of a Bolshevik."

Then there's this comment from Terry, responding to an email from Judge Phil Simon of the Northern District of Indiana, who was sitting with us by designation. Phil had apologized for being a "pain in the backside" but asked Terry to make a couple of modest changes in the draft opinion he had circulated.[15] Terry wrote back, saying, "Rest assured, I do not consider you a 'pain in the backside,' [although that] might well be true if you had me down by seven after nine on some fancy-schmancy golf course in Valparaiso." I chimed in (electronically speaking) and noted that Terry was in a particularly good mood notwithstanding the Packers' loss to the Vikings the day before because "for the first time in 20 years, he came in first in his own football pool." Terry replied: "It's true. I shocked the experts by rolling to a win in our pool yesterday despite going with Green Bay over the Vikes. It's the first time all year I haven't been bested by at least one of the Sykes law clerks or her hot-shot secretary, Chris Petrie."

Now, a few words about that football pool. Everybody in the building looked forward to it every fall — and to Terry's March Madness basketball pool in the spring. Terry called himself "The Commissioner" and he had lots of rules, which my law clerks regularly challenged. Before the football season opener and every Tuesday during the season, Terry distributed a "Commissioner's Memo." In addition to the weekly standings, the memo contained hilarious little nuggets about that week's winners and losers. The Commissioner frequently had a few choice words for Bill Callahan, one of our wonderful magistrate judges who has the misfortune of being a Chicago Bears fan. We anxiously awaited the arrival of the Commissioner's Memo on Tuesday mornings throughout the fall. As the Commissioner, Terry was the final authority — the court of last resort, as it were. At the beginning of last year's season, he explained the rules for the pool and how the championship round would work:

> All weekly winners, plus 6 "discretionary picks" by the Commissioner, will qualify to compete for the league championship. As usual, the 6 discretionary picks will be based on the subjective judgment of the **Commissioner** — but things like good manners, nice penmanship, and a willingness to suck up to him will be given strong consideration.

As an appellate judge, Terry's opinions stood out for their clarity, brevity, attention to factual detail, and straightforward reasoning. They were always interesting, which is saying a lot when it comes to judicial opinions. As is well known, he liked to liven up his opinions with sports and pop-culture references.[16] Criminal cases, in particular, drew on his storytelling strengths.[17] Last weekend, I tried to come up with a "Top Ten List" of Terry's opinions (we all know how much he loved lists), but I had to give up. There are just too many great ones. So I'm going to mention just a few that would have to be included among his "Greatest Hits":

Olinger v. United States Golf Association is a Terry Evans classic that opens with one of his preferred newspaper-style introductions: "This case presents a clash between big time sports and the Americans With Disabilities Act. It pits the venerable United States Golf Association against a professional golfer who wants to compete in America's greatest—and most democratic—golf tournament, the United States Open."[18] The opinion goes on to explain that pro golfer Ford Olinger, who suffered from a degenerative condition that impaired his ability to walk, had asked the USGA for an accommodation in order to compete to qualify for the Open. More specifically, he wanted to use a golf cart. The USGA said "no" and he sued. Terry's opinion takes the reader through a brief history of the USGA and the U.S. Open, sprinkled with interesting and obscure statistics.

After canvassing the law and the evidence in the style of a *Sports Illustrated* column, Terry came down on the side of the USGA and rejected the golfer's claim for a cart accommodation. He concluded:

> The focus of our opinion has been on one question: Must the USGA allow Ford Olinger to compete while riding in a golf cart instead of walking? The answer is "no."

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[15] *United States v. Stotler,* 591 F.3d 935 (7th Cir. 2010).

[16] *See, e.g., Brennan v. Connors,* 644 F.3d 559 (7th Cir. 2011); *Murphy v. Eddie Murphy Prods., Inc.,* 611 F.3d 322 (7th Cir. 2010); *Vought v. Wis. Teamsters Joint Council No. 39,* 558 F.3d 617 (7th Cir. 2009); *United States v. Murphy,* 406 F.3d 857 (7th Cir. 2005).

[17] *See, e.g., United States v. Moore,* 563 F.3d 583 (7th Cir. 2009); *Calloway v. Montgomery,* 512 F.3d 940 (7th Cir. 2008).

[18] 205 F.3d 1001, 1001 (7th Cir. 2000).

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> The question we have not addressed is whether the USGA should give seriously disabled, but otherwise well qualified, golfers a chance to compte. Compared to most people who play golf, Olinger's skill level is beyond comprehension. And without question, most players would prefer to walk while playing competitive, championship caliber golf. Surely a player like Olinger would gladly trade in his cart if he could walk a golf course without pain. But the decision on whether the rules of the game should be adjusted to accommodate him is best left to those who hold the future of golf in trust.[19]

The Supreme Court would later disagree in the more famous Casey Martin case, affirming a decision of the Ninth Circuit that was issued at about the same time as Terry's but had come out the other way.[20] Before the Supreme Court granted cert. in the *Martin* case to resolve the conflict, a friend of Terry's wrote to him suggesting that the conflict between the circuits could be worked out in a game of golf, 36 holes, one circuit's judges riding and the other circuit's judges walking. Terry wrote back and nixed the idea:

> I think your idea of a match between the Ninth and the Seventh Circuits would be a disaster. We have 11 judges on the Seventh Circuit . . . . Of the 11, only 2 play golf and I'm better than the other guy, so you can see our team would sink. So I'm afraid, without even knowing anything about the abilities of the judges on the Ninth Circuit, they would wax us in a tournament.

Crue v. Aiken[21] involved a First Amendment claim by a group of students and professors at the University of Illinois whose pressure campaign to change the school's Native American mascot was squelched by the university's administrators. Terry's opinion opens with a colorful description of college mascots, from the prosaic to the fanciful. After listing a number of nicknames he thought were "pretty cool" and others he said were "pretty boring," Terry paused to make a very important legal observation: It was "quite obvious," he wrote, "that, when considering college nicknames, one must kiss a lot of frogs to get a prince. But there are a few princes."[22] Then he listed some familiar and venerable nicknames followed by some that were not so familiar:

> Can anyone top the Anteaters of the University of California—Irvine; the Hardrockers of the South Dakota School of Mines . . . ; the Humpback Whales of the University of Alaska—Southeast; the Judges (we are particularly partial to this one) of Brandeis University; the Poets of Whittier College; the Stormy Petrels of Oglethorpe University in Atlanta; the Zips of the University of Akron; or the Vixens (will this nickname be changed if the school goes coed?) of Sweet Briar College . . . .[23]

"As wonderful as all these are," he said, "we give the best college nickname nod to the University of California — Santa Cruz. Imagine the fear in the hearts of opponents who travel there to face the . . . 'Banana Slugs'?"[24] I recall that Frank Gimbel once introduced Terry at a bar association event as "one of the comedy writers down at the Seventh Circuit." This opinion suggests that Frank may have been on to something. Still, after this entertaining detour, Terry comprehensively analyzed the plaintiffs' claim and found a First Amendment violation.

Terry wrote some important opinions in copyright and trademark cases — difficult areas of law that benefitted from his clear-eyed analysis and clean writing. One was *Central Manufacturing, Inc. v. Brett,*[25] a trademark dispute involving the "Stealth" line of baseball bats developed by a company affiliated with former Kansas City Royals star George Brett. The opinion begins with a summary of Brett's notable batting records and a riveting account of the famous "Pine Tar Incident." But it goes on to clarify how trademark registration can be overcome. There are many other examples of how Terry made complex legal doctrine interesting and understandable.[26]

Terry didn't disagree with his colleagues very often, and when he did, it was always in good faith and good humor. In one case early on in my tenure, Dick Posner, Terry, and I divided three ways. It was a criminal case — *United States v. O'Neill*[27] — and Terry thought the district judge had probably committed an error and the case should go back for a do-over — but just on the sentence.

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[19] *Id.* at 1007.

[20] *PGA Tour, Inc. v. Martin,* 532 U.S. 661 (2001), *aff'g* 204 F.3d 994 (9th Cir. 2000).

[21] 370 F.3d 668 (7th Cir. 2004).

[22] *Id.* at 671.

[23] *Id.*

[24] *Id.*

[25] 492 F.3d 876 (7th Cir. 2007).

[26] *See, e.g., Janky v. Lake Cnty. Convention & Visitors Bureau,* 576 F.3d 356 (7th Cir. 2009); *Incredible Techs., Inc. v. Virtual Techs., Inc.,* 400 F.3d 1007 (7th Cir. 2005); *Billy-Bob Teeth, Inc. v. Novelty, Inc.,* 329 F.3d 586 (7th Cir. 2003).

[27] 437 F.3d 654 (7th Cir. 2006).

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Dick thought the judge had definitely made a mistake but the proper remedy was to unwind the plea, not just the sentence. I thought there was no error at all. So Dick assigned the case to Terry to try to bring consensus. Terry circulated a draft opinion, but Dick couldn't agree and sent a dissent. I replied that I didn't agree with either opinion. This is what Terry emailed back: "Very interesting. We have two extremes (and I use the term only in a loving way, of course). My approach [is] somewhat in the middle [and] rather pragmatic. So where do we go from here?" Dick replied that he would amend his opinion to join Terry's disposition, but explain why he preferred his own. So Dick revised his separate opinion, described the three-way split, and said he was "join[ing] Judge Evans's proposed disposition," but "at the risk of seeming a fusspot" would explain why he disagreed with the analysis. I emailed back to say I would circulate my dissent soon. I added this: "For the record, in my humble opinion, Dick Posner is not a fusspot. I think we can be unanimous on that." Terry shot back: "I dissent—Posner *is* a fusspot."

This trip through some of Terry's cases illustrates his great gift to our court and to the law. He always looked for the story and central legal insights in each case, and he explained them in clear, compelling, often entertaining prose. He placed the law in the context of what he knew about human experience — and that was a lot — and he made it more understandable and accessible to everyone.

One of the great joys for me in joining this court was the opportunity to work with Terry again. He boosted my judicial career and was present at every important step along the way. He administered the judicial oath of office to me three times: In 1992 as a newly elected state trial judge; in 1999 as a newly appointed state supreme court justice; and in 2004 as a newly confirmed circuit judge on this court. Here is what he told the assembled dignitaries and guests at my supreme court investiture in the Assembly chamber at the State Capitol in 1999:

> Some of you know that Diane was my law clerk back in the early 1980s. At that time, she was in a minority; some of you may not know that she was an affirmative action appointee. She was a member of a group that had been discriminated against, certainly in my court and in some other courts in our building. And I thought it was high time that the discrimination should come to an end. So I bit the bullet and hired a conservative Republican.

As much as he loved his work on the bench, Terry's family was always primary: His beloved Joan; his daughter Kelly and her husband, Erich; his daughter Christine and her husband, Randy; his son David; and his grandchildren Olivia, Henry, and Stella. Oh, how he loved his family. He had many good friends — some to whom he was extremely close; they, too, were very important to him. Those of us who were blessed to be in the concentric circles around him were immeasurably enriched by his friendship.

Terry Evans filled the lives of his family and friends with joy. He filled this courthouse and our legal community with a sense of shared purpose. He filled our court with his practical wisdom and wit. And he filled the casebooks with lucid opinions, memorably written. Terry's buoyant approach to life and his humane approach to the law inspired countless others in our community. His legal and human legacies will endure. We — everyone in this room and many more in our community — loved him very much. He left us too soon and is very deeply missed.

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.

AN INTERVIEW WITH JUDGE

John D. Tinder

by Brian J. Paul [*]

Born in 1950 in Indianapolis, Indiana, Judge John Daniel Tinder is a 1975 graduate of Indiana University School of Law. Between stints at the U.S. Attorney's Office for the Southern District of Indiana, an office he would eventually head from 1984 to 1987, Judge Tinder served as a public defender, a deputy county prosecutor, and a private practitioner. In 1987 President Ronald Reagan nominated him to be a district court judge for the Southern District of Indiana, a position he held until 2007 when he was confirmed to a seat on the U.S. Court of Appeals for the Seventh Circuit.

Q. How did you come to the attention of President Bush as a potential nominee for the appellate bench?

A. I don't know for sure, because I've never talked to President Bush, and no one on his behalf told me directly. I can draw some inferences, though. Whether they're accurate or not, I'll have to see. I think it was some time in the Spring of 2007, I got a call from someone on behalf of Senator Lugar's office. Calls were being made around to let people know there was the likelihood of an opening because Judge Manion was going to become a senior judge as of a certain date. And the inquiry was, do you know of people who would be qualified and interested for consideration for appointment? I responded to that, giving names of various people that might be obvious and then said, by the way, I would be interested in that. Subsequent to that, I had occasion to meet with Senator Lugar and discuss my interest in the position. Sometime after that I was contacted by people within the administration, asking me questions, and I provided information and so forth, and the process was ultimately underway. I'm assuming that Senator Lugar or someone on his behalf may have mentioned my interest to someone in the administration.

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[*]*Mr. Paul is a partner in the Appellate Practice Group of Ice Miller LLP in Indianapolis. This is an edited transcription of a recorded interview that took place on September 26, 2011.*

Interview: Judge John D. Tinder

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Q. Is the job what you expected?

A. It is. There are parts of it that I suppose I wasn't as familiar with as a trial judge as I should have been. The aspect of petitions for rehearing and how important those are to the court and how that draws each judge on the court into the consideration of every case in which there is a petition for rehearing was something I really hadn't thought about much as a district judge. And it's a very frequent process in the Seventh Circuit. I think petitions for rehearing are filed in maybe more than 25% of the cases. In the district court in the Southern District of Indiana, motions for reconsideration or post-trial motions were relatively rare. But on the court of appeals, petitions for rehearing are quite common. And so rather than just a three-judge consideration of the legal issues, you're actually drawing all the judges into it. So, that's something I really hadn't anticipated.

The travel time is a little greater than I suspected, but I'm becoming a better traveler. I think I'm becoming more efficient. With say 25 sittings a year, you're making 25 trips [between Indianapolis and Chicago]. The best time you can make on a trip is a little over six hours, a round trip, so that's several hundred hours a year in a car or some other means of transportation. And that either comes off your work time or your leisure time, and there's no way you can take it off your work time. You've still got to do the same work as everybody else, so it comes out of your leisure time. I guess I hadn't thought about that that much. But other than that, it's what I expected.

Q. In recent years Chief Judge Easterbrook has invited district court judges to sit on the appellate court as visiting judges. As a former district court judge yourself, do you think the experience is helpful to district judges?

A. I had done that back in '92 or '93 and I thought it was very helpful as a district judge because it gave me a greater familiarity with what the work of the court of appeals is and gave me a perspective about what a record looks like to an appellate judge and what sort of considerations go into the review of the trial record. I hope that helped me to become a better trial judge, at least better at explaining why I would do certain things, and how I was doing them, and the reasons for it.

A few years ago, someone pointed out to me that one of my experiences there also turned out to be kind of noteworthy, but I didn't know it at the time. I was able to sit on one panel that included Judge Posner and Judge Bauer, and we had a case involving a securities arbitration issue that was really well argued by both sides, very interesting case, and I really enjoyed the case and thought it was well lawyered. Someone pointed out to me a couple of years ago and said go back and look to see who argued that case for the winner. It turned out to be a young man named Barack Obama. And I remembered the case as being well argued, but for the life of me I can't remember him actually arguing. Unfortunately, those recordings aren't available, but in fact, on the record, he did argue it. I wasn't alert enough to spot him as a future president.

Anyway, it was a very good experience for me as a district judge. And I think it's a great experience, looking at it from an appellate judge's perspective, too. I think it helps us stay in touch with what is happening on the district courts, because in our lunches and other discussions, we are able to get updated from those out in the field, so to speak, and it also helps us be more familiar with those people who are on the district court. We're not just looking at a name in a transcript. We have a much better opportunity to interact with them and kind of bridge that distance between the district court and the court of appeals a little bit. I think it's a great process, and I hope we continue to do it. And I think we have found that it's well accepted both by the appellate colleagues and by the district judges.

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Q. How does being a former district court judge color your thought process as an appellate court judge?

A. We're all informed by the experiences of our life. I think it certainly gives me a perspective on some of the pragmatic challenges of being of district judge, the volume of cases which you have to handle, some of the scheduling stresses that a district judge has. For example, if you're in the midst of one trial with a jury, and you've got another jury scheduled to begin in a couple of days, and witnesses are flying in from all over the country, and it's been scheduled for a long time, and there's an ice storm coming, you're worried about whether these jurors you have now are going to be able to get home safely and back, and so forth. And when an issue comes up before you, say an evidentiary issue, you may make an effort to rule on that very quickly. Whereas in calm reflection you might want to have a two to three hour hearing over it.

So, I have those experiences that give me that perspective. But I don't think it's necessarily a superior perspective to anyone else on the court. We all come from a variety of backgrounds, and each lends something that I think is useful to the overall composition of the court. I think it's nice to have a mix of those who come from a litigation trial background and those who come from an academic background and those who come from others as well.

Q. Do you think your experience as a district court judge affects your willingness to reverse?

A. I certainly don't start in the cases saying, let's find a way to affirm this judge, or let's find a way to reverse this judge. I try to look at each case on the merits of the case itself. I do hope that trial judges show patience and preparation and pay due attention to the law and so forth. And I would expect trial judges to perform well generally. So, I hope that prior history doesn't cause me to tip the scale one way or the other. I was a prosecutor at one time. I hope that wouldn't cause me to favor the government in a case or disfavor the government. I was also a defense lawyer at other times. And I did both civil and criminal. So, I hope there's enough of a balance in my history to help keep me on track and be fair in each case.

Q. Are there aspects of being an appellate court judge that you prefer over being a district court judge? Are there aspects you do not prefer?

A. The short answer is yes. One of the great things about being an appellate judge is when you get one of these knotty legal issues, you really can drill down and take a really deep look at those things. And you have the opportunity to share your ideas with your colleagues on the panel and hear their ideas as well. And when you've got three appellate judges, or the entire court for that matter, on an en banc matter, looking at this, you really get down to the core of the matter. On the trial court, it's really just you, for the most part. The lawyers make their presentations, you can consult with your law clerk about it, but in terms of an experienced lawyer looking at it, it's you. You don't get that benefit of your colleagues' input in the same way that you do on the appellate court.

Another aspect of the appellate bench that certainly keeps me going is the range of things that you see is a good bit broader than you'd see in any given district. We have seven districts within our circuit, and things that happen in Chicago and the Chicagoland area are quite different than might happen in the Western District of Wisconsin or the Southern District of Indiana and what have you. So, you get to see a broad range of different business activities, business relationships, employment situations, and a wide range of different accusations and criminal activities. And that's really pretty stimulating to be able to see a wider range of things. And you're also quite conscious of what our circuit is doing relative to what the other circuits are doing.

There are aspects that are not as preferred to being on the trial bench. One of them is scheduling. As a trial judge, you are the conductor of the train. You decide when you start, how far you go, how many stops you make in between. And you know when you're at the end of the line. You've reviewed the briefs and decided that summary judgment is going to be granted. It's granted, and you don't have to consult anybody else about it. But, as an appellate judge, you're always the passenger on a train that's being driven by someone else. That is, the schedule has to be coordinated among three judges. When you feel that you've evaluated the issues as much as you need to and your opinion is written, you have to get the approval of at least one other judge before it's final. So, you're always depending on someone else to agree with you, and that's not true on the trial court.

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Another thing that I miss somewhat from the trial court is there are lots of cases that are really tough knotty cases, and they're set for trial and you prepare for those events, and all of a sudden, the Friday before the Monday start of trial, sometimes they go away, sometimes they settle at the last minute. And all of a sudden, where you thought you'd be in trial for two weeks, you have two weeks where you're not in trial, and that provided the opportunity to do a lot of other things, work-related and also the occasional day where you didn't have pressing matters. In the court of appeals, if that case is fully briefed and set for argument, it almost never goes away. I miss that part of being a trial judge.

Q. Name an appellate judge (living or dead) that you think is worthy of emulation by other appellate judges.

A. That's tough because there are so many. Among my living colleagues of the court, I'd hate to overlook someone. So what I'm going to do is pick the colleague that I lost recently, Terry Evans. He was a really terrific guy and a great member of our court, a very valuable member. And of all the things that I think he did well, I think his writing is what all of us should try to emulate. And that is, he always wrote concisely, clearly, and in a common sense way so that the knotty legal issues could be unraveled and understood by anyone who would pick up the opinion. And he wrote so that his opinions were very readable, interesting, enjoyable, and you'd want to read them start to finish. I think those traits are things that every appellate judge ought to emulate.

Q. Do you subscribe to a particular judicial philosophy?

A. Not that I know of. I didn't sign up for any particular area of jurisprudence or philosophy. I try to be thorough, I try to be prepared, I try to be accurate, I try to be fair. If that's a philosophy, then sign me up. But I'm not trying to be in any particular school of jurisprudence.

Q. Which areas of the law particularly interest you?

A. I think civil cases in general are often more interesting and nuanced than criminal cases. And it's hard to pick a particular type of case. ERISA cases can be fascinating. Bankruptcy cases, shockingly, can be very interesting. Civil rights cases are obviously, at least to me obviously, very interesting because you have the intersection of a lot of different societal interests. And sorting that out through our civil rights laws are absolutely fascinating problems. Real estate issues that come up I find to be very interesting. Even tax cases can be very interesting. I'm unfortunately not very selective. I guess my view on that is summed up by something I said before, and that is, the job of a federal judge is one in which it's quite possible to become tired, but impossible to become bored. Each day's arguments presents six new fascinating puzzles. I don't try to find any single area or groups of areas, because if I did, I would be overlooking some really fascinating other areas.

Q. Did your time in the U.S. Attorney's Office in any way turn you off to criminal law?

A. No, criminal law is a wonderful area to be in. It's chock full of characters — the people who work as law enforcement, criminal defense lawyers, prosecutors — they're all pretty interesting characters (or for the most part pretty interesting characters). The people who are involved as witnesses, victims, and defendants are everyday people off the street that have very interesting stories to tell and very interesting motivations. Criminal cases tend to go more quickly than civil cases. And in almost every criminal case, no matter how solid the case is, even in the ordinary, slam dunk, run of the mill case, you can mine a constitutional issue somewhere along the line. So that always makes it very interesting.

But just overall, I think civil cases can take on many different aspects. And there's also more gray in most civil areas. In the criminal sector, with the advent of public defenders and appointed counsel, virtually every issue that one can think of has been raised somewhere, sometime, in some court. In the civil arena, because of economic considerations, some things don't get litigated or don't get appealed and so forth. So it's much more difficult in the civil area to find settled law. And so I think maybe that's part of what makes it more interesting to me.

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Q. How do you go about the process of writing opinions? How do you use your clerks in that process, for example?

A. It probably starts with the preparation for the argument. And I think this is something you may intend to ask later on. Both a law clerk and I will read the briefs in anticipation of the argument taking place, and a memo is prepared. Sometimes the law clerk and I will talk before the memo is prepared, and I'll give specific direction as to the areas that I want briefed in advance. Or sometimes we don't have a chance to talk before the memo gets written, and the law clerk and I will go over what's in the memo, what I find in the briefs, what they find in the briefs. And sometimes I have additional research done, some other exploration maybe of the record. In any event, that becomes sort of my working document going into the argument. The arguments are held, and we have a conference immediately following the arguments. The three judges then discuss the cases and give a tentative vote. And then the presiding judge assigns the writing of the opinion to a particular judge. If it's me, I sit down with my law clerk, we talk about the discussion the judges had and the argument that preceded it. I'll generally give the law clerks specific directions about the overall structure of an opinion indicating what we're going to do with the case, affirm or reverse or a little mix of both, and the areas we're going to discuss and how to get there. And generally, the law clerk will take a first cut at a draft and will eventually get me that draft, which will then undergo a series of rewrites, and rewrites, and rewrites. Sometimes just a few; sometimes as many as 10, 15, maybe more to get the opinion to where I feel comfortable with it. Then it's circulated among the panel, and there may be more revisions after that. It's a writing and rewriting process. The bulk of my time is spent on rewriting and revision and expansion and so forth. That's essentially how we do it.

Q. Since you've been on the appellate bench, are there two or three opinions that you've written that you're particularly pleased with?

A. That's like asking someone which of their children is their favorite. I try to do my best on everything that goes out the door. Frankly, there is no one or a handful of opinions that I would say are my best work. I'd like to think it's all the best that I can do. So, I'll leave it to others to pick out what they think is good or bad in any particular opinion. I don't have special ones that I hold as models.

Q. I found five cases in which you dissented, and only one of those was a panel opinion. The other four were dissents in en banc proceedings. Do you ever disagree with a panel decision but decide not to dissent?

A. I guess that count may be right. I've had a couple of concurrences that one might think of more as dissents because I disagreed with the reasoning of how the majority got there, but I came out to the same place. But to answer your question directly, no, I don't give up a vote simply for unanimity. If I feel strongly enough, if I feel the outcome isn't correct or the logic used and the reasoning is not correct, I would say so. So, I suppose then, if there's just one panel dissent in that period of time, that was the only case in which I felt that way. I know there will be more because of what I'm working on right now. No, I would not give up a vote simply for unanimity.

There have been times when I have been persuaded by the logic of my colleagues. I can give you a specific example. Within the last year there was a case involving sovereign immunity. It's *Board of Regents of the University of Wisconsin System v. Phoenix International Software, Inc.* Initially I wrote the majority opinion, and Judge Wood wrote a dissent. There was a petition for rehearing, and in the course of evaluating that, and we did rehear it, I became convinced that she was absolutely right, and I changed my vote, as did my colleague, Judge Flaum, and the opinion came out of the rehearing as a unanimous opinion offered by Judge Wood. That can happen. I can be persuaded, but if not persuaded with the majority's position, I would certainly dissent.

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Q. You have said in a previous interview that "[o]ral arguments are useful if you are prepared nearly well enough to make your ruling before the argument starts, so that you know the case about as well as the lawyers do." How do you prepare for oral arguments?

A. Other than what I mentioned before, there is often additional research conducted based on the cases that the parties have cited as a starting point, and we often look for other cases and sometimes just a different way of looking at the issues. There's often some digging into the record beyond the appendices to make sure we know what happened down below. There's a fair amount of back and forth between me and my law clerk before argument. The judges do not discuss the case prior to argument, and we do not share memos in advance. I guess that's pretty much it. The preparation time for argument certainly far exceeds the argument times we allow. I don't keep good track of it, but I'm going to guess it probably takes me anywhere from 5 to 20 hours to prepare for any particular argument. This month, in particular, I'm sitting on about 40 cases, so there's a lot of prep time that goes into it. I've got six argument days within a month's period of time.

Q. What sorts of things do you see from lawyers in oral argument that you find to be particularly helpful (or not)?

A. It's always helpful when a lawyer will avoid the windup and get to the pitch. Sometimes in argument, and I think more often in briefs, it just takes so long for the argument to come forward. I think the lawyers who do better are the ones that get right to the point; why their client should win or why the opponent should lose and to be up front about it. And if there's a soft spot in your case, to explain it, explain the soft spot and why that's not a problem. So often lawyers seem to sort of dance around the edges instead of getting right to it. Given the volume of things the judges need to do and the importance of clarity in how we resolve, I think it would be very helpful to get to the point.

Q. There are some very active and aggressive questioners on the Seventh Circuit. How would you describe your style of questioning?

A. If there's something about a case that I think isn't being adequately developed by the argument of the lawyer or the insightful questioning of my colleagues, I'll step in. Often, though, I find my questions having been asked by someone else, areas that I'm interested in, they've already gotten into. I don't feel any particular need to dominate the time being spent in argument. The lawyers only have so much time, so I think they ought to be allowed to develop their argument. If they need to be steered back to particular points that I'm concerned about, I'm happy to step in at an appropriate time to guide them to that point. But I don't feel the need to dominate the argument.

One aspect of questioning by judges that I think is useful to observe, and that is that it's the first time the judges have communicated in each other's presence about the case. So, when you hear what your colleague is interested in, that may be some reflection of where your colleague might be on that case, what your colleague's view might be. So that's very helpful to hear the questions from other judges. I don't consider myself a hot panelist, nor do I consider myself in the camp that would say judges should not ask questions.

Q. You argued cases in the Seventh Circuit when you were a practicing attorney. Did you learn any lessons from those experiences that influence you now as an appellate judge?

A. I learned pretty quickly to listen to the question and answer that question right away rather than saying, "Judge, I'll get to that but I want to make these other points first." If a judge asks a question, it's something that is intended to direct you to a part of the case that's very important to that judge, and so you really need to get to it right away. I certainly remember some very early arguments I made as a young lawyer where I didn't understand that point, but I've learned that over time. They're not asked idly or for someone's amusement. The questions are asked to steer your argument toward particular points of concern. And it's not as though the question is asked so that you will give up on your case. It really is to get you to something the judge is concerned about and would like to have some explanation and resolve some concerns about it. I don't think judges are asking lawyers to agree with them or lose the case. I don't think that's the point of the questions.

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Q. How often would say an oral argument changes your mind in a case?

A. That's a very good question and is often asked. I should keep a statistic on it. I don't. I heard Judge Kanne say in about 15% of the cases the argument changes his mind. That sounds like a good number to me. Maybe what I should do over a year's period of time is keep track of the number of arguments, and the number of times my mind changes from my initial inclination as I'm going into the argument. I hope it's apparent to lawyers who argue in front of our court the judges are really well prepared before the argument. Whenever I hear a lawyer, most often who's never argued there before, say something like, "if you'll read my brief" or "if you'll look at this in the appendix," that's really not a good way to phrase it. I'm pretty well assured that that brief's been read and reread and looked at from lots of different angles by the judges, so that's really not a good way to approach the court. But your mind can be changed. To hear the context as the lawyer explains it and to understand how something could have been prejudicial in light of other things that happen during the trial or other rulings that were made, I think it can give some insight that you just can't get from paper. And your mind can be changed. Otherwise we wouldn't have arguments.

Q. What are some of the attributes of a particularly helpful brief?

A. I think clarity rather than volume. I always enjoy a brief that gets to the critical issues and strips them down to what they really are instead of gilding everything and meandering to the point. Just because we allow 14,000 words to say something, that doesn't mean you need to use all of them. The reading load for each day's arguments is just mind-boggling to me. I've heard it estimated at something like 1,500 pages for each day's argument. And that's law reading, that's not reading 1,500 pages of novels. So, you've got this opportunity to capture a judge's mind, and you don't want that judge part way through flipping to the end to see how many more pages he or she has to read. You want them to be eager reading throughout. Try to avoid taking 100 words to say what you could say in 15. So, clarity and conciseness are certainly attributes of very good briefs.

An explanation of the concepts is also helpful. The concepts are much more important than the cases. We can look at the cases, but why are those cases important? What are the principles behind those cases that make them meaningful?

I always remember something the jurors would say at virtually every trial. I always talked to the jurors afterwards, and they would always say, would you tell those lawyers we got it the first time? They don't have to talk to us like we're third graders and tell us six and seven times these various things. We've got it the first time. The same is true with judges. They do get it, and you don't have to say something six different ways for the judge to get it.

I wasn't very clear and concise in my answer, but those are the points.

Q. Are there things that you wish lawyers would do more often in their appellate briefs? Less often?

A. That's a little bit like that pornography thing: you know a good one when you see one. It is surprising to me how often the reply brief can quickly get to what's really important. And if lawyers would write their opening and response briefs more like reply briefs, I really think that judges would appreciate that. There's such a windup, such a slow unfolding in so many briefs, it's hard to be patient with that. But, believe me, the quality of the briefs in the circuit is great. If there are better circuits than this, I would be surprised.

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PROFESSIONALISM IN Opinion Writing

by Justice Thomas E. Hoffman *

Introduction by Jeffrey Cole

Justice Thomas Hoffman is the author of the majority opinion in Maksym v. Board of Election Commissioners of Chicago, *406 Ill. App.3d 9 1(1st Dist. 2011), which held that Rahm Emanuel was not eligible to run in the Chicago mayoral election. There was a stinging dissent, which along with the celebrity of the candidate resulted in nationwide media coverage. The Illinois Supreme Court reversed, 242 Ill 2d 303 (2011); Rahm Emanuel became the mayor of Chicago, and the case, predictably, lost its hold on the public's attention. It continues, however, to be significant to Bench and Bar alike, for reasons beyond the narrow legal result. In his concurring opinion in* Maksym, *in which Justice Burke joined, Supreme Court Justice Charles Freeman expressed his grave concern about the "tone" of the Supreme Court majority opinion and that of the dissenting opinion in the appellate court. He lamented that the kind of "inflammatory accusations" he perceived in those decisions "serve only to damage the integrity of the judiciary and lessen the trust which the public places in judicial opinions." 242 Ill. 2d at 332– 333. Justice Brandeis famously said, crime is contagious. So too is incivility, regardless of its source or object. If judicial opinions are intemperate and disrespectful, judges cannot fairly expect and demand more from lawyers. As Justice Hoffman wisely puts it: "[Judges] cannot, without behaving like hypocrites, demand that the Bar observe a standard of professionalism that we are unwilling to practice."*

* * *

For years, I simply ignored ridicule and hyperbole that cropped up in reported opinions; focusing instead on the strength, or lack thereof, of the legal analysis which the opinions contained. Of late however, I have come to believe that opinions, be they majority or dissenting, imbued with pejorative comments tend to undermine the legitimacy of the court's decision,[1] undercut the esteem for the court itself[2] and, in the case of dissenting opinions, corrode the congeniality that should exist on a reviewing court.[3]

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** Justice Hoffman is a judge on the Illinois Appellate Court, First District. This article is based upon a speech he gave to the Illinois Appellate Court Conference on September 27, 2011.*

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In an effort to understand exactly how pervasive the writing of opinions containing imprudent language had become in the Illinois Appellate Court, I examined a sample of opinions originating in each of the five Illinois appellate districts. I am pleased to report that, in the main, appellate opinions in this State are civil in tone and express a thoughtful analysis of the issues. I did find, however, a small number of opinions, especially dissents, containing what I believe to be unnecessarily intemperate language which justify our attention. I must confess that the opinions which I found came from the 1st, 2nd and 3rd Districts. I was unable to find any opinions originating in the 4th or 5th Districts containing obviously intemperate language. That's not to say that none exist; it only means that my limited search failed to reveal any.

Before addressing specifics, I wish to make one point perfectly clear, although I will offer some examples of rather harsh language, I have no intention of identifying the authors; as it is not my intention to embarrass anyone; rather, my purpose is to call attention to the unbecoming nature of intemperate judicial writing.

According to Judge Aldisert in his work on judicial writing, a majority opinion is defined as a reasoned elaboration, in writing, that justifies a conclusion; the purpose of which is to set forth an explanation for a decision that adjudicates a live case or controversy that has been presented before the court.[4] I for one start from the basic proposition that a majority opinion represents the author's earnest effort at a well-reasoned, cogent, and fair decision. A dissenting opinion is a statement of reasons calling for a conclusion different from that of the majority.

Without question, conscientious jurists can disagree, but I believe that we as appellate judges should do so in a civil and judicious manner. It is the well reasoned, respectful dissent which in most cases will, at minimum, motivate the author of the majority opinion to refine, clarify, and improve the majority opinion.[5] A logical and persuasive proposed dissent may even alter the course of a case, and itself become the framework of the majority opinion.[6] To accomplish these goals, however, the proposed dissent must foster rational discussion among colleagues. Imbuing a dissent with pejorative comments directed at the judges in the majority or demeaning their honest work-product hardly promotes rational discussion; rather, it tends only to corrupt collegial discourse.[7]

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[1] Virginia A. Hettinger, Stefanie A. Kindquist, and Wendy L. Martinek, Judging on a Collegial Court: Influences on Federal Appellate Decision Making 19 (2006).

[2] M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent,* 2007 Sup. Ct. Rev. 283, 283 (2007).

[3] Frank M. Coffin, on Appeal: Courts, Lawyering, and Judging 224-25 (1994).

[4] Ruggero J. Aldisert, Opinion Writing 9 (1990).

[5] Ruth Bader Ginsburg, *The Role of Dissenting Opinions,* 95 Minn. L. Rev. 1, 3 (2010) ("there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation"); Stanley H. Fuld, *The Voices of Dissent,* 62 Colum. L. Rev. 923, 927 (1962) (stating that a dissent is an "antidote for judicial lethargy" that ensures "the bench has done its work under the constant spur of self-criticism."); R. Dean Moorhead, *Concurring and Dissenting Opinions,* 38 A.B.A. J. 821, 823 (1952) ("With the threat of a concurring or dissenting opinion, the bench does its work under a constant self-criticism."); Randall T. Shepard, Perspectives: *Notable Dissents in State Constitutional Cases,* 68 Alb. L. Rev. 337, 341 (2005) (citing Moorhead, *supra*).

[6] See Leroy Roundtree Hassell, Sr., *Appellate Dissent: A Worthwhile Endeavor or an Exercise in Futility?,* 47 How. L. J. 383, 386 (2004); Ginsburg, *supra* note 5, at 4 (2010) ("On occasion . . . a dissent will be so persuasive that it attracts the votes necessary to become the opinion of the Court.").

[7] Coffin, *supra* note 3, at 219 (1994) ("One corrupter of written or oral discourse is the unthinking use of words that are, in the mind of the reader or listener, so imbued with irritating or pejorative meaning that rational discussion is likely to be derailed.").

[8] *People v. Hackett,* 943 N.E.2d 13, 23 (Ill. App. Ct. 2010) (Schmidt, J., dissenting).

[9] *Id.*

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By way of example, I commend for your consideration the following passages which appear in reported appellate decisions:

"The majority opinion is nonsense...." [8]

"The majority opinion stands the law on its head..." [9]

"In an illogical perversion of contract interpretation.....the majority..." [10]

"The majority ...., employing its own perverted version of the law, ..." [11]

"The majority's finding ....defies all reason." [12]

"A figment of the majority's imagination." [13]

Can you imagine the author of a majority opinion considering, with an open mind, the arguments in a dissent containing such purposefully insulting language? As Justice Fred Green of the 4th District of the Illinois Appellate Court wrote in a very well-reasoned article published in 1994: "The style of dissent which is most persuasive is also one which is collegial. Logic should be the cutting edge of such a document. Emotional argument, ridicule or personal attack upon other panelists which injures collegiality are usually unpersuasive." [14]

I believe that caustic dissents do much more harm than merely negatively affecting the views of the dissenter's colleagues in the immediate case. They can strain the personal relationships of the members of a reviewing court to the extent that such a dissent may well affect the willingness for the dissenter's colleagues to seriously consider his or her views in future cases.[15] As Judge Richard Posner once observed: "Appellate judging is a cooperative enterprise. It does not work well when the judges' relations with one another become tinged with animosity..." [16]

Judge Aldisert cautions that a dissent should be impassive in tone, rather than angry, and it should not exaggerate the holding of the majority and then simply attack the straw person it has itself constructed.[17] A dissent is, in many ways, the first published interpretation of the majority opinion; [18] to have that first interpretation be a misinterpretation serves only to garble the law from the moment of its announcement and, if taken seriously, mislead the bar. Take for example, the following passage which begins the dissent in a relatively recent case:

> "For all practical purposes, it is now legal in Illinois for a parent to murder his or her newborn infant. With today's decision, the majority sends a clear signal that, when a parent is charged with murdering a newborn baby, this court will not apply the standard of review in the same manner as we would in any other criminal case. We will draw previously unheard of inferences and presumptions in favor of the defendant and will reward the defendant for attempting to cover up the crime." [19]

Aside from the intemperate tone, these sentences grossly misstate the position of the majority. I can state with absolute confidence that the majority did not declare that "it is now legal in Illinois for a parent to murder his or her newborn infant," nor did they announce a new standard of review for parents charged with murdering a newborn baby. Does anyone seriously believe that histrionics such as this influenced anyone who was not already disposed to the dissenter's position?

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[10] *Thompson v. Gordon,* 923 N.E.2d 808, 821 (Ill. App. Ct. 2009) (Hutchinson, J., dissenting).

[11] *Id.* at 823 (Hutchinson, J., dissenting).

[12] *In re R.W.,* 930 N.E.2d 1070, 1077 (Ill. App. Ct. 2010) (Schmidt, J., dissenting).

[13] *Maksym v. Board of Election Comm'rs of City of Chicago,* 9942 N.E.2d 739, 757 (Ill. App. 2011).

[14] Frederick S. Green, *Dissenting While on a Collegial Court of Review,* 6 App. L. Rev. 10, 16 (1994).

[15] Hettinger, Lindquest, and Martinek, *supra* note 1, at 76 (citing a study showing that "justices often consider the past behavior of the majority opinion writer when deciding whether to file a separate opinion."). *Cf.* Note, *From Consensus to Collegiality: The Origins of the "Respectful" Dissent,* 124 Harv. L. Rev. 1305, 1321 (2011) ("Because an adversary in one . . . case might become an ally in the next, Justices have powerful incentives to mitigate the human costs of dissent . . . The Justices, in other words, sought to avoid uncivil behavior that frustrated coalition-building in both the short and long terms."); Jennifer S. Lerner and Larissas Z. Tiedens, *Portrait of the Angry Decision Maker: How Appraisal Tendencies Shape Anger's Influence on Cognition,* 19 J. Behav. Decision Making 115, 116 ("[Anger] commonly carries over from past situations to infuse normatively unrelated judgments and decisions.").

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In his 1953 article entitled "The Heated Judicial Dissent," Roscoe Pound, then Dean Emeritus of the Harvard Law School, cautioned that judicial opinions are "no place for intemperate denunciation of the judges's colleagues, violent invective, attributings of bad motives to the majority of the court, and insinuations of incompetence, negligence, prejudice, or obtuseness of fellow members of the court."[20] Such writing "is not good for public respect for courts and law and the administration of justice."[21]

What level of confidence can the public have in the legitimacy of a court's decision when one member accuses his or her colleagues of misstating the record or of "selective disregard for relevant and binding authority in order to reach what appears to be a predetermined result,"[22] or when the dissenting justice writes that "the majority opinion is nonsense"[23]? I submit that such intemperate language erodes public confidence,[24] especially when a newspaper editorialist finds it far more convenient to proliferate a dissenter's explosive accusations than to rationally analyze the legal dispute that provoked it.[25] As Pound observed: A judicial opinion should express the author's reasons, not his or her feelings.[26]

Simply put, I can find absolutely no valid reason for an author of either a majority or dissenting opinion to resort to ridicule or hyperbole. The strength of any opinion is, or should be, in the validity of its reasoning, not the level of its vitriol.[27] I have never understood what motivates an author of either a majority or dissenting opinion to resort to insulting, demeaning, or pejorative language. Perhaps such a tact is necessary because the author is incapable of supporting his or her position with a logical analysis, or because the author is attempting to curry public favor; then again, it might be fueled by the author's underlying inferiority complex or reflect a self-satisfying attitude of superiority. It could represent pay back for some earlier insult directed at the author, or it might be motivated by something as simple as a personal dislike or lack of respect for a colleague. I simply don't know, nor do I particularly care to find out. I do know, however, that such a style of writing serves no positive purpose in support of any legal analysis, and certainly does nothing to promote the stature of the court.[28]

I could go over a number of other examples of rude and offensive language appearing in opinions of the Illinois Appellate Court, but I believe the point has been made. I will give only one more example, but this one comes from a dissent in a U.S. Supreme Court opinion.

In the case of Michigan v. Bryant,[29] the Supreme Court was again faced with the question of whether statements introduced at trial constituted inadmissible hearsay under the 6th Amendment's Confrontation Clause as explained in *Crawford v. Washington,*[30] and *Davis v. Washington*[31]. The facts in Bryant are straightforward. The Detroit police responded to a radio dispatch indicating that a man had been shot. When they arrived, they found Anthony Covington lying in a gas station parking lot, bleeding from a gunshot wound. Within a short period of time after their arrival, five separate Detroit police officers questioned Covington about the shooting; asking similar questions such as: "What happened."; "Who shot you."; and "Where did the shooting take place." Covington told the officers that Rick Bryant had shot him as he was leaving Bryant's house.[32]

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[16] RICHARD A. POSNER, HOW JUDGES THINK 33 (2008).

[17] ALDISERT, *supra* note 4, at 170 (1990).

[18] See Green, *supra* note 14, at 14 ("some believe that the existence of the dissent serves to give further definition to the majority opinion").

[19] *People v. Ehlert,* 811 N.E.2d 620, 633 (Ill. 2004) (Thomas, J., dissenting).

[20] Roscoe Pound, *The Heated Judicial Dissent,* 39 A.B.A. J. 794, 795 (1953).

[21] *Id.*

[22] *Thompson v. Gordon,* 923 N.E.2d 808, 824 (Ill. App. Ct. 2009) (Hutchinson, J., dissenting).

[23] *People v. Hackett,* 943 N.E.2d 13, 23 (Ill. App. Ct. 2010) (Schmidt, J., dissenting).

[24] Evan A. Evans, *The Dissenting Opinion–Its Use and Abuse,* 3 MO. L. REV. 120, 123 (1938) (the more impersonal the character of a court, the more willing the respect it earns) (quoting William A. Bowen, *Dissenting Opinions,* 17 Green Bag 690 (1905)).

[25] See Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings,* 62 U. CHI. L. REV. 1371, 1413 (1995) ("If the case is newsworthy, the dissent will inevitably be characterized as 'biting,' 'scathing,' 'powerful,' 'strong,' or 'acerbic,' resulting in a 'divided,' 'fractured,' or 'split open' court.").

[26] Pound, *supra* note 20, at 797.

[27] Pound, *supra* note 20, at 797 (A judge's opinion "should express his reason, not his feelings.").

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Covington died shortly after making the statements to the police. Bryant was arrested and charged with murder. At his trial, which occurred before Crawford and Davis were decided, the police officers testified as to what Covington had told them.[33] The officers admitted that the purpose of their questioning of Covington was to find out who shot him.[34] They didn't ask about his health, whether Bryant was still at large with a gun, or where Bryant might be.[35]

Following his trial, Bryant was found guilty of second-degree murder. However, the Michigan Supreme Court reversed the conviction, holding that Covington's statements, as testified to by the police officers, constituted inadmissible hearsay under the 6th Amendment's Confrontation Clause.[36]

The United States Supreme Court granted certiorari. In a 6-2 decision, the Supreme Court concluded that Covington's identification and description of Bryant as the shooter and his description of the location of the shooting were not testimonial statements because they had a "primary purpose...to enable police assistance to meet an ongoing emergency."[37] Therefore, their admission at Bryant's trial did not violate the Confrontation Clause. The Supreme Court vacated the judgment of the Michigan Supreme Court and remanded the matter for further proceedings on the issue of whether the admission of Covington's statements was otherwise permitted by state hearsay rules.[38]

> Justice Scalia wrote a scathing dissent, containing the following statements:
>
> The purpose of the police officer's questioning of Covington as found by the majority "is so transparently false that professing to believe it demeans this institution."[39]
>
> "In its vain attempt to make the incredible plausible... the majority opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles."[40]
>
> "A final word about the Court's active imagination."[41]
>
> "The Court's distorted view creates an expansive exception to the Confrontation Clause for violent crimes."[42]
>
> "Today's decision is not only a gross distortion of the facts. It is a distortion of the law."[43]
>
> "The result is incoherent."[44]
>
> "Today's illogical roadmap..."[45]
>
> "Today's opinion falls....short on the facts, and short on the law."[46]

* * *

My question is simple. To what end was the use of such sarcastic and pejorative language? Wouldn't it have been sufficient to point out that under Crawford and Davis Covington's statements were testimonial in nature, whether judged by the intent of the declarant or the intent of the interrogators? As such, the police officers' testimony relating to Covington's statements was inadmissible hearsay; the introduction of which violated 6th Amendment's Confrontation Clause. In point of fact, that is exactly what Justice Ginsberg did in her dissenting opinion, sans ridicule or hyperbole; relying instead upon a professional counter-analysis.[47]

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[28] American Bar Association, Judicial Opinion Writing Manual 15 (1991) ("You should also avoid. . .vituperation. Abuses of this nature denigrate the fair and impartial administration of justice . . . .")

[29] 131 S. Ct. 1143 (2011).

[30] 541 U.S. 36 (2004).

[31] 547 U.S. 813 (2007).

[32] *Michigan,* 131 S. Ct. at 1150.

[33] *Michigan,* 131 S. Ct. at 1150.

[34] *Michigan,* 131 S. Ct. at 1172 (Scalia, J., dissenting).

[35] *Id.*

[36] *Id.* at 1150-51.

[37] *Id.* at 1150.

[38] *Id.* at 1167.

[39] *Michigan,* 131 S. Ct. at 1168 (Scalia, J., dissenting).

[40] *Id.*

[41] *Id.* at 1172.

[42] *Id.* at 1173.

[43] *Id.* at 1174.

[44] *Michigan,* 131 S. Ct. at 1168 (Scalia, J., dissenting).

[45] *Id.*

[46] *Id.* at 1176.

[47] *See Michigan,* 131 S. Ct. at 1176-77 (Ginsburg, J., dissenting).

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In his majority opinion in *People v. Ehlert,* Justice Charles Freeman of the Illinois Supreme Court noted that it is difficult to expect practitioners to engage in civility in the practice of law when judges are unwilling or unable to engage in respectful legal discourse in a published opinion.[48] Or, as Justice Benjamin Miller of the Illinois Supreme Court cautioned in *People v. Bull:* "We cannot prescribe civility to members of the bar when our own opinions are disfigured by comments as offensive as those we have admonished lawyers for making...We should receive no less from our colleagues than we expect from lawyers who appear in our courts."[49]

If we can agree that ridicule, sarcasm, and hyperbole have no place in our opinions, the next question is what, if anything, should we do about it when its does appear?

Clearly, we cannot prevent a colleague from writing in a style which we find offensive, but we need not sit idly by and decline to register our displeasure, nor must we concur in an opinion containing imprudent language. To my mind, when we concur in an opinion containing intemperate language, we are no less responsible than the author. By concurring, we cloak the author's choice of language with an aura of acceptability. We can easily write a short separate opinion distancing ourselves from any pejorative comments or write a completely separate opinion containing our analysis of the issues, just as Justice Ginsberg did in Bryant. We might even concur in result only. When the intemperate language appears in a dissent, the non-author member of the majority can easily write a short special concurrence taking the dissenter to task for his or her unprofessional tone or comments. I just don't believe that doing nothing is an option.

Incivility reflects upon us as a court. We set the bar for professionalism in our court, and I for one think it should be set high. Whatever level of professionalism we display in our opinion writing, we have a right to demand from the bar in their brief writing.[50] Whatever level of respect we show to each other as colleagues, we have right to demand from the attorneys who appear before us in their dealings with each other. But we cannot, without behaving like hypocrites, demand that the bar observe a standard of professionalism that we are unwilling to practice.

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[49] *People v. Bull,* 705 N.E.2d 824, 845 (Ill. 1998) (Miller, J., specially concurring).

[50] Philip Allen Lacovara, *Un-Courtly Manners: Quarrelsome Justices are no Longer a Model of Civility for Lawyers,* 80 A.B.A. J. 50 (Dec. 1994) (noting that judges are primary authority figures who set the tone for the legal profession); Evans, *supra* note 24, at 125 ("if members of the court openly and emphatically protest the incorrectness of [a majority] decision they set an example for the citizenry, largely uneducated in the courts and the theory of the law, to follow the example.").

Upcoming Board *of* Governors' Meeting

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 Saturday:

March 3, 2012

May 8, 2012

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

The Global Economic Crisis and Its Impact on Contract Obligations

By Charles E. Harris, II[1] and Courtney L. Anderson[2]

Over the last decade, a series of disasters have caused tremendous business interruptions and financial difficulties in global business markets, e.g., Hurricane Katrina, the Icelandic volcanic eruptions, the devastating earthquake and tsunami that struck Japan, the September 11th terrorist attacks, the global economic crisis and the BP oil spill. Examining how contracting parties reacted to one of these events — the global economic crisis — highlights the impact that these disasters can have on contractual obligations. As in the case of past economic crises such as the Great Depression, the oil crisis of the 1970s or 1986's Black Monday, the adverse conditions caused by the most recent economic crisis have motivated parties to file lawsuits seeking to excuse or renegotiate their contractual obligations. In doing so, they have relied on contract provisions such as material adverse change ("MAC") and force majeure clauses, as well as the common law doctrines of impossibility, commercial impracticability and frustration of purpose (collectively, the "excuse-of-performance doctrines").

Material Adverse Change Provisions

MAC provisions generally either: (1) excuse, terminate or modify a party's contract obligations when a material adverse change has occurred; or (2) require a party to warrant that it has not experienced a material adverse change prior to performance under the agreement. Courts have generally focused on the following three factors in considering whether a MAC provision permits a party's performance to be excused or modified: what constitutes an adverse event; what constitutes a material change; and the role of a party's prior knowledge of the adverse event.

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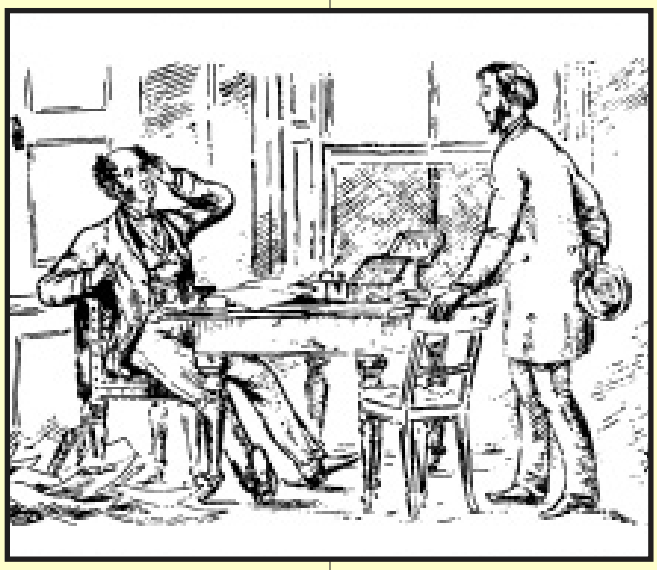
Scope of Adverse Event. The term "adverse event" refers to an occurrence that has an unfavorable or unintended effect on business or the relevant market. Courts have favored narrow interpretations of what constitutes an adverse event, absent broad contract language. In *Esplanade Oil & Gas, Inc. v. Templeton Energy Income Corp.,* 889 F.2d 621, 624 (5th Cir. 1989), where the MAC provision in an oil and gas property purchase agreement excused performance in the event of an "adverse material change to the properties," the Fifth Circuit refused to extend the provision to encompass the 1986 collapse in the oil market or the associated drop in the price of oil — despite the significant effect that these events had on the value of the properties at issue. By contrast, in *Great Lakes Chemical Corp. v. Pharmacia Corp.,* 788 A.2d 544 (Del. Ch. 2001), where any change adversely affecting the "business of the Company" fell within the MAC provision's language, the Delaware Chancery Court concluded that a "reasonable inference from such a broadly worded definition is that price cutting in the market, patent infringement by a competitor, diminished sales that resulted from these events, and the loss of a major customer due to market forces, could fall within the scope of the term" as these events directly affected the business of the company. *Id.* at 558.



Materiality. Even though materiality is rarely defined within MAC provisions, some courts have found "material" to be an unambiguous term that allows the materiality of a change to be determined as a matter of law. *E.g., Kena Props., LLC v. Merchants Bank & Trust,* No. 06-3688, 2007 WL 627382, at *2 (6th Cir. Feb. 20, 2007). Other courts, however, have said that materiality is a question of fact that depends on the duration of the change, the amount of the change, and whether the change relates to an essential purpose the parties sought to achieve through the agreement. *E.g., Genesco, Inc. v. The Finish Line, Inc.,* No. 07-2137-II (III) (Tenn. Ch. Dec. 27, 2007) (collecting cases).

With respect to duration of the claimed adverse change, the Delaware Chancery Court has emphasized that "the important thing is whether the company has suffered a [m]aterial [a]dverse [e]ffect . . . over a commercially reasonable period, which one would think would be measured in years rather than months." *IBP, Inc. v. Tyson Foods, Inc.,* 789 A.2d 14, 67 (Del. Ch. 2001). Hence, whether a change has persisted long enough to be material must be decided on a case-by-case basis. That being said, courts will honor the parties' contract where they have agreed on what constitutes a sufficient duration. In *Genesco, Inc.,* for instance, the Tennessee Chancery Court concluded that Genesco had suffered a material adverse change based on its financial performance over a six-month period since the MAC provision in the parties' merger agreement acknowledged that as being the appropriate time frame. No. 07-2137-II (III).

As for the amount of change that is material, courts have not settled on a generally accepted baseline percentage or threshold quantity. However, it is clear that moderate changes in the economic climate will likely not be sufficient to establish materiality. Looking again at *Genesco,* the court found that a 61% decline in earnings over the contractually relevant six-month period was material. *Id.* In reaching its decision, the court ruled that Genesco's decline in performance was the result of the ripple effect of the 2007 changes in the housing and mortgage and credit industries on general economic conditions, including high gas prices, housing and mortgage issues, and consumer debt. *Id.* at 31-32. By contrast, in *Hexion Specialty Chemicals, Inc. v. Huntsman Corp,* 965 A.2d 715, 738 (Del. Ch. 2008), the Delaware Chancery Court found that there had been no material adverse change excusing Hexion from completing a merger where the target company's net debt had increased only five percent over several quarters.

The essential purpose of the contract can also inform a court as to what constitutes a material adverse event. For example, in *Esplanade Oil & Gas,* the court noted that, through the pricing term in the oil and gas property purchase agreement at issue, the parties sought to "fix the value at which the trade would later be finalized." 889 F.2d at 624. Thus, the court concluded that the parties did not intend for market fluctuations affecting the ultimate value of the trade to be a material adverse event that could excuse performance. *Id.*

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Knowledge. Some MAC provisions contain language specifically limiting their scope to supervening events that were unknown or unforeseeable at the time the agreement was executed. And even where a MAC provision is silent on this point, courts have regularly held that MAC provisions should be limited to unforeseeable events. *E.g., IBP,* 789 A.2d at 68.

Historically, courts have been skeptical that sophisticated parties were unaware that an economic reversal was a possibility. For example, in *Bear Stearns Co. v. Jardine Strategic Holdings,* No. 34657 (N.Y. Sup. Ct. June 17, 1998), a New York court held that a bidder for 20% of Bear Stearns could not rely on a MAC provision, despite an $100 million loss by Bear Stearns on "Black Monday," because the buyer knew that Bear Stearns was in a volatile, cyclical business. In the context of the recent economic crisis, as discussed in detail below, most courts have found that contracting parties could or should have known about the possibility of a downturn.

* * *

In sum, a party's success in seeking contractual relief based on a MAC provision depends on a case-by-case determination that looks to the context in which the contract was negotiated, the specific language included in the contract, the nature of the adverse event and its impact on contract performance, and the governing law in the matter.

Force Majeure Clauses

Although slightly less common, parties have also relied on force majeure clauses to excuse or modify their obligations in light of the recent economic crisis. As one court has explained, "force majeure clauses are to be interpreted in accord with their function, which is to relieve a party of liability when the parties' expectations are frustrated due to an event that is 'an extreme and unforeseeable occurrence' that 'was beyond [the party's] control and without its fault or negligence.'" *Team Mktg. USA Corp. v. Power Pact LLC,* 41 A.D.3d 939, 942 (N.Y. Sup. App. 2007). Accordingly, the issues that parties are likely to face when relying on force majeure clauses center around whether the current economic conditions generally (or the economic hardship a particular party is facing) can be considered a qualifying event and whether those economic conditions are in fact unforeseeable.

Traditionally, force majeure clauses are successfully invoked in the context of natural disasters, such as hurricanes and earthquakes, or extraordinary man-made acts, such as war. Courts have been hesitant to apply force majeure provisions to market fluctuations or instances of economic hardship. As the Seventh Circuit has explained, "a force majeure clause is not intended to buffer a party against the normal risks of a contract. . . . A force majeure clause interpreted to excuse [a party] from the consequences of the risk he expressly assumed would nullify a central term of the contract." *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.,* 799 F.2d 265, 275 (7th Cir. 1986). Given the unprecedented scope of the most recent economic crisis, however, courts may be willing to find that a party has not assumed such a substantial degree of risk.

The exact analysis a court may undertake will certainly be affected by the specific language of the force majeure provision at issue. For instance, where a force majeure clause enumerates events that may be a basis for invoking that clause, courts are reluctant to enlarge this list to include different *types* of events.

Decisions Considering Excuse-of-Performance Doctrines. Several decisions concerning the recent economic crisis have involved the excuse-of-performance doctrines. The major focus of each decision is whether the downturn was a foreseeable event. While most of the decisions determined that the current economic conditions were indeed foreseeable, at least one court held otherwise and another court allowed a party to proceed with a defense predicated on the excuse-of-performance doctrines where the plaintiff's employees purportedly made public statements indicating that the economic crisis was unforeseeable.

One of the most comprehensive decisions addressing the current economic crisis and the meaning and its impact on the doctrines of impossibility and impracticability and the allocation of risk among contracting parties was authored by United States Magistrate Judge Jeffrey Cole of the Northern District of Illinois in 2009. In *Ner Tamid Congregation of N. Town v. Krivoruchko,* 638 F. Supp. 2d 913 (N.D. Ill. 2009), the defendant relied on the impossibility and impracticability doctrines in seeking to excuse his performance under an agreement requiring him to purchase a building for $3.8 million. The defendant, who had purposefully chosen not to have a contingency clause in his contract with the seller, nonetheless argued that the depth of the collapse in the real estate market was unforeseeable and that he should not have to bear the risk that Judge Cole found he voluntarily assumed.

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Judge Cole carefully analyzed the application of the impossibility doctrine under Illinois law and in rejecting the claim of impracticability, quoted extensively from numerous news articles in the public domain going back to 2005 that discussed the real estate bubble and forecast the impending housing crisis. Based on the prevalence of those articles, Judge Cole concluded that the collapse in the real estate market was not unforeseeable, within the meaning of the cases that have analyzed the defense, even if the timing and extent of the economic downturn may not have been certain. Here is part of what the court said:

> But let us assume that the situation in the summer of 2007 was an acute event; Mr. Krivoruchko's argument is nonetheless analytically incorrect. The question is not whether the "depth of the recession" was foreseeable, but rather, it is whether it was foreseeable that a lender might not provide him with financing in connection with the purchase of the Ner Tamid property. The foreseeability of that event is beyond debate.
>
> * * *
>
> It is precisely because inability to obtain financing is a foreseeable (and significant) risk that can be readily guarded against in the parties' agreement that financing contingency provisions are common in both commercial and residential real estate contracts. [citations omitted]. But they are by no means exclusive, and there are any number of reasons why a party may choose to pay cash. [citations omitted].
>
> Sophisticated commercial parties like Mr. Krivoruchko are free to contract as they desire, subject to the constraints of local or federal law. [citations omitted]. It is not for a court paternalistically to rewrite a party's agreement to include terms that they chose not to make a part of their agreement, [citations omitted], and there is a strong presumption against provisions that easily could have been included in the contract but were not. [citations omitted].

Ner Tamid Congregation of North Town, 638 F.Supp.2d at 928 -929.

Other courts have made similar findings. For instance, in *Wagner & Wagner Auto Sales v. Land Rover North America,* 539 F. Supp. 2d 461 (D. Mass. 2008), the federal district judge in Massachusetts wrote that "economic downturns and market shifts" are the type of risks that are always foreseeable: "[i]f the normal ebb and flow of consumer demand in a market-based economy were adequate grounds for excusing contractual performance, scarcely any contract could be enforced at all." *Id.* at 472. Similarly, in 2009, the Arizona Court of Appeals found that "an economic downturn or lack of financing" is "not an unforeseen event." *Archer v. Archer,* No. 1 CA-CV 08-0543, 2009 WL 1682146, at *3 (Ariz. Ct. App. June 16, 2009).

Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co. appears to be the only decision finding that the economic crisis was unforeseeable at the time of contracting. In 2002, Hoosier Energy Rural Electric Cooperative and John Hancock Life Insurance Company completed a complicated sale-in-lease-out (or SILO) transaction, under which Hoosier agreed to provide John Hancock a $120 million credit default swap that would be paid by a designated surety if a default occurred. Hoosier had 60 days to find a new qualified swap provider if the surety's credit rating dropped below a specific threshold and failure to do so would allow John Hancock to declare a default and to demand payment from the surety. In June 2008, the designated surety's credit rating slipped below the requisite threshold and Hoosier was not able to find a replacement swap provider. John Hancock called on the surety to pay the credit default swap, prompting Hoosier's suit for an injunction barring John Hancock from collecting, and the surety from paying, the credit default.

Hoosier argued that its obligation to find a new swap provider should be temporarily suspended due to the economic downturn and its effect on the availability of qualified swap providers. The district court's discussion focused almost exclusively on the unforeseeability of the economic downturn. It stated that the nature and scope of "the credit crisis facing the world's economies in recent months is unprecedented and was not foretold by the world's preeminent economic experts." *Hoosier Energy Rural Elec. Co-op., Inc.,* 588 F. Supp. 2d at 932. More specifically, it concluded that the economic downturn temporarily froze the market for comparable swap providers at any price and that "[t]hose effects were not anticipated and could not have been guarded against" at the time of contracting in 2002. *Id.* Thus, the court found that a temporary extension of Hoosier's time to find a replacement swap provider was warranted under the doctrine of temporary commercial impracticability.

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In September 2009, the Seventh Circuit affirmed the district court's decision but criticized the district court's analysis. It described the district court's account of the 2008 credit crunch as a "once-in-a-century" event as an "overstatement," citing the Great Depression and two other financial downturns. *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.,* 582 F.3d 721, 728 (7th Cir. 2009). The court also admonished that "enforceable contracts are vital to economic productivity" and "it is hard to see how an economic downturn can be alleviated by making contracts less reliable." *Id.* at 727.

Despite the Seventh Circuit's commentary in *Hoosier Energy,* a district court in the Northern District of Illinois upheld a commercial impracticability defense based on the economic crisis where the plaintiff's employees had publicly stated that the crisis was unforeseeable. Public statements by corporate employees could potentially be used against companies who argue that the economic crisis was foreseeable. In *Bank of America, N.A. v. Shelbourne Development Group, Inc.,* 732 F. Supp. 2d 809, 815 (N.D. Ill. Aug. 18, 2010), the bank filed a breach of contract lawsuit against a Chicago developer demanding full payment of a construction loan after the developer failed to secure another loan. As an affirmative defense, the developer argued that its performance was either temporarily or permanently excused under the doctrine of commercial impracticability. The court denied the bank's motion to strike the commercial impracticability defense. Noting that "[t]he viability of this affirmative defense depends on whether the economic downturn was foreseeable," the court ruled that it was "'uncertain whether the extent of the 2008 credit crunch, which extended into 2009, was foreseeable' to the parties at the time that they entered into the loan documents" because the developer alleged that the bank's own executives and officer had "repeatedly made public statements and other communications describing the current economic conditions, including those affecting the real estate market and the availability of credit, as unprecedented, unparalleled and not reasonably foreseeable." *Id.*

Governmental Action May Excuse Performance

The global financial crisis has resulted in a variety of domestic and international financial regulatory actions and reforms. In light of this trend toward greater government regulation in the financial markets, it is important to consider when changes in government regulations or orders may discharge performance under the excuse-of-performance doctrines. It is well-recognized that performance may be excused if a supervening government action prohibits the performance or imposes requirements that make it impracticable. The party seeking to excuse performance must still establish all of the requirements set forth above for the doctrines to apply, including unforeseeability. With respect to foreseeability, the Supreme Court has said that "in the world of regulated industries . . . the risk that legal change will prevent bargained-for performance is always lurking in the shadows." *Winstar Corp.,* 518 U.S. at 869. Although none concern government action resulting from failing economic conditions, fairly recent decisions show that courts are willing to excuse a party's performance where a government regulation or order clearly affects a party's performance in such a way that it is either impossible or impracticable for the party to comply with the regulation or order and to also perform its contract. In 2009, the Federal Court of Claims discharged the United States Postal Service's performance under a mail delivery contract after the Postal Service novated the routes under the contract to another party pursuant to an Illinois court's order. Tracking the elements of impracticability, the court stated that "the Postal Service no longer had a practicable option to perform under the original contract"; the state court orders that rendered performance impracticable "were in no way procured by" the Postal Service; and there was no indication that "at the time of the formation of the contract, the Postal Service was aware of the potential for such a dispute and assumed that risk." *Hicks v. United States,* 89 Fed. Cl. 243, 258 (Fed. Cl. 2009).

Similarly, in *BP Chemicals, Inc. v. AEP Texas Central Co.,* 198 S.W.3d 449 (Tex. App. 2006), a court excused performance based on government action. BP Chemicals concerned the effect of a government regulation on a "take and pay" electricity contract. AEP refused to take and pay for two electricity transfers from BP because BP did not follow the new procedures that were established in accordance with a Texas regulation when it made the transfers and, as a result, it was "impossible" for AEP to recognize the deliveries. The Texas Court of Appeals concluded that the new transmission procedures, and BP's failure to follow them, were supervening events that excused AEP's payment for the two electricity transfers under the doctrines of "commercial impracticability, impossibility of performance and/or frustration of purpose." *Id.* at 460.

Conclusion

Whether a contracting party should seek to excuse or modify its contractual obligations due to the recent economic conditions based on contract provisions or the excuse-of-performance doctrines is ultimately a fact-specific determination based in large part on the language of the provision at issue and the underlying events surrounding the execution of the relevant agreement. Parties may best protect themselves from the continuing effects of the economy by inserting provisions into their contracts, where appropriate, which expressly address whether performance may be excused based on severe economic conditions.

Great Expectations *meet* Painful Realites (Part II)

*by Steven J. Harper**

In this two-part article, Steven J. Harper, former Kirkland & Ellis LLP partner, author, regular contributor to The American Lawyer *– Am Law Daily, and adjunct professor at Northwestern University, challenges law schools to rethink their roles and responsibilities as the profession's gatekeepers.*

In the last issue of The Circuit Rider, *Part I suggested that Northwestern's former dean, David Van Zandt, relied on misguided metrics in running the school. Part II considers how the proliferation of such metrics distorts law school missions, disserves students, and undermines the profession. There's a better way.*

Students become unwitting victims of misguided metrics. As law school applicants, they are oblivious to problems that could plague them later and for a long time. In fact, they resist such insights, starting with the fact that almost half of recent graduates have more than $100,000 in law school loans. ("Law School Survey of Student Engagement, 2009 Annual Survey Results," (Indiana University Center for Postsecondary Research) (http://lssse.iub.edu/pdf/LSSSE_Annual_Report_2009_forWeb.pdf)) It's far more comforting to focus on the misleading 90+% employment rates and seven-figure large law firm starting salaries that pervade virtually all law schools' promotional websites.

"What psychologists call confirmation bias kicks in when, for example, the first sentence of the "Career Services" page in the downloadable Northwestern brochure tells recruits: "For the past three out of four years, Northwestern Law has ranked first on *Princeton Review's* list of law schools with the best career prospects."

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Who took the time to scrutinize the *Princeton Review* methodology? Or to learn that, according its criteria, Harvard ranked below Boston University and Boston College in 2009 and behind Vanderbilt in 2010 – and that Yale was nowhere to be found among the top ten for any recent year? Last year, Northwestern's slight decline as measured by this meaningless metric resulted in the following revision to the school's website: "*Princeton Review* has ranked Northwestern Law as the best law school in the country for job prospects for four out of the past six years." Ironically, *Princeton Review's* initial 2011 press release praised Brown University in another category: number one among the nation's "Top Law Professors." (http://blurblawg.typepad.com/files/brown-law.jpg) Brown, of course, doesn't have a law school.

Once enrolled, students quickly encounter pressures – growing educational debt and the peer prestige associated with a big law job offer, among others – that push most of them toward large firms. Part I of this article reviewed the data suggesting the many perils of that path for most who follow it. Deans shouldn't add the formidable suasion of the law school mission itself to encourage students in such a direction. That's why Van Zandt's most remarkable position in his ABA's *Litigation* quarterly article "Client-Ready Law Graduates" [Vol. 36, No. 1, Fall 2009] was that today's law schools exist primarily to fill the training gap that large firms leave in their pursuit of eye-popping equity partner earnings.

When the prime directive is to maximize client billable hours in the short-run, senior attorneys no longer possess an economic incentive to provide partner-associate mentoring that has been central to the profession. Van Zandt urged that such firms now need law schools to be their enablers, doing that job for them. With apprenticeship-type experiences of an earlier era gone, big law partners told him what they wanted. Rather than challenging the leaders of the nation's premier legal institutions to reconsider their own suspect business models, he complied.

When Van Zandt bragged about making his graduates "ready," it was fair to ask, "Ready for what?" That was the naked emperor sitting in Northwestern's large law firm focus groups that Van Zandt himself described as keys to formulating the school's long-term strategic direction. Part I of this article reviewed the data concerning the widespread rates of attorney dissatisfaction and worse, especially in big firms. Should deans ignore the downside of high-paying jobs for graduates simply because there's no metric for assessing future psychological distress that such positions can cause? If so, they'd better be careful because someday there might be: Keep an eye on future alumni donor rates from recent law school classes.

Maybe curriculum changes are appropriate. There's nothing wrong with teaching soon-to-be-lawyers how to read a financial statement or balance sheet. Offering business-related law courses is a good idea, but it's not novel. Even 30 years ago, I was among the vast majority of Harvard second-year students who took accounting, corporations, and taxation. But Van Zandt sought to go much farther, adding mandatory courses in teamwork, project management, and basic decision-making strategy using the business school case method. Doesn't Northwestern already have a business school? Where's the class on the potential fate of graduates as professionally dissatisfied big firm lawyers? Where's the vehicle for conveying basic information that might help them avoid that outcome?

Accelerating, but to what end?

If Northwestern's long-term strategic thinkers tackled those questions, there's little evidence of it in *Plan 2008's* flagship initiative – the accelerated JD. That program embodies the MBA mentality of misguided metrics. (http://www.law.northwestern.edu/academics/ajd/) For starters, applicants can take either the business school GMAT or the LSAT. That's good news for Kaplan Education, Princeton Review, and other organizations making millions from prospective law students striving to improve their own personal metrics – standardized test performance. Now they have another one.

Once enrolled, the accelerated students begin cramming three years of academic work into two, starting with a web-based course even before they arrive on campus and begin full-time study in May. (http://www.law.northwestern.edu/academics/ajd/documents/AJD.pdf)

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They continue into the fall and spring with the typically rigorous first-year academic schedule -- plus extra business school-type courses throughout -- while competing with traditional second-year students for summer jobs.

While contemplating the wisdom of such a regimen, ask any attorney what the first year of law school would have been like if another class had been added to the ordeal. Before the answer comes, refresh the witness' recollection with a few agonizing episodes from Scott Turow's *One L* because, in general, the pressure isn't much different for today's students. For anyone on a two-year accelerated path, an already precious commodity – time during the first year to integrate experiences while contemplating one's place in a diverse and challenging profession – all but disappears. They'll be even less likely to rethink the big firm track to which most students begin gravitating during their early months of law school.

Northwestern assures accelerated students of "the opportunity to participate in all extracurricular and co-curricular activities, including journals." (http://www.law.northwestern.edu/academics/ajd/) But the writing competition for the school's most prestigious publication, *Northwestern Law Review,* probably doesn't look very appealing to them when it first rolls around after fall semester grades during the grueling first year. Maybe Northwestern has devised a way for accelerated students to reach editorial positions. At other schools, they're reserved exclusively for third-year students. As Van Zandt knows from his own time on the *Yale Law Review* and his subsequent career, they're also gateways to judicial clerkships and academia.

Adding insult to injury, the accelerated students pay the same tuition as the three-year people because Northwestern prices the degree, not the time spent getting it. Two-year program participants receive only a single financial benefit: They reenter the workforce sooner, if they can get jobs.

In his keynote address to a *Southwestern Law Review* symposium, Van Zandt gave three reasons for pushing the accelerated JD.

First, he sought "a slight edge in recruiting students…[who] may choose us instead of another law school because they can finish their degree in two years." (D. Van Zandt, "The Evolution of J. D. Programs, -- Is Non-Traditional Becoming More Traditional? – Keynote Address Transcript," *Southwestern Law Review* (Vol. 38, No. 4, Spring 2009), p. 616 (http://www.swlaw.edu/ academics/ cocurricular/ lawreview/pastissues/ pastissues/vol38_no4)) With Northwestern's tuition near the very top among all law schools and offering no discount for accelerating to an abysmal job market for graduates, that seems dubious.

Second, he wanted to "tap a different population of students to expand our pool of potential applicants." In particular, he hoped to "reach those who were planning on going to MBA programs." (*Id.*) That's precisely the wrong direction. For too long, law school missions have focused myopically on persuading students to become lawyers. Promotional techniques have had the effect, if not the intent, of misleading uncertain young people into the law; that hasn't served students or the profession.

Third, he acknowledged that the participants would be guinea pigs for his big firm, business-oriented curriculum changes: "[W]e simply want to have a vehicle in which to test and instill some of the competencies in our students. The accelerated JD provides us with an experimental ground." (*Id.*)

As Van Zandt rolled out the accelerated JD in June 2008, I watched a Chicago television interviewer ask him about its prospects.

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"We'll let the market tell us," he said.

Which market? Large law firm leaders? Churning out graduates more quickly looked better to them when they recommended it to Van Zandt during the summer of 2007 – a year before the economy crushed their hiring programs. At the *Southwestern Law Review* symposium in early 2009, he said he was planning "a marketing effort with employers, particularly ones who participated in the focus groups, in order to ensure that these [accelerated JD] students get the same employment chances as the regular three-year students." (D. Van Zandt, *Southwestern Law Review, supra* at 619)

Such an effort invites questions about the impact of the new program on another market -- the regular three-year students. As demand for new associates in big firms shrinks, will the additional accelerated JD candidates improve or worsen the educational experiences and job prospects of the classes into which they are parachuted?

How about judges looking for clerks from the editorial ranks of the school's law review? Are they a market that matters to assessing the accelerated program?

How about the accelerated students themselves? Does their psychological well-being figure into the analysis at all?

Rather than wrestle with such vexing questions, the MBA mentality of misguided metrics satisfies itself with the superficial: an applicant pool of candidates with high LSATs and GMATs, decent undergraduate grades, and private wealth or a banker willing to lend them tuition money. Running the law school in this way – as a business – reaps short-term financial rewards for the institution. As with transfer students (discussed in Part I), the accelerated JD tuition dollars drop directly to Northwestern's bottom-line. Will anyone notice as an original class of 240 grows by 25 to 40 transfer students or that, if the *Plan 2008* dreams ever come true, someday another 60 accelerated JDs join them? Why not just increase the class size by 50% at the outset and call it a day?

Concluding his keynote address, Van Zandt said that people asked him if acceleration was his goal for the entire school. He said that it was still an open question, but could "easily see a world in which our entire program is two years." (p. 617) Less than two years later, he'd left that legal world altogether.

Shortening the time to get a legal degree isn't a bad idea. But the effort to develop the accelerated JD would have been better spent lobbying the ABA and state bar licensing organizations to revisit the overarching three-year accreditation requirement. It's not magical; Clarence Darrow took classes for a year at the University of Michigan Law School, spent another year reading the law under the tutelage of a practitioner, and then sat for the Ohio bar. As today's students and lawyers rightly complain that law schools offer a boring, expensive third year while failing fail to provide practical training, that 100-year-old model looks a lot better than rushing students through a three-year curriculum in two. But then again, lopping off the third year would reduce law school tuition revenues – another important metric for the short-term profit-minded.

In search of a better way

Alternatively, if we're stuck with a third year that most students and many practicing lawyers deem superfluous, now is the time to make it more meaningful. As government budget cuts crush legal assistance programs for the poor, law schools could accomplish the win-win of giving students real-life client opportunities that enhance their practical skills while making the profession – and the world – a better place. To his credit, Van Zandt encouraged such experiential learning. In fact, *Plan 2008* recommended that third-year students have "an opportunity for a semester-long, faculty-supervised, full-time experience in which they can put into practice their prior learning." (p. 20)

I don't know what Van Zandt had in mind, but the Legal Services Corporation has local complements almost everywhere there's a law school. In Chicago, the Legal Assistance Foundation of Metropolitan Chicago, Chicago Volunteer Legal Services, Chicago Legal Clinic, Cabrini-Green Legal Aid, The Legal Aid Bureau, and many others would welcome such sophisticated student help. But they'd also need supervisors. If insufficient tenured and tenure track faculty were qualified or interested, big firm lawyers could assist – as many already do to their great personal satisfaction.

But let's be honest about that, too: What students learn in clinical programs won't have much relevance to the mundane tasks that consume associates' early years in large firms. Most of that work requires no specialized training at all; too much of it doesn't even require a legal degree.

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But as explained in Part I of this article, the vast majority of the nation's 50,000 annual law school graduates won't get big law jobs anyway and most of those who do won't stay at their firms very long. It would be nice to give all of them practical legal skills that they can use in their ongoing efforts to make a living. That's a lot different from immersing students in a new curriculum that's a business school knockoff catering to large law firm desires.

In short, improving and invigorating the third-year doesn't require adopting a business school approach to the content of a practical legal education – an approach that has broader professional implications as well. Space permits only their brief mention here. Another prominent Yale alumnus graduated three years before Van Zandt's arrival as a student and later became its dean. In his 1993 book, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press), Anthony Kronman offered a prescient insight:

"The world has grown too complex, they say, for lawyers to make do without the more systematic forms of understanding that philosophy and economics provide. This is the main idea behind the call for a new policy science in law and the suggestion that lawyers be reconceived in its light. But it immediately raises a basic question about the identity of the legal profession… If a lawyer must become a jack-of-all-trades with a knowledge of many fields, how in the end will he differ from the experts in these fields themselves?" (p. 358)

How can a law school organized around an MBA-type curriculum geared to the speedy processing of students with high GMATs nurture the unique qualities of character, wisdom, and judgment that should always define what being a lawyer means? It's commendable to reconsider outdated courses and to enhance practical training in necessary legal skills. But that doesn't require giving big law and its business model of misguided metrics the dominant voice in reshaping those programs.

The economic collapse that began in September 2008 has provided a unique opportunity to rethink recent trends that too quickly became accepted truths. The leaders of great law schools should be guiding the profession out of its current tunnel, not surrendering their flashlights to those who continue burrowing into darkness.

Even prominent business school deans are searching their souls and revisiting their priorities. For three decades, they used the cash cows of MBA programs to churn out graduates at a ferocious pace, literally day-and-night; MBAs accounted for one-quarter of all graduate degrees awarded in 2005-2006. (K. Holland, "Is It Time to Re-Train B-Schools?" *The New York Times,* March 15, 2009)

After years of focus on maximizing shareholder values to the exclusion of all others, the global cataclysm generated second thoughts about educational missions. By early 2009, *The New York Times* reported that business school deans and faculty at Harvard, Yale, NYU and other leading institutions were calling for "professionalization" – making business management more like law or medicine, complete with a code of conduct, a certification examination and continuing education, as if those elements created the core values that defined any true profession anyway. (K. Holland, *The New York Times, supra*) In 2010, Professor Nitin Nohria, a leading voice of such efforts, became dean of the Harvard Business School.

With such cries for change, the circle became complete. The architects of the MBA mentality that encouraged unrestrained self-interest and short-term profit-maximization clung to a final hope: Maybe the big law firms had survived with a different ethic intact. In earlier times, the newly reform-minded business school leaders might have correctly regarded the legal profession's most influential institutions as a viable alternative, but not in the early 21st century. Most of them had become mired in the misguided metrics swamp, too.

All of this is more than an academic inquiry. The behavioral ramifications of abandoning reasoned judgment in favor of misguided metrics are profound. The finest schools – Northwestern is certainly among them for now – have always led rather than followed. Leadership doesn't mean ceding decision-making responsibility to lay magazine editors who propound silly criteria for judging society's most important institutions. (In case you missed it, *U.S. News* now ranks big law firms, too.) It doesn't mean creating focus groups from a wealthy but unhappy constituency and thereby raising a school's profile while perfecting its machinery to replenish the ranks of the dissatisfied as quickly as they are depleted. It doesn't mean pushing novel programs solely for the sake of their novelty – although it's worth noting that two other schools, Southwestern Law School and the University of Dayton, offered accelerated JD programs years before Northwestern. Leadership doesn't mean urging students onto tracks that took too many of their predecessors to unfulfilling destinations. When law school leaders proceed in such a manner, the profession's gatekeepers have lost their way.

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A proposal for the long run

There's no reason to overstate the case of attorney unhappiness that the data in Part I confirm. Even the most pessimistic surveys suggest that about half of all practicing lawyers enjoy their work and are satisfied with their careers. Many are in large law firms – as I was for 30 rewarding years. Perhaps Northwestern's graduates fall disproportionately into the happy category, but that's doubtful. Such a conclusion would imply that the school selected its students for their unique understanding of what life as a lawyer would be and, therefore, suffered less disappointment when they encountered it.

No such prophylactic counseling occurred, but it suggests a starting point for one type of reform that might blunt the impact of misguided metrics. The undergraduate course I've taught (at Northwestern, ironically) for four years confirms the need for straightforward information that law schools can provide. Most entering students are unaware of what lies ahead and they resist the truth with a powerful corollary: Bad things happen only to someone else. Their career expectations derive from idealized images that bear little resemblance to the daily work of most attorneys. In real life, Perry Mason, Clarence Darrow, and the lead characters on *Law & Order* are few and far between, but try telling that to a prospective 1L.

Nevertheless, that's what law schools and undergraduate colleges could do – starting before students begin their expensive journeys. Legal Studies is a popular pre-law major and a natural venue for courses that could enlighten prospective law students about contemplated legal careers. A few weeks of reality therapy for juniors and seniors could go a long way toward helping them make better choices that will endure for a lifetime.

Likewise, Northwestern Law School boasts that it interviews 4,000 applicants every year. Rather than discussing the merits of retaking the LSAT to get higher scores that will help the school's *U.S. News* ranking, interviewers could probe students' understandings of the profession they seek to join *before* they incur debt equivalent to a home mortgage (but without the house) as the price of admission. That means helping them realize that, if they're lucky, their first employers of choice will be big firms because that's where they can make the money needed to repay student loans – although getting such a job will be a daunting challenge. It requires explaining that the work they perform there could diverge from their expectations in ways most of them won't like.

On its website, a law school can brag about sending 60% of its graduates to big firms with six-figure salaries and thereby holding the "No. 1 Spot in *NLJ* Ranking" – as the banner headline on Northwestern's landing webpage proclaimed shortly after it won that contest for 2009. (No such fanfare accompanied its drop to eighth the following year.) But rather than pretending that such a result is unambiguously positive for every potential law school applicant, why not describe what life and work is really like in most of those places? Why not give them this article – both parts -- and require a responsive essay with their applications?

Once classes begin, tough love sessions could continue in a first-year curriculum that included a penetrating analysis of large firms from a young attorney's perspective. How, if at all, do big firms differ from each other in ways that matter? What tasks do associates perform? What lifestyle is compatible with billing 2,200 hours or more annually at firms expecting such commitments? On the last subject, Yale distributes an informative memorandum, "The Truth About the Billable Hour" (http://www.law.yale.edu/documents/pdf/CDO_Public/cdo-billable_hour.pdf). Maybe that helps to explain why they send a lower percentage graduates into big law than other top schools – even allowing for employment after judicial clerkships that many accept after graduation.

Students could learn about voluntary attrition. When economic circumstances gave young lawyers more options, many firms had trouble "keeping the keepers" – the title of a recent NALP report. It's worth pondering why.

Involuntary attrition can be brutal for both its victims and the workplace. Even as the economy improves, students should study how poorly many of their associate predecessors fared during the financial collapse of 2008-2009. After all, the business cycle isn't going away.

Students could benefit from knowing that in most big firms that they might regard as the best, fewer than one in ten talented new hires achieves equity partnership after a decade or more of hard work. Law schools could bring that metric to life: Northwestern's first accelerated JD class had an average of six years' work experience; those 2011 graduates who join a typical large firm, survive to the final up-or-out equity partner determination, and fail to advance will be in their 40s when they start their new job searches.

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Think of this project as analogous to moving sex education from the whispers and misconceptions of the playground to a clear-headed exposition in the classroom. For those valuing the long-run fate of human beings thrust into unexpected and unwelcome reality, it's equally important. Is there a metric by which to measure the success of such efforts? How about higher rates of attorney career satisfaction in the years ahead? Or is that an externality that the "law school as a business" model labels irrelevant to its bottom-line and, therefore, ignores?

An attack on high rates of attorney unhappiness could target the front end of the profession's pipeline. Educators could perform a noble service by forcing prospective students to overcome their own confirmation bias; some might realize that they don't want to be lawyers after all. Law schools can equip students with the knowledge necessary to resist pressures that put most of them on the big law track before they understand where it leads. Without shock therapy – successive jolts of truth – students will yield to inertia and momentum that propel too many of them to unfulfilling careers. If only half of today's practicing lawyers enjoy their work, then the profession's most important mission is to help the others either to refrain from entering it in the first place or to find more individually compatible positions once they arrive.

As a matter of self-interest, wise firm leaders should embrace such transparency. Working environments are better when laborers understand what to expect before they arrive. When I interviewed prospective associates, I told them that my firm wasn't the place for everyone – just as someone there had once told me. Today, communicating that message is even more important.

Students can help themselves, too. They can ask law firm interviewers questions that might provide insights into big law life and reveal firm differences. As a student 30 years ago, my personal favorite was: "Briefly describe your work at various times, say, as a second-year associate, a fifth-year associate, a non-equity partner, and now."

Lawyers love to talk about themselves and attentive listeners will learn much from the responses. A brief online investigation can produce even more information. Prospective associates might discover things they'd rather not know about a firm that otherwise interests them, but the truth eventually emerges anyway. Sooner is better than later when it comes to acquiring knowledge that frames life's most important decisions.

Which schools will go first? Isn't a variant of what economists call the prisoner's dilemma an obstacle to my radical proposal? Won't a law school pursuing such brutal candor suffer a competitive disadvantage by deterring applicants who will gravitate to schools that don't?

Maybe, but the approach hasn't hurt Yale. In fact, moving in this direction should improve the quality of law schools that have the courage to try. Any educational institution is only as good as its essential human assets: students and faculty. One result of better information to all prospective lawyers should be a shift in their preferences – from myopic attention to big firm starting salaries and elusive equity partner wealth to longer-range considerations of what they really want from a legal career. A school that similarly shifted its emphasis from favoring the large firm track to a more balanced mission that included big law constituencies without dwarfing all others would attract a broader range of students and faculty. Expanding the universe of those interested in joining someplace that has finite capacity makes it better.

There's also a more powerful reason to act: It's the right thing to do, both for students and the profession. Deans can pretend that none of this is their job; that they're just minor players in a large market beyond their control. They can argue that the task of informing those who buy the pig in a poke of a law school education is someone else's responsibility, even as their institutions encourage the pursuit of big firm jobs that are disappearing. But if law schools aren't obliged to play fair with their own students, who is? Isn't sunlight still the best disinfectant? And shouldn't those of us in positions to lift a shade or open a window make the effort?

* * *

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George Cotsirilos: *in* Memoriam

by Judge Charles P. Kocoras *

Long before I met George Cotsirilos personally, I became acquainted with his reputation. The time period was the early 1970s when I was in the infancy of my career as an Assistant United States Attorney. George's reputation as a criminal defense lawyer was sterling. Indeed, in many quarters he was viewed as the best criminal defense lawyer in Chicago.

As I gained more and more experience as a prosecutor, it became my desire to get a case against one of George's clients. Although I hold the view that trials of criminal cases are undertakings in the pursuit of a noble result, that is, the rendition of justice to the parties in a way that is honored by society, there is, nevertheless, a competitive aspect to trial work. So I wanted to go against the best.

As luck would have it, I was assigned the prosecution of a doctor for income tax charges who had George as his lawyer. I looked forward to the trial, although not without considerable trepidation. As we both prepared to meet in the courtroom, however, George's client suffered a heart attack and was no longer able to endure the pressures of a trial. Our office then did the decent thing and dismissed the indictment. In retrospect, I was probably spared some painful courtroom lessons.

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** Judge Kocoras is a Senior United States District Judge for the Northern District of Illinois. Judge Kocoras' tribute to George Cotsirilos was originally published in the September 2011 Chicago Bar Association Record along with remembrances by Judge William J. Bauer of the Seventh Circuit Court of Appeals, Tom Sullivan, former U.S. Attorney and Partner at Jenner and Block, William J. Martin, and Ann Tighe and Jim Streicker, who for many years were George's law partners. George passed away earlier this year at the age of 90. He was one of the initial recipients of the Chicago Bar Association and Chicago Bar Foundation's Justice John Paul Stevens Award for integrity and public service. As Judge Bauer wrote of his friend of more than 50 years, "he was the very personification of a great gentleman, a great lawyer, a great thinker and a great friend." "I look back with gladness knowing that I got to share him with the rest of the world, that I got to laugh with him, mourn with him, travel, drink and eat with him and enjoy his love. And I had the great good fortune to help celebrate his 45th birthday (in London!), his 90th birthday in Chicago and to kiss him goodbye on his death bed. He was the finest at whatever life gave him to do." These remembrances and Judge Kocoras' tribute are reprinted with the gracious permission of the CBA Record.*

Letter *from the* President

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My level of involvement in the organized bar has varied somewhat through the years as my practice (and family) grew. Yet, I have always found that when I have been able to be meaningfully engaged, what I got from it was far more than what I was asked to give to it.

If you are reading this article, you are involved – or at least have an interest in – the Seventh Circuit Bar Association. I urge you to consider becoming more active in our organization and in allowing us to become your "Domus".

The Association provides a terrific vehicle for connecting professionally with other lawyers and judges throughout the Circuit. Our annual meeting regularly includes some of the finest CLE programming available anywhere in the country. The receptions, annual dinner, luncheons, and young lawyers breakfast that occur during the course of the meeting – while perhaps not as grand as what one might experience at Middle Temple – are great fun and an opportunity to share experiences as well as broaden your professional network.

We also have increased our programming throughout the year, often partnering with other bar organizations to present programs on a wide array of topics impacting those practicing in the federal courts. And under the leadership of Tom Campbell, we have mounted a major symposium on Abraham Lincoln and are about to do the same on the legal issues facing the Great Lakes.

We provide wonderful opportunities for bono work. If you have the interest and ability to handle an appeal, please contact Don Wall in the Circuit Clerk's Office. If your capabilities are in the trial courts, we regularly can provide guidance on getting appointed to interesting matters and there is no one better than our Secretary, Mike Brody at Jenner & Block, to help you with that.

Finally, while we may not be able to provide the regular in-person mentoring that may occur through dining at the English Inns, we can provide even more immediate guidance to young lawyers seeking direction and support through our e-mentoring program. Led by Young Lawyers Committee members Beth Gaus, Seth Thomas, Amy Lindner, and Chris Esbrook, this program makes available the wisdom of some of the most prominent judges and lawyers in the country and provides an opportunity for young lawyers to meet with some of the giants of the bench and bar to interview them. Go to our website www.7thcircuitbar.org to see the remarkable work that this team – with the assistance of our talented Circuit Clerk Gino Agnello – has done.

What we may lack in the physical trappings of the English Inns, we make up for in the quality of our experience. Tell your friends. Come join us. Come home.

George Cotsirilos: *in* Memoriam

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Some years later, George and I became good friends. I came to learn that, as good a lawyer as he was, he was a better person. George and a few other prominent Greek-Americans would meet every few months for lunch in Greektown, and I was invited to join them. They were all men of achievement in various professions and disciplines, and the lunchtime discussions were funny, engaging, and informative.

George seemed to have been born with a smile on his face and was blessed with a warmth and grace that went along with it. While he had many stories to tell, he did not live in the past. George was a contemporary man with a modern outlook, even though his courtroom experiences and triumphs bordered on the stuff of legends. He delighted in those experiences, although he never made himself the focus of the stories. A special one involved a restaurant owner who shot and killed three patrons in his diner one particular afternoon. After a trial with George as his lawyer, the restaurant owner was acquitted of all charges. George loved to tell the details of that story.

It is not uncommon that people are viewed larger in death than they were in life. That could never have been said of George. The eminent lawyer Bill Martin knew George well and, when we grieved together over the loss of George, he said to me: "He was the best there was." That feeling was no different than what was said about George in earlier times. Bill's singular accolade was so richly earned and deserved.

When George retired from the active practice, our profession lost a titan of the courtroom. The defense bar lost a prince of the realm and society lost a model citizen for whom excellence in all things was his constant pursuit. George taught us all about how to live well. He possessed an unmatched devotion to worthy causes and we learned from him the reward of fulfillment in their pursuit. Those lessons came not through lectures or pontification but rather by our observation of him. He was a master in all that he did and he pleasured us with his friendship. That is why the void left by his absence is so deeply felt and leaves us so empty. What a man he was.

Ventriloquism *in* Depositions

The Continuing Problem of Lawyers Conferring with Witnesses During Questioning

By Jeffrey Cole [*]

It was not all that long ago that requiring pre-trial disclosure of one's evidence "would be repugnant to all sporstmanlike instincts." 6 Wigmore, Discovery § 1845 at 490 (3rd Ed.1940). The common law's "sporting theory" of justice did not openly defend or condone trickery and deception; but it did regard "the concealment of one's evidential resources and the preservation of the opponent's defenseless ignorance as a fair and irreproachable accompaniment of the game of litigation." *Id. See also* 8 Wright, Miller & Marcus, Federal Practice & Procedure: Civil 2d § 2001 at 40 (1994). Dissatisfaction with the common law's approach, which it was argued was not congenial to truth-seeking and was incompatible with the just determination of cases on their merits, led to mounting calls for reform. Finally in 1938, came the Federal Rules of Civil Procedure, which required disclosure of relevant information in advance of trial. *See Swierkiewicz v. Sorema N. A.,* 534 U.S. 506, 512 (2002); *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 253 (1978) (Powell, J., concurring and dissenting); *Hickman v. Taylor,* 329 U.S. 495, 500 (1947). At last, Nirvana.

Well not quite, as anyone who has taken discovery in any civil case is aware. Indeed, we have it on the highest authority that "discovery is the bane of modern litigation," *Rossetto v. Pabst Brewing Co., Inc.,* 217 F.3d 539, 542 (7th Cir. 2000)(Posner, J.), and that the success of judicial supervision in checking the discovery abuses that abound has been on the modest side. *Bell Atlantic v. Twombly,* 550 U.S. 544, 559 (2007). There are no easy answers. Judge Easterbrook has concluded that the source of "discovery abuse" does not lie in the rules regulating discovery or in tinkering with Rule 26, Rule 37, or any of the other discovery provisions. In his view, the source of the problem lies in the structure of legal rules (too much uncertainty), in the allocation of fees and costs (they should be borne by those who caused them to be incurred), and in the operation of the judicial system (there is room for more direction by judicial officers and less by litigants). *See* Frank Easterbrook, *Discovery as Abuse,* 69 B.U.L. Rev. 635, 647-648(1989).

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[*]*Jeffrey Cole is a United States Magistrate Judge in Chicago and is the Editor-in-Chief of The Circuit Rider.*

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These are heroic themes, which have found a receptive audience in scholarly circles and where it counts most, in the Supreme Court. *See e.g., Twombly, Supra.* But what of the lawyers slugging it out in the trenches, who, while patiently waiting for the larger institutional changes to be made, are confronted on a regular basis with an opponent who obstructs the discovery process? I should like to discuss some possible answers to a particular problem that occurs with unsettling frequency, but often goes unnoticed or insufficiently challenged: it involves the lawyer who obstructs the deposition either through (a) instructing a witness not to answer, (b) interrupting the witnesses' answer and instructing him to say no more, (c) coaching the witness either overtly through purported "objections," or (d) – and this is the ultimate form of abuse – by consulting with the witness either in or outside the deposition room in the middle of a question. Here is an example that occurred recently. It is by no means an isolated phenomenon. The names have been changed to protect the guilty.

During the course of the plaintiff's deposition of an important witness who had been employed by the defendants, the witness was asked about certain kickbacks and her knowledge of those to whom the kickbacks may have been paid. In response to questions, the witness – let us call her Ms. Flim – testified that "I don't want to use the name. I can't do that." At that point, counsel for the defendants – we shall call him Mr. Flam – objected that the question called for speculation "unless she has, you know, clear information on this." This was the kind of coaching the Federal Rules of Civil Procedure do not allow. *Cf. Woods v. Ramsey,* 199 F.3d 437 (5th Cir. 1999); *Flowers v. Owens,* 274 F.R.D. 218, 226, n.6 (N.D.Ill. 2011); *Lee v. Wal-Mart Stores, Inc.,* 2011 WL 796784 (E.D.Va. 2011); Rule 30 (c)(2)(Objections are to be stated "concisely and in a nonargumentative and nonsuggestive manner"). And in any event, the objection was improper. Apart from the fact that Ms. Flim's initial answer did not hint at an absence of knowledge or that a further answer would be speculative, there is no rule prohibiting a witness from answering a question because it involves some conjecture. Further questioning might reveal additional information that itself would be admissible or lead to other admissible evidence or that would show that the seeming speculation is in fact more than a guess. If the questions lead nowhere, so be it.

But this was just the beginning. Ms. Flim was again asked for the name, if she had one. She did not say that she did not have a name in mind or that her prior testimony about a particular broker was somehow inaccurate. Instead of allowing the witness to answer the question, Mr. Flam interrupted and informed the examiner that he was going to confer with his client and immediately left the deposition room with Ms. Flim in tow. No explanation or justification was even attempted by him. This was, to put it mildly, improper. Because a deposition generally proceeds as at trial, Rule 30(c)(1), Federal Rules of Civil Procedure, courts have uniformly held that once a question is asked, counsel has no right to confer except to invoke a privilege. Or as the Seventh Circuit long ago put it in a case involving scores of such mid-questioning conferences, "[i]t is too late once the ball has been snapped for the coach to send in a different play." *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130,* 657 F.2d 890, 902 (7th Cir. 1981). *See e.g., BNSF Ry. Co. v. San Joaquin Valley R. Co.,* 2009 WL 3872043, 3 (E.D.Cal. 2009); *Cordova v. United States,* 2006 WL 4109659 (D.N.M. 2006) (improper for counsel to engage in off-the-record conference with witness during pending questions); *Plaisted v. Geisinger Medical Center,* 210 F.R.D. 527 (M.D.Pa. 2002) (improper for counsel to leave the deposition to confer with his client); *Morales v. Zondo, Inc.* 204 F.R.D. 50, 53 (S.D.N.Y.2001); *McDonough v. Keniston,* 188 F.R.D. 22, 23 (D.N.H. 1998). *See also, 7 James Wm. Moore et al., Moore's Federal Practice* ¶ 30.42[2] (3d ed.1997).

The conference lasted almost a half hour. In the dialogue that followed with the examiner, Mr. Flam, while apologizing for the length of the interruption, said pointedly that if he felt it necessary he would again interrupt the deposition to have further conferences with the witness. When the question about the identity of the person whom Ms. Flim had in mind in her earlier testimony was asked again, Mr. Flam asked the examiner to "suspend this line of questioning regarding this issue until later in the deposition so that I can speak to my client and his personal counsel regarding testimony thus far." Counsel for the plaintiff quite properly refused and stated that he intended on asking the question again.

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Before he could even do so, however, Ms. Flim, with Pavlovian precision, chimed in, "I feel I was speculating, I don't feel I was – I don't feel what I said was correct." She then volunteered, "I was speculating"... "I mean, I don't have any hard evidence." She then repeated that same line. When asked again for the name of the person to whom she had referred in her earlier answers, she said "I don't have any hard evidence, and I misspoke." She conceded that she had "a few brokers in mind," but, alerted by Mr. Flam's earlier objection and no doubt by the lengthy private conference she had with him, her story now was that she had "speculated. I saw no hard evidence of anything."

When asked again for the name, she again refused, saying that she would only be "speculating. I absolutely saw no–" Before she could continue, Mr. Flam instructed her not to say anything else. Even Ms. Flim conceded that it certainly looked "kind of odd" for the sudden switch in her testimony coming as it did on the heels of her half-hour conference with the defendant's lawyer, but denied that it had anything to do with what occurred during that conference. That was an understatement if ever there were one. *Avery v. Georgia,* 345 U.S. 559, 564 (1953) (Frankfurter, J., concurring) seems to apply perfectly here: "The mind of justice, not merely its eyes, would have to be blind to attribute such an occurrence to mere fortuity." *See also United States v. Rodriguez,* 975 F.2d 404 (7th Cir. 1992); *Coggeshall v. United States,* 69 U.S. 383 (1865).

Stymied, counsel for the plaintiff was forced to move on.

The conduct recounted above is indefensible under Rule 30, Federal Rules of Civil Procedure. Of course, overt instructions to a witness not to answer a question absent a claim of privilege are forbidden, even if the questions are designed to be harassing and provocative rather than information-seeking. *Redwood v. Dobson,* 476 F.3d 462, 468 (7th Cir. 2007); *Flowers, supra;* Rule 30 (c)(2). Judge Easterbrook's panel opinion in *Redwood* explains exactly how a lawyer aggrieved by his adversary's conduct should proceed. Counsel for the witness may halt the deposition and immediately apply for a protective order and sanctions. See 476 F.3d at 467-468; Rule 30(d)(3) and (4); Rule 26(c).

But filing a motion for a protective order takes time, and the delay rewards the obstructionist by giving him the time needed to further structure the witness' answer if and when the deposition resumes at some point in the future. The most immediate course of action and often the most effective is to call the district or magistrate judge overseeing discovery. (I instruct the lawyers in every case that I have to do precisely that, and there has never been a problem that could not be resolved during a phone call with counsel).

Lawyers seem reluctant to "bother" the judge. They shouldn't be. And be specific in explaining to the person who initially screens the call, exactly what the problem is. A statement that you're having difficulties at the deposition may well result in the judge responding through the court personnel that you should try to work it out. An explanation that the opposing lawyer is instructing the witness not to answer questions that do not involve privilege or has left the deposition room in the middle of a question to confer with the witness is more likely to get the judge's attention and get you the immediate relief you need. If you anticipate a problem, file a prophylactic motion with the judge beforehand so that you can get some court-ordered ground rules. At least in this way, if there is a problem and you need to call, the judge will be more likely to take the call.

On the question of sanctions, you should seek them if the circumstances warrant it. Not every bit of misconduct justifies running to the judge for relief. But, in the right setting, nothing will sensitize your opponent to his or her obligations more than a sanctions award. It's certainly true that judges aren't overly keen on officiating squabbles between lawyers. But they know the difference between a squabble and an issue of real moment, and they understand their responsibilities under the Rules. The question is generally not whether a sanction should be sought, but how best to underscore the institutional importance of fee shifting in your presentation to the court – especially if you think the judge is one who is not happy with discovery disputes. (And who is?). Don't simply file a boilerplate motion that cites no case or even the appropriate rule of civil procedure or that refers the court to a large transcript without reference to specific pages.

The judge will take his or her cue from the care with which the motion was prepared. It is persuasive to explain that fee shifting, under Rule 37, is not merely to compensate your client; "General deterrence, rather than mere remediation of the particular parties' conduct, is a goal under Rule 37; unconditional impositions of sanctions are necessary to deter 'other parties to other lawsuits' from flouting 'other discovery orders of other district courts.'" *United States Freight Co. v. Penn Cent. Transp. Co.,* 716 F.2d 954, 955 (2nd Cir.1983).

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Here is how the Seventh Circuit has phrased it:

> "'The great operative principle of Rule 37(a)(4) is that the loser pays.' Charles Alan Wright & Arthur R. Miller, 8 *Federal Practice and Procedure* § 2288 at 787 (1970). Fee shifting when the judge must rule on discovery disputes encourages their voluntary resolution and curtails the ability of litigants to use legal processes to heap detriments on adversaries (or third parties) without regard to the merits of the claims." (Parenthesis in original).

Rickels v. City of South Bend, Indiana, 33 F.3d 785, 786-87 (7th Cir. 1994) (Easterbrook, J.).

A further potential obstacle to a successful sanctions motion is the sometimes almost unconscious reaction by the court that the problems at the deposition are nothing more than an expression of the "[m]utual enmity" that characterizes much of modern day litigation. Your presentation must dispel that notion and should emphasize that even bad blood does not excuse the breakdown of decorum at a deposition or authorize violation of the governing rules. Instead of "declaring a pox on both houses," district judges are instructed by the Courts of Appeals to use their authority to maintain standards of civility and professionalism. "It is precisely when animosity runs high that playing by the rules is vital. Rules of legal procedure are designed to defuse, or at least channel into set forms, the heated feelings that accompany much litigation. Because depositions take place in law offices rather than courtrooms, adherence to professional standards is vital, for the judge has no direct means of control." *Redwood,* 476 F.3d at 469-470.

There is more, however, that can and should be done beyond merely seeking sanctions and a resumption of the deposition where a witness' testimony appears to have changed or been affected by a mid-question conference. You should try to ascertain what caused the witness' volte face. The obvious question is whether there is an attorney-client privilege that may be asserted at the resumption of the deposition regarding what transpired at the improper conference between the witness and counsel. Some courts have held that the discussion is not covered by the attorney-client privilege at all, and that the deposing attorney is entitled to inquire about the content thereof. *Plaisted,* 210 F.R.D. at 535. Where the witness denies that her *volte face* was the result of the improper conference – as Ms. Flim did -- the witness may have waived any attorney-client privilege that may have existed regarding the discussions with counsel as to the particular question or questions that are involved. Other courts have held that an *in camera* conference with the witness is in order. *Chassen v. Fidelity Nat. Financial, Inc.,* 2011 WL 723128, 1 (D.N.J. 2011)("Since improper coaching of a deponent during a short deposition break may undermine the truthfulness of the deposition testimony, the questioning of Ms. Hoffman as ordered by Magistrate Judge Salas is appropriate.").

The very significant question would then exist as to whether the witness could be represented at the *in camera* proceeding by the lawyer who obstructed the deposition by conferring with the witness. Given the nature of the inquiry and the potential consequences to counsel, it would seem that the lawyer who participated in the improper conference ought not to be allowed to act as counsel in that proceeding. Of course, the witness can be represented by other counsel who do not have an actual or potential conflict of interest.

These issues can be complex, and the above discussion is not intended to give ready answers. It is designed simply to point out problems that unfortunately continue to be a common feature of many depositions and to suggest possible ways to deal with them.

Politics *and the* English Language

By George Orwell *

Most people who bother with the matter at all would admit that the English language is in a bad way, but it is generally assumed that we cannot by conscious action do anything about it. Our civilization is decadent and our language -- so the argument runs – must inevitably share in the general collapse. It follows that any struggle against the abuse of language is a sentimental archaism, like preferring candles to electric light or hansom cabs to aeroplanes. Underneath this lies the half-conscious belief that language is a natural growth and not an instrument which we shape for our own purposes.

Now, it is clear that the decline of a language must ultimately have political and economic causes: it is not due simply to the bad influence of this or that individual writer. But an effect can become a cause, reinforcing the original cause and producing the same effect in an intensified form, and so on indefinitely. A man may take to drink because he feels himself to be a failure, and then fail all the more completely because he drinks. It is rather the same thing that is happening to the English language. It becomes ugly and inaccurate because our thoughts are foolish, but the slovenliness of our language makes it easier for us to have foolish thoughts. The point is that the process is reversible. Modern English, especially written English, is full of bad habits which spread by imitation and which can be avoided if one is willing to take the necessary trouble. If one gets rid of these habits one can think more clearly, and to think clearly is a necessary first step toward political regeneration: so that the fight against bad English is not frivolous and is not the exclusive concern of professional writers. I will come back to this presently, and I hope that by that time the meaning of what I have said here will have become clearer. Meanwhile, here are five specimens of the English language as it is now habitually written.

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** Orwell's Politics and the English Language was first published in London in 1946. It has become a classic. While it was not directed to the bar and brief writing, it should be read by anyone interested in persuasive writing. Plus, it's a lot of fun to read.*

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These five passages have not been picked out because they are especially bad -- I could have quoted far worse if I had chosen -- but because they illustrate various of the mental vices from which we now suffer. They are a little below the average, but are fairly representative examples. I number them so that I can refer back to them when necessary:

> 1. I am not, indeed, sure whether it is not true to say that the Milton who once seemed not unlike a seventeenth-century Shelley had not become, out of an experience ever more bitter in each year, more alien *[sic]* to the founder of that Jesuit sect which nothing could induce him to tolerate. - Professor Harold Laski (Essay in *Freedom of Expression*)
>
> 2. Above all, we cannot play ducks and drakes with a native battery of idioms which prescribes egregious collocations of vocables as the Basic *put up with for tolerate,* or *put at a loss for bewilder.* - Professor Lancelot Hogben *(Interglossia)*
>
> 3. On the one side we have the free personality: by definition it is not neurotic, for it has neither conflict nor dream. Its desires, such as they are, are transparent, for they are just what institutional approval keeps in the forefront of consciousness; another institutional pattern would alter their number and intensity; there is littlein them that is natural, irreducible, or culturally dangerous. But *on the other side,* the social bond itself is nothing but the mutual reflection of these self-secure integrities. Recall the definition of love. Is not this the very picture of a small academic? Where is there a place in this hall of mirrors for either personality or fraternity? - Essay on psychology in *Politics* (New York)
>
> 4. All the "best people" from the gentlemen's clubs, and all the frantic fascist captains, united in common hatred of Socialism and bestial horror at the rising tide of the mass revolutionary movement, have turned to acts of provocation, to foul incendiarism, to medieval legends of poisoned wells, to legalize their own destruction of proletarian organizations, and rouse the agitated petty-bourgeoise to chauvinistic fervor on behalf of the fight against the revolutionary way out of the crisis. - Communist pamphlet
>
> 5. If a new spirit is to be infused into this old country, there is one thorny and contentious reform which must be tackled, and that is the humanization and galvanization of the B.B.C. Timidity here will bespeak canker and atrophy of the soul. The heart of Britain may be sound and of strong beat, for instance, but the British lion's roar at present is like that of Bottom in Shakespeare's *A Midsummer Night's Dream* -- as gentle as any sucking dove. A virile new Britain cannot continue indefinitely to be traduced in the eyes or rather ears, of the world by the effete languors of Langham Place, brazenly masquerading as "standard English." When the Voice of Britain is heard at nine o'clock, better far and infinitely less ludicrous to hear aitches honestly dropped than the present priggish, inflated, inhibited, school-ma'amish arch braying of blameless bashful mewing maidens! -Letter in *Tribune*

Each of these passages has faults of its own, but, quite apart from avoidable ugliness, two qualities are common to all of them. The first is staleness of imagery; the other is lack of precision. The writer either has a meaning and cannot express it, or he inadvertently says something else, or he is almost indifferent as to whether his words mean anything or not. This mixture of vagueness and sheer incompetence is the most marked characteristic of modern English prose, and especially of any kind of political writing. As soon as certain topics are raised, the concrete melts into the abstract and no one seems able to think of turns of speech that are not hackneyed: prose consists less and less of *words* chosen for the sake of their meaning, and more and more of *phrases* tacked together like the sections of a prefabricated henhouse. I list below, with notes and examples, various of the tricks by means of which the work of prose construction is habitually dodged:

Dying metaphors. A newly invented metaphor assists thought by evoking a visual image, while on the other hand a metaphor which is technically "dead" (e.g. *iron resolution*) has in effect reverted to being an ordinary word and can generally be used without loss of vividness. But in between these two classes there is a huge dump of wornout metaphors which have lost all evocative power and are merely used because they save people the trouble of inventing phrases for themselves. Examples are: *Ring the changes on, take up the cudgel for, toe the line, ride roughshod over, stand shoulder to shoulder with, play into the hands of, no axe to grind, grist to the mill, fishing in troubled waters, on the order of the day, Achilles' heel, swan song, hotbed.* Many of these are used without knowledge of their meaning (what is a "rift," for instance?), and incompatible metaphors are frequently mixed, a sure sign that the writer is not interested in what he is saying.

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Some metaphors now current have been twisted out of their original meaning without those who use them even being aware of the fact. For example, toe the line is sometimes written as tow the line. Another example is the hammer and the anvil, now always used with the implication that the anvil gets the worst of it. In real life it is always the anvil that breaks the hammer, never the other way about: a writer who stopped to think what he was saying would avoid perverting the original phrase.

Operators or **verbal false limbs.** These save the trouble of picking out appropriate verbs and nouns, and at the same time pad each sentence with extra syllables which give it an appearance of symmetry. Characteristic phrases are *render inoperative, militate against, make contact with, be subjected to, give rise to, give grounds for, have the effect of, play a leading part (role) in, make itself felt, take effect, exhibit a tendency to, serve the purpose of, etc., etc.* The keynote is the elimination of simple verbs. Instead of being a single word, such as *break, stop, spoil, mend, kill,* a verb becomes a phrase, made up of a noun or adjective tacked on to some general-purpose verb such as *prove, serve, form, play, render.* In addition, the passive voice is wherever possible used in preference to the active, and noun constructions are used instead of gerunds (*by examination of* instead of *by examining*). The range of verbs is further cut down by means of the *-ize* and *de*formations, and the banal statements are given an appearance of profundity by means of the not un- formation. Simple conjunctions and prepositions are replaced by such phrases as *with respect to, having regard to, the fact that, by dint of, in view of, in the interests of, on the hypothesis that;* and the ends of sentences are saved by anticlimax by such resounding commonplaces as *greatly to be desired, cannot be left out of account, a development to be expected in the near future, deserving of serious consideration, brought to a satisfactory conclusion,* and so on and so forth.

Pretentious diction. Words like *phenomenon, element, individual (as noun), objective, categorical, effective, virtual, basic, primary, promote, constitute, exhibit, exploit, utilize, eliminate, liquidate,* are used to dress up a simple statement and give an air of scientific impartiality to biased judgements. Adjectives like *epoch-making, epic, historic, unforgettable, triumphant, age-old, inevitable, inexorable, veritable,* are used to dignify the sordid process of international politics, while writing that aims at glorifying war usually takes on an archaic colour, its characteristic words being: *realm, throne, chariot, mailed fist, trident, sword, shield, buckler, banner, jackboot, clarion.* Foreign words and expressions such as *cul de sac, ancien regime, deus ex machina, mutatis mutandis, status quo, gleichschaltung, weltanschauung,* are used to give an air of culture and elegance. Except for the useful abbreviations *i.e., e.g.* and *etc.,* there is no real need for any of the hundreds of foreign phrases now current in the English language. Bad writers, and especially scientific, political, and sociological writers, are nearly always haunted by the notion that Latin or Greek words are grander than Saxon ones, and unnecessary words like *expedite, ameliorate, predict, extraneous, deracinated, clandestine, subaqueous,* and hundreds of others constantly gain ground from their Anglo-Saxon numbers. The jargon peculiar to Marxist writing *(hyena, hangman, cannibal, petty bourgeois, these gentry, lackey, flunkey, mad dog, White Guard,* etc.) consists largely of words translated from Russian, German, or French; but the normal way of coining a new word is to use a Latin or Greek root with the appropriate affix and, where necessary, the size formation. It is often easier to make up words of this kind (*deregionalize, impermissible, extramarital, non-fragmentary* and so forth) than to think up the English words that will cover one's meaning. The result, in general, is an increase in slovenliness and vagueness.

Meaningless words. In certain kinds of writing, particularly in art criticism and literary criticism, it is normal to come across long passages which are almost completely lacking in meaning. Words like *romantic, plastic, values, human, dead, sentimental, natural, vitality,* as used in art criticism, are strictly meaningless, in the sense that they not only do not point to any discoverable object, but are hardly ever expected to do so by the reader.

When one critic writes, "The outstanding feature of Mr. X's work is its living quality," while another writes, "The immediately striking thing about Mr. X's work is its peculiar deadness," the reader accepts this as a simple difference opinion. If words like *black* and *white* were involved, instead of the jargon words *dead* and *living,* he would see at once that language was being used in an improper way. Many political words are similarly abused. The word *Fascism* has now no meaning except in so far as it signifies "something not desirable." The words *democracy, socialism, freedom, patriotic, realistic, justice* have each of them several different meanings which cannot be reconciled with one another.

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In the case of a word like democracy, not only is there no agreed definition, but the attempt to make one is resisted from all sides. It is almost universally felt that when we call a country democratic we are praising it: consequently the defenders of every kind of regime claim that it is a democracy, and fear that they might have to stop using that word if it were tied down to any one meaning. Words of this kind are often used in a consciously dishonest way. That is, the person who uses them has his own private definition, but allows his hearer to think he means something quite different. Statements like *Marshal Petain was a true patriot, The Soviet press is the freest in the world, The Catholic Church is opposed to persecution,* are almost always made with intent to deceive. Other words used in variable meanings, in most cases more or less dishonestly, are: *class, totalitarian, science, progressive, reactionary, bourgeois, equality.*

Now that I have made this catalogue of swindles and perversions, let me give another example of the kind of writing that they lead to. This time it must of its nature be an imaginary one. I am going to translate a passage of good English into modern English of the worst sort. Here is a well-known verse from *Ecclesiastes:*

> I returned and saw under the sun, that the race is not to the swift, nor the battle to the strong, neither yet bread to the wise, nor yet riches to men of understanding, nor yet favour to men of skill; but time and chance happeneth to them all.

Here it is in modern English:

> Objective considerations of contemporary phenomena compel the conclusion that success or failure in competitive activities exhibits no tendency to be commensurate with innate capacity, but that a considerable element of the unpredictable must invariably be taken into account.

This is a parody, but not a very gross one. Exhibit (3) above, for instance, contains several patches of the same kind of English. It will be seen that I have not made a full translation. The beginning and ending of the sentence follow the original meaning fairly closely, but in the middle the concrete illustrations -- race, battle, bread -- dissolve into the vague phrases "success or failure in competitive activities." This had to be so, because no modern writer of the kind I am discussing -- no one capable of using phrases like "objective considerations of contemporary phenomena" -- would ever tabulate his thoughts in that precise and detailed way. The whole tendency of modern prose is away from concreteness. Now analyze these two sentences a little more closely. The first contains forty-nine words but only sixty syllables, and all its words are those of everyday life. The second contains thirty-eight words of ninety syllables: eighteen of those words are from Latin roots, and one from Greek. The first sentence contains six vivid images, and only one phrase ("time and chance") that could be called vague. The second contains not a single fresh, arresting phrase, and in spite of its ninety syllables it gives only a shortened version of the meaning contained in the first. Yet without a doubt it is the second kind of sentence that is gaining ground in modern English. I do not want to exaggerate. This kind of writing is not yet universal, and outcrops of simplicity will occur here and there in the worst-written page. Still, if you or I were told to write a few lines on the uncertainty of human fortunes, we should probably come much nearer to my imaginary sentence than to the one from *Ecclesiastes.* As I have tried to show, modern writing at its worst does not consist in picking out words for the sake of their meaning and inventing images in order to make the meaning clearer. It consists in gumming together long strips of words which have already been set in order by someone else, and making the results presentable by sheer humbug. The attraction of this way of writing is that it is easy. It is easier -- even quicker, once you have the habit -- to say *In my opinion it is not an unjustifiable assumption that* than to say *I think.* If you use ready-made phrases, you not only don't have to hunt about for the words; you also don't have to bother with the rhythms of your sentences since these phrases are generally so arranged as to be more or less euphonious. When you are composing in a hurry -- when you are dictating to a stenographer, for instance, or making a public speech -- it is natural to fall into a pretentious, Latinized style. Tags like *a consideration which we should do well to bear in mind* or *a conclusion to which all of us would readily assent* will save many a sentence from coming down with a bump. By using stale metaphors, similes, and idioms, you save much mental effort, at the cost of leaving your meaning vague, not only for your reader but for yourself. This is the significance of mixed metaphors. The sole aim of a metaphor is to call up a visual image. When these images clash -- as in *The Fascist octopus has sung its swan song, the jackboot is thrown into the melting pot* -- it can be taken as certain that the writer is not seeing a mental image of the objects he is naming; in other words he is not really thinking.

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Look again at the examples I gave at the beginning of this essay. Professor Laski (1) uses five negatives in fifty three words. One of these is superfluous, making nonsense of the whole passage, and in addition there is the slip -- *alien* for akin -- making further nonsense, and several avoidable pieces of clumsiness which increase the general vagueness. Professor Hogben (2) plays ducks and drakes with a battery which is able to write prescriptions, and, while disapproving of the everyday phrase *put up with,* is unwilling to look *egregious* up in the dictionary and see what it means; (3), if one takes an uncharitable attitude towards it, is simply meaningless: probably one could work out its intended meaning by reading the whole of the article in which it occurs. In (4), the writer knows more or less what he wants to say, but an accumulation of stale phrases chokes him like tea leaves blocking a sink. In (5), words and meaning have almost parted company. People who write in this manner usually have a general emotional meaning -- they dislike one thing and want to express solidarity with another -- but they are not interested in the detail of what they are saying. A scrupulous writer, in every sentence that he writes, will ask himself at least four questions, thus:

1. What am I trying to say?
2. What words will express it?
3. What image or idiom will make it clearer?
4. Is this image fresh enough to have an effect?

And he will probably ask himself two more:

1. Could I put it more shortly?
2. Have I said anything that is avoidably ugly?

But you are not obliged to go to all this trouble. You can shirk it by simply throwing your mind open and letting the ready-made phrases come crowding in. They will construct your sentences for you -- even think your thoughts for you, to a certain extent -- and at need they will perform the important service of partially concealing your meaning even from yourself. It is at this point that the special connection between politics and the debasement of language becomes clear.

In our time it is broadly true that political writing is bad writing. Where it is not true, it will generally be found that the writer is some kind of rebel, expressing his private opinions and not a "party line." Orthodoxy, of whatever colour, seems to demand a lifeless, imitative style. The political dialects to be found in pamphlets, leading articles, manifestos, White papers and the speeches of undersecretaries do, of course, vary from party to party, but they are all alike in that one almost never finds in them a fresh, vivid, homemade turn of speech. When one watches some tired hack on the platform mechanically repeating the familiar phrases -- *bestial, atrocities, iron heel, bloodstained tyranny, free peoples of the world, stand shoulder to shoulder* -- one often has a curious feeling that one is not watching a live human being but some kind of dummy: a feeling which suddenly becomes stronger at moments when the light catches the speaker's spectacles and turns them into blank discs which seem to have no eyes behind them. And this is not altogether fanciful. A speaker who uses that kind of phraseology has gone some distance toward turning himself into a machine. The appropriate noises are coming out of his larynx, but his brain is not involved, as it would be if he were choosing his words for himself. If the speech he is making is one that he is accustomed to make over and over again, he may be almost unconscious of what he is saying, as one is when one utters the responses in church. And this reduced state of consciousness, if not indispensable, is at any rate favourable to political conformity.

In our time, political speech and writing are largely the defence of the indefensible. Things like the continuance of British rule in India, the Russian purges and deportations, the dropping of the atom bombs on Japan, can indeed be defended, but only by arguments which are too brutal for most people to face, and which do not square with the professed aims of the political parties. Thus political language has to consist largely of euphemism, question-begging and sheer cloudy vagueness. Defenceless villages are bombarded from the air, the inhabitants driven out into the countryside, the cattle machine-gunned, the huts set on fire with incendiary bullets: this is called *pacification.* Millions of peasants are robbed of their farms and sent trudging along the roads with no more than they can carry: this is called *transfer of population or rectification of frontiers.* People are imprisoned for years without trial, or shot in the back of the neck or sent to die of scurvy in Arctic lumber camps: this is called *elimination of unreliable elements.* Such phraseology is needed if one wants to name things without calling up mental pictures of them. Consider for instance some comfortable English professor defending Russian totalitarianism. He cannot say outright, "I believe in killing off your opponents when you can get good results by doing so."

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Probably, therefore, he will say something like this:

> While freely conceding that the Soviet regime exhibits certain features which the humanitarian may be inclined to deplore, we must, I think, agree that a certain curtailment of the right to political opposition is an unavoidable concomitant of transitional periods, and that the rigors which the Russian people have been called upon to undergo have been amply justified in the sphere of concrete achievement.

The inflated style itself is a kind of euphemism. A mass of Latin words falls upon the facts like soft snow, blurring the outline and covering up all the details. The great enemy of clear language is insincerity. When there is a gap between one's real and one's declared aims, one turns as it were instinctively to long words and exhausted idioms, like a cuttlefish spurting out ink. In our age there is no such thing as "keeping out of politics." All issues are political issues, and politics itself is a mass of lies, evasions, folly, hatred, and schizophrenia. When the general atmosphere is bad, language must suffer. I should expect to find -- this is a guess which I have not sufficient knowledge to verify -- that the German, Russian and Italian languages have all deteriorated in the last ten or fifteen years, as a result of dictatorship.

But if thought corrupts language, language can also corrupt thought. A bad usage can spread by tradition and imitation even among people who should and do know better. The debased language that I have been discussing is in some ways very convenient. Phrases like *a not unjustifiable assumption, leaves much to be desired, would serve no good purpose, a consideration which we should do well to bear in mind,* are a continuous temptation, a packet of aspirins always at one's elbow. Look back through this essay, and for certain you will find that I have again and again committed the very faults I am protesting against. By this morning's post I have received a pamphlet dealing with conditions in Germany. The author tells me that he "felt impelled" to write it. I open it at random, and here is almost the first sentence I see: "[The Allies] have an opportunity not only of achieving a radical transformation of Germany's social and political structure in such a way as to avoid a nationalistic reaction in Germany itself, but at the same time of laying the foundations of a co-operative and unified Europe." You see, he "feels impelled" to write -- feels, presumably, that he has something new to say -- and yet his words, like cavalry horses answering the bugle, group themselves automatically into the familiar dreary pattern. This invasion of one's mind by ready-made phrases (*lay the foundations, achieve a radical transformation*) can only be prevented if one is constantly on guard against them, and every such phrase anaesthetizes a portion of one's brain.

I said earlier that the decadence of our language is probably curable. Those who deny this would argue, if they produced an argument at all, that language merely reflects existing social conditions, and that we cannot influence its development by any direct tinkering with words and constructions. So far as the general tone or spirit of a language goes, this may be true, but it is not true in detail. Silly words and expressions have often disappeared, not through any evolutionary process but owing to the conscious action of a minority. Two recent examples were *explore every avenue and leave no stone unturned,* which were killed by the jeers of a few journalists. There is a long list of flyblown metaphors which could similarly be got rid of if enough people would interest themselves in the job; and it should also be possible to laugh the not un- formation out of existence, to reduce the amount of Latin and Greek in the average sentence, to drive out foreign phrases and strayed scientific words, and, in general, to make pretentiousness unfashionable. But all these are minor points. The defence of the English language implies more than this, and perhaps it is best to start by saying what it does *not* imply.

To begin with it has nothing to do with archaism, with the salvaging of obsolete words and turns of speech, or with the setting up of a "standard English" which must never be departed from. On the contrary, it is especially concerned with the scrapping of every word or idiom which has outworn its usefulness. It has nothing to do with correct grammar and syntax, which are of no importance so long as one makes one's meaning clear, or with the avoidance of Americanisms, or with having what is called a "good prose style." On the other hand, it is not concerned with fake simplicity and the attempt to make written English colloquial. Nor does it even imply in every case preferring the Saxon word to the Latin one, though it does imply using the fewest and shortest words that will cover one's meaning. What is above all needed is to let the meaning choose the word, and not the other way around. In prose, the worst thing one can do with words is surrender to them. When you think of a concrete object, you think wordlessly, and then, if you want to describe the thing you have been visualising you probably hunt about until you find the exact words that seem to fit it.

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When you think of something abstract you are more inclined to use words from the start, and unless you make a conscious effort to prevent it, the existing dialect will come rushing in and do the job for you, at the expense of blurring or even changing your meaning. Probably it is better to put off using words as long as possible and get one's meaning as clear as one can through pictures and sensations. Afterward one can choose -- not simply *accept* -- the phrases that will best cover the meaning, and then switch round and decide what impressions one's words are likely to make on another person. This last effort of the mind cuts out all stale or mixed images, all prefabricated phrases, needless repetitions, and humbug and vagueness generally. But one can often be in doubt about the effect of a word or a phrase, and one needs rules that one can rely on when instinct fails. I think the following rules will cover most cases:

1. Never use a metaphor, simile, or other figure of speech which you are used to seeing in print.
2. Never use a long word where a short one will do.
3. If it is possible to cut a word out, always cut it out.
4. Never use the passive where you can use the active.
5. Never use a foreign phrase, a scientific word, or a jargon word if you can think of an everyday English equivalent.
6. Break any of these rules sooner than say anything outright barbarous.

These rules sound elementary, and so they are, but they demand a deep change of attitude in anyone who has grown used to writing in the style now fashionable. One could keep all of them and still write bad English, but one could not write the kind of stuff that I quoted in those five specimens at the beginning of this article.

I have not here been considering the literary use of language, but merely language as an instrument for expressing and not for concealing or preventing thought. Stuart Chase and others have come near to claiming that all abstract words are meaningless, and have used this as a pretext for advocating a kind of political quietism. Since you don't know what Fascism is, how can you struggle against Fascism? One need not swallow such absurdities as this, but one ought to recognise that the present political chaos is connected with the decay of language, and that one can probably bring about some improvement by starting at the verbal end. If you simplify your English, you are freed from the worst follies of orthodoxy. You cannot speak any of the necessary dialects, and when you make a stupid remark its stupidity will be obvious, even to yourself. Political language -- and with variations this is true of all political parties, from Conservatives to Anarchists -- is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind. One cannot change this all in a moment, but one can at least change one's own habits, and from time to time one can even, if one jeers loudly enough, send some worn-out and useless phrase -- *some jackboot, Achilles' heel, hotbed, melting pot, acid test, veritable inferno, or other lump of verbal refuse* -- into the dustbin, where it belongs.

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