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The Expert Witness as Teacher: How a "Neutral" Tutorial Can Enhance a Jury's Understanding of Your Case

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I. Introduction

Modern litigation brings with it many things: a great commitment of lawyer time and client expense, detailed examination of both law and fact, and uncertainty as to outcome. Quite often, attorneys need expert witnesses. While this need exists in many securities and commercial cases, it is particularly common in some of the more complex areas of tort litigation, including product liability, toxic tort, and pharmaceutical litigation. Sometimes the jurors hear expert evidence that they can understand or that they are at least familiar with, such as testimony about an x-ray. Other times, particularly where the outcome turns on the issue of causation, the jurors must cope with advanced and unfamiliar subjects, such as biology, chemistry, and statistics. Where the jurors are unfamiliar with a subject, the expert must *educate* them—and often the judge as well—before he or she can persuade them.

This Article will address the role of the expert witness as a teacher. In Part II, we discuss the rules of evidence that govern expert testimony; those rules provide flexibility for an expert to discuss background information if it is helpful in understanding the expert's testimony. In Part III, we discuss how to simplify complex evidence to help the jury and the judge understand your case. Techniques that simplify the presentation of complex information include narrowing the potential issues, using both ordinary language and simple images, and, in particular, providing a "neutral" example. A neutral example uses an analogy or metaphor that is unrelated to the relevant scientific principle, but helps the jury to understand the principle. While the specifics of the expert's subject may be unknown to nearly everyone in the courtroom, the expert can frequently analogize the underlying concepts to things that

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are familiar to the jury. If the jurors are properly educated by the expert, so that the relevant concepts are no longer stumbling blocks, they are far more likely to be persuaded by your evidence. In filling this role as "teacher," it is important that the expert avoid being perceived as an advocate. Having the expert present neutral, illustrative examples can provide many of the advantages of a court-appointed, third-party expert, such as improving understanding and credibility. Next, Part IV will take the reader through an extended example, using the commonly encountered but complex statistical technique known as "attributable fraction" to illustrate how a difficult concept—unfamiliar to many lawyers and jurors—can be presented in simple, neutral terms to help the jury understand your case.

II.
Evidentiary Rules For Expert Testimony

Today, expert testimony is governed by the Federal Rules of Evidence and various equivalent state laws, but the use of expert testimony at trial has long-standing common law roots.[1] The Federal Rules provide that a witness "who is qualified as an expert by

[1] *See generally* Tal Golan, *Revisiting the History of Scientific Expert Testimony*, 73 Brook. L. Rev. 879 (2008); Stephan Landsman, *Of Witches, Madmen, and Products Liability: An Historical Survey of the Use of Expert Testimony*, 13 Behav. Sci. & L. 131 (1995); Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40 (1901).

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knowledge, skill, experience, training, or education" may testify if, among other things, "the expert's scientific, technical, or other specialized knowledge will help . . . to understand the evidence."[2]

The Federal Rules of Evidence also allow an expert to rely on and present to the jury information that would otherwise be inadmissible:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, *they need not be admissible for the opinion to be admitted*. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only *if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect*.[3]

Since the expert can present information that would otherwise not be admissible, using an expert gives a lawyer more leeway in the scope of information that can be presented. Most relevant to this article, it allows for the presentation of background information that

[2] Fed. R. Evid. 702.

[3] *Id.* at 703 (emphasis added).

is of "probative value" in evaluating the expert's opinion. Additionally, an expert may use various rhetorical devices, including analogy and metaphor, to clarify and explain his or her opinion.

The use of analogy and metaphor allows the expert to liken unfamiliar concepts and disciplines to familiar concepts and disciplines. This strategy is an essential component of preparing any expert's testimony; the expert should limit the amount of new information the trier of fact will need to digest. In a complex case, the facts are already difficult enough. If those facts cannot be placed within a comprehensible framework, they are likely to be misunderstood or ignored.

III.
Keep It Simple

Likening unfamiliar concepts to familiar ones is part of the process of simplification—relentless simplification—that is essential to the proper presentation of expert testimony. The attorney must ask, "How much information does the trier of fact need to know in order to understand this case?" Rarely will the answer involve more than a small component of an expert's discipline.

If an expert will be testifying with regard to causation, the first question to ask is "What aspects of causation are—and are not—at issue?" Most broadly, this issue involves an analysis of whether the defendant will contest "general causation," *i.e.*, is the defendant's product or conduct *capable* of causing the damage at issue in the case, or whether the defendant will limit its defense to a denial of "specific causation," *i.e.*, did the defendant's product or actions cause the damage at issue *in this case*.[4]

While any case involving causation issues entails consideration of specific causation, many cases do not need an expert to explain the various steps required to dissect general causation, because it is not contested, and will give members of the jury excess information that is likely to confuse them. If, as in the example below, much of the evidence regarding causation is epidemiological[5] or statistical, the expert should only address and explain complicated questions if general causation is contested.[6] Any background information that goes *beyond* that point should be discarded.

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[4] *See* Douglas L. Weed, *Causation: An Epidemiologic Perspective (In Five Parts)*, 12 J.L. & Pol'y 43, 44 (2003).

[5] Epidemiology is the study of "the distribution and determinants of disease or other health-related states and events in populations and the application of this study to control of health problems." Michael D. Green, *Causation in Pharmaceutical Cases*, SL038 ALI-ABA 139, 231 (2005).

[6] These complicated questions include whether the events were a result of mere random variation, or were a result of a factor that happens to be common to both persons with the relevant exposure and the relevant disease.

In addition to considerations of causation, the expert must use simple and clear language. One of the primary guides for the presentation of expert scientific evidence, the Federal Judicial Center's *Reference Manual on Scientific Evidence*, notes the importance of the use of simple language, stating that

> [a]ttorneys and witnesses in scientific and technological cases tend to succumb to use of the jargon of the discipline, which is a foreign language to others. From the outset the court should insist that the attorneys and the witnesses use plain English to describe the subject matter and present evidence so that it can be understood by laypersons. They will need to be reminded from time to time that they are not talking to each other, but are there to communicate with the jury and the judge.[7]

The same point was made more bluntly by a juror from *Ernst v. Merck*,[8] one of the Vioxx cases, who likened the testimony of one of the defense experts to the sound of the teacher from the televised *Peanuts* cartoons: "Whenever Merck was up there, it was like 'wah, wah, wah.' We didn't know what the heck they were talking about."[9] This case serves as a good reminder why it is so important that the jury to be able to understand expert witnesses; though the case was later reversed, the jury initially awarded the plaintiffs a $253 million verdict.[10]

A further element to consider in the quest to simplify an expert's presentation of scientific evidence is the form that evidence will take. There is of course traditional oral testimony. There are also visual aids to testimony, which can range from simple charts and PowerPoint slides to more complex animations and simulations.[11] Animation and simulation are often created digitally, and they present a sequence of images that demonstrate some aspect of the evidence. There are, however, important differences between the two.[12] An *animation* is an

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[7] Fed. Judicial Ctr., Reference Manual on Scientific Evidence 58 (2d ed. 2000). The second edition of the Manual can be downloaded from the Federal Judicial Center website at www.fjc.gov/public/pdf.nsf/lookup/sciman00.pdf/$file/sciman00.pdf.

[8] *See* Merck & Co. v. Ernst, 296 S.W.3d 81 (Tex. App. 2009). The Texas Court of Appeals reversed the trial court's judgment, finding the evidence to be legally insufficient on the issue of causation. *Id.* at 99–100. The Texas Supreme Court denied the plaintiff's petition for review without an opinion on December 16, 2011. *See* The Supreme Court of Texas, Orders on Causes, http://www.supreme.courts.state.tx.us/historical/2011/dec/121611.htm.

[9] Heather Won Tesoriero et al., *Side Effects: Merck Loss Jolts Drug Giant, Industry*, Wall St. J., Aug. 22, 2005, at A1.

[10] The damage award was reduced by the trial court to $26.1 million, and the court of appeals did not find sufficient evidence on the issue of causation, meaning the plaintiff did not receive any award. *Merck*, 296 S.W.3d at 90, 100.

[11] *See generally* Leslie C. O'Toole, *Admitting that We're Litigating in the Digital Age: A Practical Overview of Issues of Admissibility in the Technological Courtroom*, 59 Fed'n of Def. & Corp. Couns. Q. 3 (2008).

[12] See Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 559–61 (D. Md. 2007), for a more detailed discussion of animation and simulation. See also Uniloc USA, Inc. v. Microsoft Corp., 632 F.3d 1292, 1298–99 (Fed. Cir. 2011), for further discussion on the use of computer animation.

illustration or explanation of the concepts and facts underlying a witness's testimony.[13] In contrast, a *simulation* is often a model of the actual events in the case, and it is "based on scientific or physical principles and data entered into a computer, which is programmed to analyze the data and draw conclusions from it."[14] Thus, an animation is an important tool in the expert witness's arsenal to *teach* the jury and judge in a case where causation is at issue, and the expert might well employ the sort of neutral examples described in greater detail below. In contrast, a simulation is a method of presenting the evidence itself and, by definition, cannot be separated from the evidence.

IV.
The Expert as a Teacher—An Example

Because the common law system is an adversarial one, attorneys tend to think of the expert witnesses they retain as "our" experts and, conversely, the opposing expert witnesses as "their" experts.[15] This has not gone unnoticed by courts both here and in other common law countries, and there has been movement towards the use of "neutral," typically court-appointed experts.[16] While the use of court-appointed experts is in part intended to limit the

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[13] *Lorraine*, 241 F.R.D. at 559 (citing State v. Sayles, 662 N.W.2d 1, 9 (Iowa 2003)).

[14] *Id.*

[15] This perception of course reflects the realities of most litigation. We tend to focus on the role of the expert in presenting "our case," at times to the exclusion of the role of the expert in assisting both jury and judge to understand that case.

[16] In the United States, the use of court-appointed experts is best known in connection with the breast implant litigation, where federal judges in New York, Oregon, and subsequently in Alabama, who were tasked with oversight of all federal breast implant litigation, appointed panels of experts. *See* Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1392–93 (D. Or. 1996); *In re* New York State Silicone Breast Implant Litig., 656 N.Y.S.2d 97, 98 (Sup. Ct. 1997); *In re* Silicone Gel Breast Implants Prods. Liab. Litig., CV 92-P-10000-S, 1999 U.S. Dist. LEXIS 23526, at *1 (N.D. Ala. Apr. 26, 1999). In England, under the so-called Woolf reforms of civil practice, an expert's foremost duty is to the *court*, not to any party. *See* Commissioners' Hearing: Expert Evidence: The Woolf Reforms, http://www.hmrc.gov.uk/manuals/ahmanual/ah0915.htm. In addition, experts for the opposing parties may be required to "identify and discuss the expert issues in the proceedings" and, "where possible, reach an agreed opinion on those issues." CPR 35.12. Similarly, Australia's federal courts adopted "Guidelines for Experts" in 2008. Section 1.2 of the Guidelines provides that "[a]n expert witness is not an advocate for a party even when giving testimony that is necessarily evaluative rather than inferential," and section 1.3 states that "[a]n expert witness's paramount duty is to the Court and not to the person retaining the expert." *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*, (May 2008), http://www.fedcourt.gov.au/how/prac_direction.html. *See also* Rules of Civil Procedure for Ontario, Canada, rule 4.1.01 (It is the duty of every expert to provide opinion evidence that is "fair, objective and non-partisan," which "prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.").

"adversarial" nature of expert testimony (which goes beyond the purview of this article), it is also intended to provide an outline of "the fundamentals of the relevant science or technology without touching on disputed issues."[17] It is possible, through neutral examples, to educate the trier of fact and the court on relevant scientific data while still preserving control over the manner and content of the information presented.

The following is an extended example of how an expert can present a "neutral" tutorial that not only increases the judge's and jury's understanding of the case, but also lays the groundwork for the specific defenses to be advanced.

Assume one faces a claim that a plaintiff has developed bladder cancer from exposure to the (hypothetical) chemical "enthalene." The plaintiff claims that he was exposed to this chemical through its release into the environment by the defendant. The plaintiff bases his claim of causation on epidemiological data stating that, in persons exposed to enthalene, 67% of all cases of bladder cancer are attributable to the chemical. There is, in our example, no biological marker[18] indicating that the plaintiff's disease was or was not caused by enthalene; the plaintiff's case rests on an argument that, since the epidemiological studies show that two-thirds of all bladder cancers in persons exposed to enthalene are attributable to that exposure, it is more likely than not that enthalene was the cause of his disease.

The plaintiff relies on an epidemiological concept known as "attributable fraction."[19] The attributable fraction is an estimate of what percentage of the cases of a disease are "attributable" to a particular factor in persons exposed to that factor.[20] It does *not* address whether the factor in question is a cause; rather, it assumes the factor is a cause. The attributable fraction is an effort to calculate, for public health purposes, the proportion of the disease that would be removed from the relevant population if that factor were removed.[21] The defense's case with regard to causation will likely depend in part on demonstrating to the jury that the attributable fraction cannot be used to establish that enthalene caused the plaintiff's bladder cancer.

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[17] Reference Manual on Scientific Evidence, *supra* note 7, at 58.

[18] A "biological marker" is a "physiological change in tissue or body fluids that occurs as a result of an exposure to an agent and that can be detected in the laboratory." Green, *supra* note 5, at 229.

[19] This is also sometimes referred to as the "attributable risk." The two terms are interchangeable. *Id*. at 229.

[20] *See id.* The attributable fraction can also be used to estimate the percentage of cases attributable to the exposure factor in the *entire* population—exposed and non-exposed—by accounting for the prevalence of the exposure in the population. For the sake of simplicity, this article will deal solely with the attributable fraction among the exposed population.

[21] Beverly Rockhill et at., *Use and Misuse of Population Attributable Fractions*, 88 Am. J. Public Health 15, 15 (1998).

A. *General and Specific Causation*

In analyzing its causation case, the defense would have to examine many factors that go beyond the scope of this article.[22] For purposes of this extended example, however, let us assume that a reliable epidemiological study reports that the attributable fraction for persons exposed to enthalene is 67%.

The first question the defendant should address is whether to challenge *general* causation (plaintiff fails to show that enthalene causes bladder cancer in anyone) or simply to challenge *specific* causation (plaintiff fails to show that enthalene caused his or her bladder cancer). As described in the previous subsection, an attributable fraction does not establish *whether* a factor is a cause of disease; causation is an inherent assumption in the calculation. If the defense were to challenge general causation, it would likely require having an expert address the reasons why the epidemiological results could be incorrect: (a) there is no increased risk in the exposed population, but instead, the results are attributable to random variation, *i.e.* chance; (b) the observed difference is due to a systematic error in the way the exposed and unexposed populations were measured or selected, *i.e.* "bias;" or (c) the observed difference is due to factors related both to the likelihood of being exposed and to the likelihood of developing the disease, a concept known as "confounding."[23] Each of these three concepts can be "taught" to the jury by an expert through use of neutral examples, providing the foundation for the expert's eventual presentation of the relevant data from this case. However, for the sake of simplicity, the defendant in our example will *not* challenge general causation and will instead focus its causation case only on specific causation.

In attacking specific causation, the defense might want to put on a medical clinician, who would testify to the absence of any biological difference in the presentation of bladder cancer in those exposed to enthalene compared to those not so exposed. Other witnesses might testify with regard to the factual question of other exposures that might be relevant to bladder cancer causation, or to other sources of enthalene exposure. However, the defense would ultimately have to address the reliability of the attributable fraction and have to explain why the attributable fraction cannot establish causation in any individual.

B. *Attributable Fraction—A Tutorial*

The defense will likely need an epidemiology expert to testify as to why plaintiff's specific causation case cannot stand based on the attributable fraction. If the expert simply begins discussing the statistical relationship between enthalene and bladder cancer, without first providing sufficient background, the likelihood is low that the jury will retain the rel-

[22] For example, do the epidemiological studies in question state that 67% of bladder cancers in persons exposed to enthalene are attributable to the chemical? Are there other studies that contradict the plaintiff's claim? Are the studies relied upon by the plaintiff of sufficient scientific merit to survive a *Daubert* motion?

[23] *See* Green, *supra* note 5, at 156.

evant information. Rather, it is better to have the expert explain what an attributable fraction is, where it comes from, and, importantly, its inherent limitations. This explanation is best accomplished by using a "neutral" example. This example should not touch on enthalene or bladder cancer, but it should use an exposure, a disease, and a relationship between the two that can be intuitively grasped by the jury. The example below uses a high-fat diet and cardiovascular disease ("CVD"). This example will illustrate three things the defense will want to convey about an attributable fraction: (1) what it is and is not; (2) that it fails to take into account other factors that may cause the disease in question, and thus can report more cases of disease than actually exist in the population; and (3) that it addresses *groups* of people, and says nothing about individuals, making it inappropriate evidence to prove the cause of a disease in any particular individual.

1. What Is an Attributable Fraction?

The attributable fraction is simply a mathematical restatement of a more basic epidemiological concept—the "risk ratio," or "relative risk." The risk ratio is simply the relative difference, greater or lesser, in the rate of occurrence of a given disease between the group of persons exposed to a particular factor (the "exposed") and the group not exposed to it (the "unexposed").[24] If a disease is twice as common in the exposed, the risk ratio is two; if it is five times as common in the exposed, the risk ratio is five; if it is half as common, the risk ratio is 0.5. In using the fat and CVD example (or any other example) to illustrate this concept, the expert should note that this comparison is between two *groups*, the exposed and the unexposed, not between the individual members of those groups. The expert could use a simple table, using hypothetical numbers, to work through a risk ratio. The table, often referred to as a "2 x 2 Table," compares "exposed" (high-fat diet) and "unexposed" (no high-fat diet) for presence ("CVD Yes") or absence ("CVD No") of cardiovascular disease:

	High-fat Diet YES	**High-fat Diet NO**
CVD YES	4	2
CVD NO	96	98
TOTALS	**100**	**100**

[24] *See generally* Kenneth J. Rothman & Sander Greenland, Modern Epidemiology (2d ed. 1998).

From this table, one can see that, in this hypothetical "study," the rate of occurrence of CVD among people with a high-fat diet is four out of one hundred, or 4%, while the rate of occurrence in persons without a high-fat diet is two out of one hundred, or 2%. The ratio between these two rates of occurrence is the "risk ratio," and it is an estimate of the strength of the relationship between the disease and the exposure. In this example the risk ratio would be $\frac{4}{2} = 2$.

The attributable fraction conveys a more "definitive" message than does the risk ratio. For example, a plaintiff would rather say that "two thirds of the cases of bladder cancer in those exposed to enthalene are due to that exposure" than "the risk ratio is three." Yet, as the hypothetical example will show, they are two different mathematical presentations of the same quantity. The attributable fraction ("AF") is calculated from the risk ratio ("RR") by a simple arithmetic formula: $\frac{RR-1}{RR} = AF.$ In illustrating this notion, the expert would simply plug the numbers from our high-fat and CVD example into this formula, where the risk ratio is two: $\frac{2-1}{2} = \frac{1}{2} = 50\%.$

2. Competing Causes and How the Attributable Fraction Calculation Accounts for More Cases of Disease Than Actually Exist

If the attributable fraction accounted for percentage of a given disease that would be removed from the exposed population if the exposure were eliminated, then the incidence of bladder cancer in the group that was exposed to enthalene should decrease by 67% if there had been no exposure. However, the attributable fraction does not take into account other factors (sometimes known as "competing causes") that may cause the same disease. These factors each have their own attributable fraction, and the sum of those attributable fractions in the relevant population frequently exceeds 100% of the cases of disease.

Once again, this point is most easily illustrated not by theoretical explanation but by having the expert present an example: In our hypothetical fat and CVD example, the relative risk for a high-fat diet and CVD is two, and thus the attributable fraction is 50%. However, there are many other factors associated with CVD. One paper estimated that there are more than 200 such factors.[25] The expert should explain that if just a handful of these factors are themselves associated with an increased risk of CVD, the combined attributable fractions quickly exceed 100%. If, in our hypothetical example, the risk ratio for obesity and CVD is two, this again corresponds to an attributable fraction[26] of 50%: $\frac{2-1}{2} = \frac{1}{2} = 50\%.$ If, for example, the risk ratios for high cholesterol level and high blood pressure are both two, and each has an a attributable fraction of 50%, the expert can present a simple table accounting for far more than 100% of the cases of disease in the population:

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[25] *See* P.N. Hopkins & R.R. Williams, *A Survey of 246 Suggested Coronary Risk Factors*, 40 ATHEROSCLEROSIS 1 (Vol. 1, Aug-Sept. 1981).

[26] The formula for the attributable fraction is as follows: $\frac{RR-1}{RR} = AF.$

Factor	AF (% of disease attributable to factor)
High-Fat Diet	50%
Obesity	50%
High Cholesterol	50%
High Blood Pressure	50%
TOTAL:	**200%**

The addition of only three additional risk factors for CVD—obesity, high cholesterol, and high blood pressure—accounts for 200% of the cases of CVD in the population. Because the attributable fraction purports to be the amount of disease that can be removed from the population if the exposure is removed, by definition, the maximum that can be removed is a 100%.

The noted epidemiologists Ken Rothman and Sander Greenland have explained this problem as follows:

> The fraction of disease that can be attributed to each of the causes of disease in all the causal mechanisms has no upper limit: For cancer or any disease, the upper limit for the total of the fraction of disease attributable to all the component causes of all the causal mechanisms that produce it is not 100% but infinity. Only the fraction of disease attributable to a single component cause cannot exceed 100%.[27]

Through the use of this "neutral" example, the expert can teach the jury that the attributable fraction cannot actually represent the amount of disease in the population that results from any single exposure.

3. Attributable Fractions Do Not Address Any Individual's Risk of Disease

In our enthalene and bladder cancer case, the plaintiff wants to use an attributable fraction to establish that it is more likely than not that the *plaintiff's* bladder cancer resulted from exposure to enthalene. However, the attributable fraction calculation is simply a restatement

[27] Rothman & Greenland, *supra* note 24, at 13.

of the risk ratio, and as discussed above in Part IV.B.1, a risk ratio is derived from *group* data. It is therefore important that the expert convey that a risk ratio is an average of many individuals; the results apply to the group and not necessarily to any individual (after all, if four people are forty, fifty, sixty, and seventy years old, their average age is fifty-five, though no single individual has that age).

If one were to apply the risk ratio or the attributable fraction from the group to each individual within it, one would have to assume that the likelihood of disease was identical for each member of the relevant population. This is never the case, because it assumes that the baseline risk for the disease is the same in all individuals within the group, as though the group was uniform and homogeneous, and contained no subgroups. In reality, each population group contains numerous, overlapping subgroups, varying by age, sex, race, ethnicity, occupation, lifestyle choices, and many other factors. Each of these subgroups has its own risk of a particular disease.

The expert can make this point by continuing with our fat and CVD example. Persons with a high-fat diet belong to many other groups, for example, age, sex, socioeconomic status, family history, as well as the factors identified above, *i.e.*, obesity, cholesterol level, and blood pressure. Each of these factors is itself related to the risk of developing CVD, though all are nominally part of a group (the "high-fat diet" group) with an attributable fraction of 50%. One person in the high-fat diet group could be an elderly male who is obese and has high cholesterol. Another person in the high-fat diet could be a middle-aged female with high blood pressure and a family history of heart disease. Many combinations are possible. In addition, it is likely that there are additional risk factors that have not yet been identified and are thus unknown to medical science. The risk for these as-yet-undetermined causal factors cannot be defined because they are unknown.

Ultimately, the smallest "sub-group" is the individual, and each individual has his or her own set of risks, making it impossible to apply a set of group data to a particular individual. Each individual's likelihood of developing a particular disease will differ from that of the overall population and from the smaller subsets to which that individual belongs. If one were to subdivide a study population into a series of subgroups, each more similar to the individual, the subgroups would continue to get smaller. For each successive subdivision however, one would lose "statistical power," which depends on the size of the group. The loss of statistical power results in ever-greater uncertainty as to the risk ratio (and thus as to the attributable fraction estimate). The smallest such subgroup would be an individual in the study who is virtually identical to the subject; however, one cannot make any risk estimate based on a single individual. Thus, it is impossible to use a risk ratio to predict the cause of a disease in a particular individual.

V.
Conclusion

When an attorney presents an expert witness to the jury, the attorney should be aware that the jury will tune out testimony that is too difficult to understand. Several techniques will help the jury to understand the expert's testimony. First, the defense should consider whether to challenge both general and specific causation or limit its challenge to specific causation. If the defense will challenge only specific causation, the expert need not explain anything about general causation. Second, the expert should use plain language when testifying. Finally, through the use of a "neutral" example, the expert can explain complex ideas to a jury, such as an attributable fraction. The neutral example should not be controversial and should not be based on the facts of the case. Through the neutral example, such as the high-fat and CVD example, the expert can accomplish two tasks: he or she can help to simplify complex scientific principles and can point out the shortcomings in the plaintiff's causation case.

Taming the Town Crier: Litigation and the Media[†]

Mercedes Colwin

I.
Introduction

The press and the legal profession have long maintained a complicated relationship. The legal profession relies on the press to accurately report developments that shape the lives of everyday citizens, while the press often fills its news pages and packs its programming with coverage of high-profile trials and drawn-out legal dramas. Bloggers, too, have entered the fray, posting legal tidbits on popular web sites such as *The Wall Street Journal*'s Law Blog[1] and Above the Law.[2] In cities, towns, and villages across the United States, litigators and trial attorneys often turn to their local newspapers and television stations to shape public perception about their cases, a strategy that can create risk as well as reward. In this Article, we discuss the interaction between the press and the legal profession, and this interaction's impact on the public. In this regard, we also offer some tips and best practices.

Part I provides a brief overview of how the news media influences the civil litigation system. Part II cites some telling examples of press coverage that add to the perception that large verdicts and jaw-dropping settlements are par for the course in civil litigation. Part III discusses the British Petroleum (BP) disaster in the Gulf of Mexico and what that that company's failure to tame the "town crier" can teach the legal profession. Finally, in Part IV, we offer tips and best practices on how to effectively deal with the media juggernaut.

[†] Joshua Hurwit, an associate in the New York City office of Gordon & Rees LLP, assisted with the preparation and writing of this article.

[1] Wall St. J. L. Blog, http://blogs.wsj.com/law (last visited Feb. 25, 2012).

[2] Above the Law, www.abovethelaw.com (last visited Feb. 26, 2012).

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II.
The News Media and Its Impact on Civil Litigation

Nearly a decade ago, two scholars, Jennifer K. Robbennolt and Christina A. Studebaker, studied the relationship between news media reporting and civil litigation. Their report[3] concluded that "news reporting of civil litigation presents a systematically distorted picture of civil litigation and that this reporting can influence perceptions and outcomes of civil litigation in various ways."[4]

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[3] Jennifer K. Robbennolt & Christina A. Studebaker, *News Media Reporting on Civil Litigation and Its Influence on Civil Justice Decision Making*, 27 L. & Hum. Behav. 5 (2003).

[4] *Id.*

But that was not their only conclusion. Drawing on a variety of sources, Robbennolt and Studebaker observed that most citizens turn to the news media for information about the court system, granting the press an outsized role in shaping the citizenry's perception of the Third Branch.[5] The result, according to Robbennolt and Studebaker, was that Americans had a skewed view of civil litigation, driven largely by the news media's tendency to focus its coverage on cases where plaintiffs obtained large verdicts.[6] Stated bluntly, "[t]he picture of civil litigation that one is likely to draw from the information available in the media is that of a system characterized by frequent litigation, frivolous lawsuits, greedy plaintiffs, and high damage awards."[7]

Listed below are some additional—and remarkable—conclusions reached by Robbennolt and Studebaker:

- Although at the time only about 8% of jury awards were greater than $1 million and punitive damages were included in approximately 6% of civil cases that result in a monetary award, "many people believe that large money damages and punitive damages are common."[8]
- "[A] substantial minority of participants in a jury decision making study believed that damage awards greater than $1 million are routine, with 11% . . . estimating that 50% or more of plaintiffs receive jury awards of more than $1 million."[9]
- "[S]everal studies have found a positive relationship between perceptions of the frequency of large damage awards and damage award decisions."[10]
- In criminal trials, "prejudicial publicity tends to negatively influence perceptions of the defendant as well as pretrial and posttrial judgments of guilt."[11]
- An experiment found that judges and jurors were more likely to judge a defendant liable when they had been exposed to "proplaintiff" information than when they had not, even when they had been told to disregard it in their decision making.[12]

These findings underscore the critical impact that the news media's skewed coverage of civil litigation can have on trials.

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[5] *See id.* at 6.

[6] *See id.* at 9.

[7] *Id.*

[8] *Id.* at 11.

[9] *Id.*

[10] *Id.* at 15.

[11] *Id.* at 17.

[12] *Id.* at 18.

III.
Blaring Headlines and Eye-Popping Verdicts

Seemingly on rare occasions will an individual have to read the text of a newspaper article to find out about a sizable jury verdict. In most situations, the reader need only glance at the headline. The following is a compendium of headlines drawn from newspapers published throughout the United States trumpeting big verdicts:

- "$2.7M FOR DEATH ON THE RAILS"[13]
- "$7M FOR TRAIN HIT"[14]
- "DRUNK RIDES GRAVY TRAIN—$2.3M FOR LOSING LEG IN SUBWAY"[15]
- "COP'S GOOD $HOT—$4.5M FOR MISHAP"[16]
- "Judge orders Lorillard to keep $270m on hand to pay judgment; Tobacco company appealing award"[17]
- "Injured woman wins $66m verdict against Cybex"[18]
- "Ex-Cargill worker gets $2.49 million"[19]
- "Iowa exec who alleged sexual harassment gets $500,000 settlement"[20]
- "Jury awards $33 million in van crash"[21]
- "Jury says SAP must pay Oracle $1.3 billion; Copyright infringement found in use of software"[22]

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[13] William J. Gorta, *$2.7 Million for Death on the Rails*, N.Y. Post, July 31, 2010, at 5.

[14] Tom Namako, *$7M for Train Hit*, N.Y. Post, Mar. 10, 2009, at 15.

[15] Tom Namako & Dareh Gregorian, *Drunk Rides Gravy Train—$2.3M for Losing Leg in Subway*, N.Y. Post, Feb. 18, 2009, at 5.

[16] Alex Ginsberg, *Cop's Good $hot—$4.5M for Mishap*, N.Y. Post, Nov. 27, 2008, at 3.

[17] Travis Andersen, *Judge Orders Lorillard to Keep $270m on Hand to Pay Judgment; Tobacco Company Appealing Award*, Boston Globe, Jan. 6, 2011, at 3.

[18] *Injured Woman Wins $66m Verdict Against Cybex*, Boston Globe, Dec. 9, 2010, at 11.

[19] Jeff Eckhoff, *Ex-Cargill Worker Gets $2.49 Million*, Des Moines Reg., Mar. 3, 2011, at B12.

[20] Jeff Eckhoff, *Iowa Exec Who Alleged Sexual Harassment Gets $500,000 Settlement*, Des Moines Reg., Aug. 8, 2010, at A1.

[21] Grant Schulte, *Jury Awards $33 Million in Van Crash*, Des Moines Reg., Mar. 20, 2010, at B1.

[22] James Temple & Benny Evangelista, *Jury Says SAP Must Pay Oracle $1.3 Billion; Copyright Infringement Found in Use of Software*, S.F. Chron., Nov. 24, 2010, at A1.

These headlines, and the news content that appears under them, appear to confirm Robbennolt and Studebaker's core conclusions. In their study, they argued that "media reports tend to focus on the concrete events of trials, with little systematic consideration of aggregate information."[23] The article that bore the headline "DRUNK RIDES GRAVY TRAIN—$2.3M FOR LOSING LEG IN SUBWAY," illuminates this finding.

The article chronicles "several concrete" events in the trial, culminating in the jury's multi-million dollar verdict. According to the article, the plaintiff, who was in his early twenties, was drinking with friends at a bar.[24] By the time he arrived at the subway station, he had a blood-alcohol level of .18—more than double the legal limit if he had been driving.[25] The plaintiff admitted that he was so intoxicated "he didn't remember anything about the 1:50 a.m. accident—including how he ended up on the tracks—but the jury still found he didn't bear the majority of the blame."[26] The writer went on to note that the jury found the plaintiff "35 percent responsible," but did not discuss in any significant detail the notion of comparative fault and how liability is apportioned in a typical tort case.[27]

Nor did the article mention the fact that expert testimony was the crux of the plaintiff's case. On appeal, the mid-level appellate court observed that the jury found the transit authority liable "on the basis of a mathematical formula that used a purported average reaction time as a factor in calculating whether the defendant's train operator could have stopped the train to avoid running over an intoxicated [plaintiff]."[28] Without the mention of expert testimony, and the jury's reliance on it as the basis of their verdict, the reader is left with the impression that the jury made a decision without any rational basis. This impression only adds to the widely-held perception that the civil justice system is broken.

Indeed, the inherent problem with these headlines—and their underlying content—is that they convey the message that large awards necessarily stick, fueling the perception that plaintiffs almost always prevail in civil litigation—and make out big. The typical reader likely has no idea that irrational jury awards are frequently reversed on appeal or reduced by the trial judge shortly after an enormous verdict is rendered. This fact is often either left unsaid or treated with short shrift. Typically, the article will contain a dry quote from the losing lawyer, who mentions the possibility of an appeal in some fashion.

For example, an article printed in the *San Francisco Chronicle* reporting a jury award of $1.36 million won by a man who sued a cigarette manufacturer dedicated two sentences to the tobacco-company attorney: "Defense lawyer Randall Haimovici said the companies

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[23] Robbennolt & Studebaker, *supra* note 3, at 7.

[24] *See* Namako & Gregorian, *supra* note 15, at 5.

[25] *See id.*

[26] *See id.*

[27] *See id.*

[28] Dibble v. New York City Transit Auth., 903 N.Y.S.2d 376, 377 (App. Div. 2010).

would appeal. The negligence verdict shows that jurors agreed 'we didn't do anything wrong by using asbestos in filters back in the 1950s,' he said."[29] Similarly, the *New York Post* article reporting on the $2.3 million jury verdict in favor of the drunken man who was struck by a subway train contained a single sentence about the losing side: "A spokesman for NYC Transit, Paul Fleuranges, said lawyers are reviewing the Feb. 9 verdict."[30]

In fact, and as discussed above, the defense lawyers in the drunken subway rider litigation *did* review the verdict, appealed it, and won a complete reversal.[31] However, news of the appellate court's reversal of the award—and subsequent dismissal of the suit—did not appear in the pages of the *New York Post* until more than a year after the damning news of the trial court verdict was published.[32] Thus, for the majority of the reading public, news of a drunken man's almost fatal encounter with a subway train, and resulting $2.3 million tort award, further cemented in their minds the notion that civil litigation is a wellspring of cash for plaintiffs and their counsel.

In this regard, consider the following article, also published in the *New York Post*. With a headline of "STUNNING BLOW FOR KING OF MALPRACTICE CASES,"[33] this article profiled a medical malpractice attorney who rejected an $8 million settlement offer and then lost at trial. The article noted that the medical malpractice attorney had won more than eighty-four verdicts since 1979, without indicating whether any of these eighty-four verdicts had been modified or vacated post-trial or on appeal. The attorney was quoted as follows: "'I have turned down 34 times amounts of $8 million or more,' but they'd always settled or gone to verdict for more than that amount, he said."[34] This article certainly gives the reader the impression that big verdicts are the norm and "no-cause" decisions are the exception.

Indeed, an unscientific survey of major publications leads to the conclusion that "no-cause" decisions are rarely reported. This failure to report makes sense. A losing plaintiff's lawyer is certainly not likely to alert the local newspaper of a loss, or hold a press conference discussing the merits of a case when the jury found there were none. Similarly, a courthouse reporter, already battling negative readership trends in the newspaper industry, is not likely to write about a successful defense motion for summary judgment.

To the contrary, a courthouse reporter will likely zero in on a denial of a motion for summary judgment, especially if it is coupled with a snappy quote from the presiding judge, which was the case in a *New York Times* article published on April 7, 2010:[35]

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[29] Bob Egelko, *Ex-Smoker Wins Asbestos-Filter Suit*, S.F. Chron., Mar. 11, 2011, at C2.

[30] Namako & Gregorian, *supra* note 15.

[31] *See Dibble*, 903 N.Y.S.2d at 382.

[32] Dareh Gregorian & Tom Namako, *'Legless' Drunk's $2M Win Tossed*, N.Y. Post, June 23, 2010, at 2.

[33] Dareh Gregorian, *Stunning Blow for King of Malpractice Cases*, N.Y. Post, June 23, 2009, at 7.

[34] *Id.*

[35] *See* Duff Wilson, *Novartis Bias Suit to Begin*, N.Y. Times, Apr. 7, 2010, at B1.

> A class-action lawsuit alleging that Novartis Pharmaceuticals practiced sex discrimination against female employees is set to go to trial on Wednesday in federal court in New York.
>
> The complaint seeks more than $200 million in damages on behalf of more than 5,600 female sales employees.
>
> . . .
>
> Judge Gerard E. Lynch, who was then on the United States District Court, certified the Novartis class action in 2007. Judge Lynch is now a federal appellate judge. In October, District Judge Colleen McMahon denied Novartis's motion for partial summary judgment.
>
> "The fact is, a massive amount of paper has been wasted by defendant in a quixotic quest to keep much of the plaintiffs' case from the jury," Judge McMahon wrote. "Plaintiffs have demanded a jury, and a jury they shall have."[36]

Such coverage perpetuates the myth, promoted by many in the plaintiffs' bar, that the bulk of civil litigation is a David and Goliath battle in which average Americans battle corporate titans. Clearly, Robbennolt and Studebaker were on to something.

IV.
The BP Public Relations Disaster

The bumbling by BP in the wake of its massive oil spill in the Gulf of Mexico is a case study of what happens when decision-makers fail to tamp down a media firestorm. Indeed, BP's failure to "tame the town crier" made it the focus of criticism and bad press.

The most famous public relations mistake was a remark from BP's former chief executive officer, Tony Hayward, more than a month into the spill when he told the press he was looking forward to having his life back. This callous comment—repeated over and over again on the news networks to the point where it became seared in the minds of viewers—was particularly outrageous to the public because eleven workers lost their lives in the explosion.

But you did not have to watch the news networks to learn about Hayward's gaffe. His remark was printed in dozens of newspapers across the country. A LEXIS search of major U.S. newspapers for the keywords "Hayward," "life back" and BP returned more than 300 results, the content still scathing nearly one year later. For example an opinion article printed in *The Boston Globe* in April 2011 skewered BP for its "public-relations fiascos," dryly noting that "former CEO Tony Hayward wasn't the only one who wanted his life back."[37]

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[36] *Id.* at B1, B4.

[37] Juliette Kayyem, Editorial Opinion, *The Game Changer; One Year Ago Today, Politics Collided with Disaster Recovery*, Boston Globe, Apr. 24, 2011, at 10.

One should also consider that remarks such Hayward's become viral in this digital age. Hayward's slip of the tongue became instant fodder for bloggers and must-see viewing on YouTube. As of March 2012, a video clip of Hayward telling a reporter that he would like his life back had been watched more than 165,000 times and prompted dozens of viewers to post comments.[38]

Hayward's whining, coupled with a glaring absence of visual compassion from BP's top executives in the midst of the disaster, was the driving force behind the PR firestorm. A June 11, 2010, report from the *Associated Press* noted that Hayward's gaffe was only the tip of the iceberg when it came to BP's mismanagement of the media juggernaut:

> Executives have quibbled about the existence of undersea plumes of oil, downplayed the potential damage early in the crisis and made far-too-optimistic predictions for when the spill could be stopped. BP's steadiest public presence has been the ever-present live TV shot of the untamed gusher.[39]

The AP article went on to note that even Hayward's British accent was a liability when it came to crisis response:

> Former Shell chairman John Hofmeister said it might have been more appropriate for U.S. executives of the company to take the heat. Hayward is an Englishman, and BP is based in Britain.
>
> "I think it was a mistake for Tony Hayward to come and put his physical presence in the U.S.," Hofmeister said. "The U.S. has its own culture and traditions. Foreign companies can come and do business there, but they are not necessarily welcomed."[40]

The article contained a quote from a public relations executive who observed that the smarter move would have been to have BP officials who were based in the United States on the ground in the midst of the crisis doing everything they could to help with the cleanup. "'All crises are personal,' said Richard Levick, who runs a public relations firm, Levick Strategic Communications, that advises companies. 'Action and sacrifice [are] absolutely critical.'"[41]

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[38] *See BP CEO Tony Hayward: 'I'd Like My Life Back'* (Today Show video May 31, 2010), *available at* http://www.youtube.com/watch?v=MTdKa9eWNFw.

[39] Erin McClam & Harry R. Weber, *BP's Failures Made Worse by PR Mistakes*, MSNBC, June 11, 2010, http://www.msnbc.msn.com/id/37647218/ns/business-world_business/t/bps-failures-made-worse-pr-mistakes/ (reprint of Associated Press article).

[40] *Id.*

[41] *Id.*

However, rather than personalize the crisis or show a commitment to reduce the damage, BP compounded its mistakes by barring reporters from the oil-slicked beaches. Refusing access to the press became its own story, creating the impression that BP was trying to cover up the disaster by shielding it from public view. In June of 2010, ABC News posted a video on YouTube capturing a BP worker hassling a reporter who was observing the cleanup effort on a beach. In the video, the BP worker can be heard off-screen instructing the reporter not to speak with anyone. Spliced into the video is a segment in which the reporter discusses the encounter with a New York-based anchor, who in turn opines that BP's efforts to muzzle the press constitute a "pervasive paranoia."[42]

Had BP gotten "in front" of the disaster and not attempted to squelch press coverage, BP might have "tamed the town crier" by helping to shape coverage of the disaster. Instead of allowing the storyline to be that of an aloof CEO from England and a PR team's unsuccessful efforts to impose a media blackout, BP could have created a narrative of responsiveness and compassion. BP could have created this narrative by inviting coverage of the cleanup efforts, having on-the-ground press conferences by top managers with a firm grasp of the facts. Instead, BP only made matters worse by trotting out their hapless CEO who complained that the disaster marked a stressful time in his life.

These missteps also can provide lessons for lawyers on how to alter the misperception that news coverage can create of the civil litigation process—not only through individual articles of particular jury verdicts but also the aggregate coverage of the judicial system. By taking the time to educate reporters on the important aspects of a particular case and their relation to the larger legal system, counsel can slowly take steps to affect the coverage received and—in the long run—the perceptions of potential jurors.

V.
Best Practices

We present, in no particular order, some tips on how to deal with the press in the context of litigation. We think these best practices will help to control the message:

- If you are contacted by a reporter, ask him or her to submit a list of written questions. Doing so will give you time to strategize with your client and formulate a comprehensive response.
- Do not denigrate the media. Comments such as "I'm not going to try this case in the press" may irritate reporters and their editors, causing unfavorable coverage.

[42] *See The Conversation: Press Hassled on Gulf Coast?* (ABC News video June 10, 2010), *available at* http://www.youtube.com/watch?v=VtimqwLxB0Q.

- Take the time to explain the mechanics of trial and motion practice to the reporter. For example, explaining the notion of comparative fault may lead the reporter to take a harder look at the plaintiff's allegations and conduct, especially in the context of a tort suit.
- Avoid taking a position that could come back to haunt you during the litigation or trial; for example, do not say "My client categorically denies that he was in the park at 10 p.m." A court could take judicial notice of the statement, and your adversary could use it to impeach your client. ("Mr. Smith, you testified at deposition that you were in the park at 10 p.m.—isn't it true that your lawyer told *The Daily Planet* that you were not in the park at 10 p.m.?").

VI.
Conclusion

With the advent of digital media, blogging, and the twenty-four-hour news cycle, it is more important than ever to recognize the impact of the news media on civil litigation. Practitioners can easily fall prey to a media firestorm if they do not effectively "tame the town crier" with strategic communication and sound planning. They can also shape news coverage and provide context to civil disputes by explaining the dynamics of the adversarial system and offering insight into legal concepts often ignored by the press. The practitioner who keeps these considerations in mind will help restore balance to the public's perception of civil litigation.

Juror Misconduct in the Age of Social Networking[†]

Michael K. Kiernan
Samuel E. Cooley

"It has become appallingly obvious that our technology has exceeded our humanity."

— Albert Einstein

I. Introduction

Dr. Einstein's reflection on the advance of technology resonates in the context of a growing problem in the American justice system—jurors' use of social media during trial. While juror misconduct undoubtedly predates the printing press, advances in smart phones and social networking sites provide new avenues by which jurors may stray from their sworn duties. Today, jurors can violate the rules by posting information about the case or the parties on their Facebook or Twitter accounts. Jurors also can conduct research, which gives them information outside of what was presented during the trial. Both of these actions can result in a denial of the defendant's due process rights, which require a jury to consider only the evidence before it in the trial.

[†] Submitted by the authors on behalf of the Property Insurance section of the FDCC.

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The beginning of this Article provides background information regarding the rise of social networking sites and then provides a brief history of juror misconduct in the United States. Next, it discusses how courts have reacted when jurors have used social network sites or conducted Internet-based research during a trial. This section also describes the different ways in which jurors may use social networking sites to improperly communicate with another juror, a party, a witness, or others outside the courtroom or courthouse. A juror's privacy rights may be a barrier to discovering evidence sufficient to support a claim of misconduct. With that barrier in mind, we recommend that courts consider three remedies with the potential to deter or prevent juror misconduct involving social networking and Internet research: amending jury instructions to address Internet usage; "digitally" sequestering jurors; and imposing fines on jurors who engage in the type of electronic misconduct address in this Article.

II.
The Rise of Social Networking Sites

When the first social networking site was launched in 1997,[1] few anticipated how widespread Internet-based social networking would become. In the short time since 1997,

[1] Danah M. Boyd & Nicole B. Ellison, *Social Networking Sites: Definition, History, and Scholarship*, J. Computer-Mediated Comm. Vol. 13(1) (2007) http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html (last visited Feb. 23, 2012).

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multiple sites have fueled an explosion in personal connectivity. With the 2003 release of MySpace, Internet-based social networking truly hit the mainstream market.[2] Juggernauts Facebook[3] and Twitter[4] followed in 2004 and 2006 respectively.[5] Since then, the influence of social networking on everyday life has become undeniable and, to the chagrin of some, unavoidable. Facebook claims to have 845 million active users worldwide.[6] Of these, it is estimated that about 150 million users are Americans.[7] Twitter boasted more than 500 mil-

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[2] *Id.*

[3] Facebook uses a social networking platform where users can create profiles, upload pictures and interact with other users. Users become "friends" with other users by sending "friend requests." Users can broadcast updates on their "Wall," which is a space on their profile page that lists their recent activity.

[4] Twitter is a much more limited social networking application than Facebook. Twitter users "follow" and have "followers." Users can post text-based updates (also known as "tweets") on their profile page. The updates must be 140 characters or fewer and may include links to pictures uploaded through numerous third party web applications. In some cases, a user may set privacy options where only approved "followers" can see that user's tweets, or he or she can allow all other Twitter users to view his or her tweets.

[5] Boyd & Ellison, *supra* note 1.

[6] Fact Sheet, *Newsroom*, http://newsroom.fb.com/content/default.aspx?NewsAreaId=22 (last visited Feb. 23, 2012).

[7] Chloe Albanesius, *How Many U.S. Users Does Facebook Have, Will It Affect an IPO*, PCMAG.COM (June 14, 2011), http://www.pcmag.com/article2/0,2817,2386896,00.asp.

lion registered users worldwide in February 2012.[8] In the United States alone, it is estimated that more than 107 million people have Twitter accounts.[9]

The rise of social networking sites has been accelerated by the use of smartphones. As of the end of 2011, forty-six percent of United States cell phone users owned smartphones, and sixty percent of new cell phones purchased were smartphones.[10] American smartphone owners rarely leave home without their Internet-capable devices.[11] On average, they spend approximately three hours per day socializing on social networking applications on their mobile devices[12] - more than twice the amount of time the average American spends eating.[13] Our reliance on social networking sites has even spawned a market for treatment of addiction to Internet-based social networking.[14] In a society where every passing thought and mundane life experience are potential topics for an email, text message, or tweet, it is hardly surprising that jurors are tempted to post their courthouse experiences in "real time."

III.
Background on Juror Misconduct in the United States

The laws governing juror misconduct are rooted in the constitutional right to trial by a fair and impartial jury.[15] Jurors are required to decide cases solely on the evidence presented to

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[8] Joann Pan, *Will You Be Twitter's 500 Millionth User?*, Mashable Social Media (Feb. 22, 2012), http://mashable.com/2012/02/22/twitters-500-million-user/.

[9] Lauren Dougan, *The US Has the Most Twitter Users, But the Netherlands Is More Active*, All Twitter (Feb. 1, 2012), http://www.mediabistro.com/alltwitter/the-us-has-the-most-twitter-users-but-the-netherlands-is-more-active-stats_b18172.

[10] *More US Consumers Choosing Smartphones as Apple Closes the Gap on Android*, nielsenwire (Jan. 18, 2012), http://blog.nielsen.com/nielsenwire/consumer/more-us-consumers-choosing-smartphones-as-apple-closes-the-gap-on-android/.

[11] Amanda McGee, Comment, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and its Effect on American Courtrooms*, 30 Loy. L.A. Ent. L. Rev. 301, 309 (2010).

[12] Sarah Kessler, *Mobile By the Numbers*, Mashable Tech (Mar. 23, 2011), http://mashable.com/2011/03/23/mobile-by-the-numbers-infogrpahic/.

[13] *Id.*

[14] *See* McGee, *supra* note 11, at 309. For an example of a technology dependence program, see reSTART Internet and Technology Addiction Recovery Program, http://www.netaddictionrecovery.com/ (last visited Feb. 23, 2012) (outlining the mission plan and programs available to Internet addicted individuals at a Fall City, Washington treatment center).

[15] U.S. Const. amends. VI–VII.

them.[16] Standard jury instructions from across the country explain this duty, and jurors swear to uphold it.[17] Of course, experience shows that some jurors will look beyond the evidence to reach a verdict, leaving the courts to create remedies for this species of misconduct.

Postings or interactions with other users on social networking sites would seem to fall into the broad category of juror misconduct based on external communications. In this context, courts have broad discretion to investigate alleged misconduct and determine what actions to take in the event misconduct is verified.[18] In *Remmer v. United States*,[19] the United States Supreme Court articulated the basic rule on external communications with jurors, stating that

> any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.[20]

The Court later stepped back from the presumption of prejudice and took the view that a party alleging improper juror communications must demonstrate actual prejudice. In *Smith v. Phillips*,[21] the Court observed that

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[16] *See* United States v. Olano, 507 U.S. 725, 738 (1993) (quoting Smith v. Phillips, 455 U.S. 209, 217 (1982)); United States v. Medlin, No. 10-7030, 2011 U.S. App. LEXIS 2064, at *6 (10th Cir. Feb. 1, 2011); Davis v. Woodford, 384 F.3d 628, 652 (9th Cir. 2004) (noting jury questions and judge's response that it would be improper to consider matters outside of the evidence presented, such as cost to the state's taxpayers for death penalty compared to life sentence); Chavez v. Cockrell, 310 F.3d 805, 811 (5th Cir. 2002); Whitehead v. Cowan, 263 F.3d 708, 720 (7th Cir. 2001); United States v. De La Vega, 913 F.2d 861, 871 (11th Cir. 1990).

[17] *See, e.g.*, 1-1 Modern Fed. Jury Instrs.—Crim., P 1.02 (2010); 4-71 Modern Fed. Jury Instrs.—Civil, P 71.01 (2010); Diamond-8 Modern Fed. Jury Instrs.—Civil, 8th Cir. § 3.06; S1-2 Modern Fed. Jury Instrs.—Crim., 3d Cir. § 2.33 (2010).

[18] Tanner v. United States, 483 U.S. 107, 113–15 (1987) (recounting evidence that the trial court heard after learning of potential jury misconduct, including defense attorney's testimony).

[19] Remmer v. United States, 347 U.S. 227 (1954).

[20] *Id.* at 229.

[21] Smith v. Phillips, 455 U.S. 209 (1982).

> due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. . . . [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.[22]

The party raising the alleged external communication must show by competent evidence "that the extrajudicial communications or contacts were 'more than innocuous interventions.'"[23] If this burden is satisfied, the other party must then prove that there is no "reasonable possibility that the jury's verdict was influenced by an improper communication."[24] To determine if the contact was merely innocuous, the court will consider several factors: "(1) any private communication; (2) any private contact; (3) any tampering; (4) directly or indirectly with a juror during trial; (5) about the matter before the jury."[25] Though jury misconduct arising from social networking is a developing area of the law, some basic trends are starting to emerge.

IV.
Court Reactions to Jurors' Inappropriate Use of Technology During Trials and Deliberations

Jurors can use technology to commit misconduct in several different ways. First, jurors can use social media to provide updates on the proceedings. Parties have been generally unsuccessful in obtaining relief when a juror uses social media to report trial proceedings. In this area, courts are equally unwilling in criminal and civil matters to grant relief to the challenging party. Second, some jurors have improperly attempted to make a personal connection by "friending" or "following" a party in the proceedings. Courts are generally less tolerant of this type of misconduct. Third, jurors can use social media to improperly communicate with one another during the trial. The "jury is still out," if you will, on this type of misconduct because the leading case was settled before the court resolved the issue of the jury misconduct. Finally, jurors can use the Internet to conduct research about the case and gain information that was not presented during the trial. Courts again are generally less tolerant of this type of misconduct.

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[22] *Id.* at 217.

[23] United States v. Cheek, 94 F.3d 136, 141 (4th Cir. 1996) (quoting Haley v. Blue Ridge Transfer Co., 802 F.2d 1532, 1537 n.9 (4th Cir. 1986)).

[24] *Id.* (quoting *Haley*, 802 F.2d at 1537).

[25] *Id.*

A. *Posting and Tweeting Public Messages about the Trial*

One highly-publicized example of this sort of misconduct was the criminal corruption trial of former Pennsylvania Senator Vincent J. Fumo, where the defense sought a mistrial due to a juror's updates on the status of the case on a social networking site.[26] The juror posted that there would be a big announcement on the day the verdict was handed down. The court denied the motion for mistrial,[27] which the defense unsuccessfully appealed. The appellate court upheld the district court's opinion that the juror's postings were "nothing more than harmless ramblings" that did not prejudice the defense.[28]

In another criminal case, the court refused to grant relief based on a juror's Facebook postings. In the case, the court questioned the jury foreperson about Facebook postings during a highly publicized rape trial in Florida.[29] There were several postings, but the defense attorneys attacked only one. That posting contained the following comment: "Boring, boring, boring testimony from one witness all day."[30] The jury convicted the defendant of the rape charge, and the court denied the defense motion to set aside the verdict.[31]

Another court similarly refused to grant relief to a defendant in a civil case that had resulted in a $12,000,000 verdict against the defendant where a juror had tweeted updates about the trial.[32] In that case, the juror posted updates on his Twitter account that included comments such as, "'oh and nobody buy Stoam [the defendant company]. Its bad mojo and they'll probably cease to Exist, now that their wallet is 12m lighter' and '[s]o Johnathan, what did you do today? Oh nothing really, I just gave away TWELVE MILLION DOLLARS of somebody else's money.'"[33] The court refused to set aside the verdict because the "tweets" did not discuss the substance of the case and "did not rise to the level of improper conduct."[34]

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[26] United States v. Fumo, 639 F. Supp. 2d 544 (E.D. Pa. 2009).

[27] *Id.* at 555–56.

[28] United States v. Fumo, 655 F.3d 288, 306 (3d Cir. 2011).

[29] Tanya Arja, *Jury Foreman Questioned About Facebook Postings*, My Fox Tampa Bay (Dec. 2, 2010), http://www.myfoxtampabay.com/dpp/news/local/hillsborough/jury-foreman-questioned-about-facebook-postings-12022010.

[30] *Id.*

[31] *See Kendrick Morris Gets 65 Years in Prison for Rapes*, TBO.com (Oct. 6, 2010), http://www2.tbo.com/news/breaking-news/2011/may/20/16/teen-set-for-sentencing-in-library-day-care-rapes-ar-208602/.

[32] John Schwartz, *As Jurors Turn to Google and Twitter, Mistrials Are Popping Up*, N.Y. Times, Mar. 18, 2009, at A1.

[33] *Id*; McGee, *supra* note 11, at 308–09.

[34] Though the judge's decision was unpublished, the case received a lot of media attention. *See* Martha Neil, *Juror Tweets in $12.6M Case Teach Lawyer a Lesson: Ask About Web Use*, ABA Journal (Apr. 9, 2009), http://www.abajournal.com/news/article/sweet_news_for_plaintiff_in_12.6m_case_jurors_tweets_wont_change_verdict.

B. *Using Social Media to Contact a Party or Witness*

Another category of misconduct arises when a juror attempts to "friend" or "follow" a party or witness. For instance, in a criminal case, a juror sent a firefighter witness a "friend request" on Facebook.[35] The witness did not recognize the juror and ignored the request. After the jury convicted the defendants, the juror sent the witness a message on Facebook saying she was a juror in the trial. The witness then accepted the renewed friend request and engaged in a conversation with the juror via Facebook. Upon realizing the potential impropriety of his Internet contact with the juror, the witness contacted the prosecutor. Although the court believed that the juror's conduct was "unquestionably a serious breach of her obligations as a juror," it denied the defendants' motion for relief based on jury misconduct because it did not believe that the juror's conduct "prejudiced a substantial right of the defendants."[36]

Similarly, in a federal district court case, a juror sent a Facebook "friend request" to two of the plaintiffs after the jury had rendered its verdict.[37] After the plaintiffs accepted the request, the juror learned of the plaintiff's "party animal" ways, and after the trial, the juror contacted the plaintiffs' counsel to bring it to his attention.[38] The plaintiffs' counsel raised the matter with the court and moved for a new trial. The judge denied the motion, stating that he did not find any evidence of misconduct "*during the trial*" and apparently did not impose any penalties on the juror.[39]

Despite the media attention given to these improper "friend requests," some prospective jurors still seek to initiate these types of improper online connections. However, courts are appearing to become more intolerant of this type of misconduct. For example, in a February 2012 case out of Sarasota, Florida, a prospective male juror in an automobile negligence case sent a "friend request" to the female defendant.[40] The defendant informed her attorney, who brought the matter to the court's attention. The defense attorney emphasized that while his client responded properly by reporting the incident, other parties may be tempted to accept the request, hide the matter from counsel and the court, and attempt to use the new digital relationship with the juror to influence the verdict.

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[35] People v. Rios, No. 1200/06, 2010 N.Y. Misc. LEXIS 312, at *3 (N.Y. Sup. Ct. Feb. 23, 2010).

[36] *Id.* at *9. However, the court granted the defendants' motion to set aside the verdicts because the court found that the evidence was legally insufficient to support a conviction. *Id.* at *44–45.

[37] John G. Browning, *When All that Twitters Is Not Told: Dangers of the Online Juror*, 73 Tex. Bar J. 216, 218 (Mar. 2010) (citing Wilgus v. F/V Sirius, Inc., 665 F. Supp. 2d 23 (D. Me. 2009)).

[38] *Id.*

[39] *Wilgus*, 665 F. Supp. 2d at 27–28.

[40] Douglas Stanglin, *Juror Jailed for Contempt for 'Friending' Defendant*, USA Today, Feb. 17, 2012, http://content.usatoday.com/communities/ondeadline/post/2012/02/juror-jailed-for-contempt-for-friending-defendant-/1#.Tz553lG2Z8E; Ben Zimmer, *Juror Could Face Jail Time for 'Friending' Defendant*, USA Today, Feb. 7, 2012, http://www.usatoday.com/news/nation/story/2012-02-07/juror-facebook-friend-defendant/53000186/1. This appears to be the first publicized instance of a U.S. court sentencing a juror to jail time for using Facebook to send a friend request to a party.

The prospective juror in that case, Jacob Jock, was dismissed from duty, but his misconduct did not end there. Mr. Jock then posted a status update on Facebook boasting that he escaped jury duty. During a contempt hearing on Mr. Jock's misconduct, the court held him in contempt of court and sentenced him to three days in county jail. When issuing her decision, Judge Nancy Donnellan explained to Mr. Jock that "[f]reedom is not free. It comes with responsibilities and duties, one of the most important of which is to serve as a juror when called. You were called, and you thumbed your nose at it."[41]

C. *Improper Communication among Jurors*

Facebook and Twitter can also facilitate premature discussions among the jurors. In the embezzlement trial of former Baltimore Mayor Dixon, five of the jurors became friends on Facebook and communicated with each other through the social networking site.[42] When the former mayor's defense team became aware of the online interactions between the five jurors, it moved to set aside the guilty verdict. The judge asked the jurors to testify about the communications and to refrain from further discussing the case on Facebook. Some of the jurors continued to post about their former jury duty, despite the judge's request. The issue of the jury misconduct was not fully resolved, however, since the former mayor entered into a plea agreement on the charges and resigned from office.[43]

D. *Internet Research*

Another area of concern has been the use of Internet search engines, such as Google, by jurors. A prime example of this type of misconduct occurred in a 2009 Southern District of Florida drug trial involving Internet pharmacies.[44] In that case, nine jurors admitted that they had conducted Google searches on the lawyers, parties, and media coverage of the case. They also admitted that they had consulted Wikipedia for definitions of words that had been used during trial. The court declared a mistrial based on the jurors' violation of his instructions not to conduct outside research during the trial.[45]

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[41] Stanglin, *supra* note 40.

[42] Bradley Shear, *The Facebook Five and Alleged Juror Misconduct in Baltimore Mayor's Trial*, Shear on Social Media Law (Jan. 15, 2010), http://www.shearsocialmedia.com/2010/01/facebook-five-and-alleged-juror.html; *Dixon Jurors Ignore Judge, Continue Facebook Posts*, WBALTV.com (Jan. 4, 2010), http://www.wbaltv.com/r/22117438/detail.html; Gary Haber & Robert J. Terry, *Baltimore Mayor Sheila Dixon Resigning Post*, Balt. Bus. J., Jan. 6, 2010, http://www.bizjournals.com/baltimore/stories/2010/01/04/daily31.html.

[43] *See* Shear, *supra* note 42.

[44] *See* McGee, *supra* note 11, at 308.

[45] *Id.*; Deirdra Funcheon, *Jurors Gone Wild: The Feds Slink Away from a Flubbed Internet Pharmacy Case*, Miami New Times (Apr. 23, 2009), http://www.miaminewtimes.com/content/printVersion/1517107/.

Another example of jurors improperly using Internet search engines is in *Wardlaw v. State*.[46] In that case, a man was charged with rape, child sexual abuse, and incest against his seventeen-year-old daughter. At trial, an expert testified about working with the daughter on her behavioral issues, including opposition defiant disorder (ODD). A juror decided to research ODD online and found out that lying was a trait associated with the disorder. She shared this information with the other jurors, after which another juror sent a note to the judge advising him of the incident. The defense moved for a mistrial, which the judge denied.[47] On appeal, the court found that a mistrial should have been granted.[48] It reasoned that the juror's research was "egregious misconduct" because the daughter's credibility was a crucial issue, and researching non-evidentiary information on that issue could have unduly influenced the jury.[49]

Yet another example of such misconduct arose in a criminal case out of Maryland.[50] In that case, a court overturned a first-degree murder conviction because a juror had consulted Wikipedia for information not introduced into evidence at the trial. This information included research of scientific terms and principles. The court reversed the conviction, emphasizing that an "adverse influence on a single juror compromises the impartiality of the entire jury panel."[51]

In another case, a juror searched for pornographic sites in an attempt to verify information discussed by an expert witness in a criminal trial for sexual abuse.[52] The defendant was charged with possessing child pornography, and the defense introduced an expert witness who opined that it was impossible to discern the actual age of the individuals on the pornographic websites found on the defendant's computer. Despite specific warnings from the court, the juror searched for the websites referenced in the expert's testimony to assess the expert's contentions. The jury found the defendant guilty for sexual abuse and child pornography. After the verdict, the defense counsel uncovered the evidence of the juror's Internet searches. When defense counsel brought the matter to the trial court's attention, the court held a hearing and found that the juror had committed misconduct, but it refused to set aside the verdict against the defendant.[53] The Nevada Supreme Court upheld the trial

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[46] 971 A.2d 331 (Md. Ct. Spec. App. 2009).

[47] *Id.* at 337.

[48] *Id.* at 338.

[49] *Id.*

[50] Andrea F. Siegel, *Judges Confounded by Jury's Access to Cyberspace: Panelists Can Do Own Research on Web, Confer Outside Courthouse*, Balt. Sun, Dec. 19, 2009, http://articles.baltimoresun.com/2009-12-13/news/bal-md.ar.tmi13dec13_1_deliberations-period-florida-drug-case-jurors.

[51] *Id.*

[52] Zana v. State, 216 P.3d 244 (Nev. 2009). *See also* K.C. Howard, *Juror Misconduct Cited*, Las Vegas Rev.-J., Dec. 1, 2007, http://www.lvrj.com/news/11993056.html.

[53] *Zana*, 216 P.3d at 546.

court's ruling, finding that the juror's actions did constitute misconduct but that the actions did not prejudice the defendant.[54]

Courts have also found improper jury research in the following circumstances: where a juror researched Internet databases for the defendant corporation's past profits;[55] where a juror used MapQuest to assess testimony regarding the distance between two relevant locations in the case;[56] and where a juror researched whether Tasers are lethal devices in a wrongful death case.[57] It is easy to see that the possibilities for improper Internet research by jurors are virtually endless.

While courts have been reluctant to grant new trials based solely on a juror's use of social media, it is apparent that courts are much more likely to grant new trials when the misconduct is Internet research. However, there are extreme examples where the use of social media has had repercussions for the litigants and juror alike.[58] For example, a juror in California, who was also an attorney, blogged about the details of the case and criticized the judge and defendant on a social networking site. The court set aside the verdict, and the California State Bar later initiated disciplinary proceedings against the juror and suspended him from practice for forty-five days.[59]

Lawyers are not the only jurors who have had to face sanctions for their failures to follow the law and refrain from discussing the case on social networking sites. In Michigan, a juror posted the following message on Facebook: "actually excited for jury duty tomorrow. It's gonna be fun to tell the defendant they're GUILTY. :P."[60] The court removed the juror, levied civil contempt fines against her, and ordered her to write an essay on the Sixth Amendment.[61]

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[54] *Id.*

[55] Moore v. Am. Family Mut. Ins. Co., 576 F.3d 781, 787 (8th Cir. 2009).

[56] Brown v. State, 620 S.E.2d 394, 397–98 (Ga. Ct. App. 2005).

[57] Browning, *supra* note 37, at 218.

[58] *In re Wilson*, No. 06-O-13109 (Cal. State Bar Ct. 2008); John Schwartz, *A Legal Battle: Online Attitude vs. Rules of Bar*, N.Y. Times, Sept. 13, 2009, at A1.

[59] *See* Martha Neil, *Calif. Lawyer Suspended over Trial Blogging While Serving as Juror*, ABA Journal (Aug. 4, 2009), http://www.abajournal.com/news/article/calif._lawyer_suspended_over_trial_blog_while_serving_as_juror/.

[60] Russell Smith, *Judge Throws the (Face)book at Juror*, Legal as She is Spoke: A Discussion of Law and Journalism, (Sept. 26, 2010), http://lasisblog.com/2010/09/26/judge-throws-the-facebook-at-juror/.

[61] *Id.*

V.
The Issue of Privacy Rights in Light of the New Juror Misconduct

As the courts draw the contours of acceptable juror behavior in this area, litigants face another challenge: they must overcome the jurors' privacy rights to establish that misconduct occurred. The California Supreme Court recently issued a stay of a trial court order that compelled a jury foreman to produce his private Facebook postings.[62] In that case, a defendant was charged with a gang-related assault. During the trial, the foreman posted on his Facebook page that the evidence was "boring." Defense attorneys sought records of the foreman's posting from Facebook, which he refused to turn over. The foreman then challenged the subpoena on grounds that production would violate his right to privacy. A trial judge found the subpoena valid and ordered the foreman to sign a consent form within ten days for the release of his Facebook records.[63] The foreman appealed the decision and requested a stay of the order that forced him to sign the consent form. The intermediate appellate court denied the foreman the relief he had requested, but the California Supreme Court granted the stay and has remanded the case to the intermediate appellate court for a full hearing on the matter.[64]

VI.
Remedies

Several suggestions have been made as to how courts and attorneys should address the problem of technology-based juror misconduct. The most popular suggestion is the amendment of jury instructions to include specific language instructing jurors that they should completely refrain from using any social networking sites, such as Facebook and Twitter, to research or post comments related to the case.[65] The idea is that if the prospective jurors are instructed on the exact conduct that is prohibited, they will be less likely to engage in that type of conduct.[66] These instructions should be written in short sentences using common terms to ensure that the jurors understand the instructions.[67]

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[62] Kathy Robertson, *Court Orders Stay in Juror's Facebook Case*, Silicon Valley/San Jose Bus. J., Feb. 15, 2011, http://www.bizjournals.com/sanjose/news/2011/02/15/court-orders-stay-in-jurors-facebook.html; Rachel Costello, *California Court to Examine Juror's Facebook Privacy*, Reporters Committee for Freedom of the Press (Apr. 1, 2011), http://www.rcfp.org/newsitems/index.php?i=11807.

[63] Robertson*, supra* note 62.

[64] *Id.*

[65] Timothy J. Fallon, Note, *Mistrial in 140 Characters or Less? How the Internet and Social Networking are Undermining the American Jury System and What Can be Done to Fix It*, 38 Hofstra L. Rev. 935, 963–67 (2010); Jeffrey T. Frederick, *You, the Jury, and the Internet*, 39-WTR Brief 12 (Winter 2010); McGee, *supra* note 11, at 316–17.

[66] Fallon, *supra* note 65, at 964.

[67] *See* Peter Meijes Tiersma, *Reforming the Language of Jury Instructions,* 22 Hofstra L. Rev. 37, 73 (1993).

Several states, including New York and Florida, have adopted pattern jury instructions including this type of language. The New York pattern instruction states as follows:

> In this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, [I]nternet chat or chat rooms, blogs, or social websites, such as Facebook, MySpace or Twitter.[68]

The Florida instruction is not as specific, but it provides a similar message: "You are not to communicate with any person outside the jury about this case. Until you have reached a verdict, you must not talk about this case in person or through the telephone, writing, or electronic communication, such as a blog, twitter, e-mail, text message, or any other means."[69]

Local Florida courts have supplemented this instruction with juror orientation videos.[70] The Sixth Judicial Circuit's version specifically identifies Facebook and Twitter in a video explaining that jurors are not to communicate with anyone about the case through social media.

Another suggestion is to threaten or order sequestration of the jury if there is a danger of social network or Internet-based misconduct.[71] Combining sequestration with the confiscation of smart phones and laptop computers will effectively eliminate any chance for the jurors to access social networking sites. However, sequestration has long been disfavored due to its cost, lack of popularity among jurors, and difficulty to administer.[72]

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[68] OFFICE OF COURT ADMIN., COMM. ON CRIMINAL JURY INSTRUCTIONS, CRIMINAL JURY INSTRUCTIONS 2D: JURY ADMONITIONS IN PRELIMINARY INSTRUCTIONS (2009), http://www.nycourts.gov/cji/1-General/CJI2d.Jury_Admonitions.pdf (last visited Feb. 15, 2012).

[69] SUPREME COURT COMM. ON STANDARD JURY INSTRUCTIONS IN CIVIL CASES, FLORIDA STANDARD JURY INSTRUCTIONS—CIVIL CASES, §700—Closing Instructions, http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml#700 (last visited Mar. 3, 2012). *See* Declan McCullagh, *Florida Bans Jurors from Tweeting, Blogging*, CNET NEWS (Oct. 29, 2010), http://news.cnet.com/8301-13578_3-20021178-38.html. *See also* Memorandum from Judge Julie A. Robinson, Chair, Judicial Conference Committee on Court Administration and Case Management, to Judges, United States District Courts (Jan. 28, 2010), http://federalevidence.com/downloads/blog/2010/Memorandum.On.Juror.Use.Of.Electronic.Communication.Technologies.pdf; *Juror Use of Electronic Social Media,* FEDERAL EVIDENCE REVIEW, http://federalevidence.com/evidence-resources/federal-jury-instructions (last visited March 8, 2012).

[70] *See, e.g.*, Information for Jurors, Jury Orientation Video, http://www.flcourts.org/gen_public/jury/index.shtml.

[71] *See* Fallon, *supra* note 65, at 965–66; McGee, *supra* note 11, at 323.

[72] Fallon, *supra* note 65, at 965–66.

A new idea to emerge in light of the new types of juror misconduct is the concept of enforcing a "digital sequestration" of the jurors.[73] Unlike traditional sequestration, this method would not require that jurors be housed at a hotel during the trial. Instead, it would cut off only the jurors' access to social networking sites. While this "digital sequestration" would limit jurors' ability to send improper "friend requests" to parties or witnesses or engage in improper dialogue with individuals regarding the case, its enforcement would be difficult and may have little effect.

For this method to be successful, social networking sites like Facebook and Twitter would have to cooperate by restricting jurors' access to their accounts during the pendency of the trial, which would likely be impossible to facilitate, given that these companies embrace an overarching desire to provide — not restrict — access to information and networking. Furthermore, digital sequestration would undoubtedly result in an overwhelming amount of litigation regarding whether the method unnecessarily infringes on individual privacy rights. Finally, even if the digital sequestration method could be implemented, it would certainly fail to totally cut off a juror from the Internet. There would be no absolute way to restrict a juror's ability to conduct research on the Internet, and a juror could always use the online social networking account of a family member or friend to search for a party or witness. In the end, the minimal remedial effect of this novel idea would seem to be far outweighed by the problems that would arise through its implementation.

A more direct remedy for the problem is the use of sanctions, which could help to curb a juror's desire to research the case or post information about the case online.[74] If courts were more willing to impose civil fines against non-compliant jurors, the imposition of those fines could help to deter future misconduct. The idea of having to pay a fine for just posting a comment about a case could keep many prospective jurors from picking up their iPhones or Blackberrys and signing on to Facebook or Twitter. Courts could also threaten and impose criminal contempt sanctions, such as short jail sentences, for cases of extreme misconduct. Although these types of sanctions might be considered excessive by some, they could have a better deterrent effect than amended instructions and the threat of sequestration.

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[73] The concept of digital sequestration was addressed in a legal blog authored by Ben Buchwalter on LikedIn. *See Digital Sequestration?*, http://www.attorneycredits.com/wordpress/2011/02/digital-sequestration/ (last visited Feb. 25, 2012). Interestingly, the discussion of this potential remedy appears to have been initiated on LinkedIn, which suggests that using social networking sites to discuss the problem and discourage jury misconduct during trial could help to prevent this problem. *Id.*

[74] *See* McGee, *supra* note 11, at 321–22.

VII.
Conclusion

Like other kinds of juror misconduct, a percentage of jurors will always misuse social media during trial. When asked about how to fix this problem, Douglas L. Keene, president of the American Society of Trial Consultants conceded, "It's really impossible to control it."[75] Even the prospect of sanctions has not fully stopped the misconduct. In fact, if you go online right now to Twitter or Facebook and do a search for tweets or posts about jury duty, you will surely find people across the nation updating everyone about their civic duty or the case they are hearing.[76]

The fight to prevent juror misconduct in the use of social networking sites has only just begun. For some, a connection to Facebook or Twitter will be more important than a juror's oath or a court's instruction. Of course, this behavior may be just the latest manifestation of an age-old problem—jurors want to talk about a trial from a position of importance and power. New technology may change the method of delivery, but human nature remains the same.

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[75] Schwartz, *supra* note 32.

[76] On February 15, 2012, the authors of this article conducted a general Twitter search for "jury duty." In the hour preceding the search, there were more than 170 tweets referencing jury duty on Twitter, including such comments as, "Someone, pls take a bat & beat me senseless with it. Why am I here yo!?! Jury duty is so cornyyyyyyyyyy," "Anyone ever have to go for jury duty? Do they let you text and email etc from your phone while you wait? Any other helpful info," and "Hes Guilty…Jury Duty is honestly the biggest waste of time…."

Perspectives on the Mediation Process and Its Participants: How and Why People Mediate*

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I.
Introduction

Esoteric newspaper articles and CLE seminar handouts discussing mediation abound. Too often, these publications offer no more than useless generalities and platitudes like "be prepared" or "work hard" or "plan your argument in advance"—something akin to a version of Steve Martin's advice regarding how to become a millionaire: "First, get a million dollars."[1] This Article seeks to avoid that trend and instead offers a compilation of objective, practical, and useful insights from primary participants in the mediation process. The experience of writing and coordinating this article was our form of The Breakfast Club, the John Hughes film about five teenagers who "each representing a different teen stereotype, come to understand each other" after "spending Saturday doing detention time in the high school library."[2]

Mediation—which involves strategic exploration, isolation, and resolution of complex issues—shares much in common with golf or parenting. Like improving one's golf stroke, improving one's skills as a mediator is a hands-on process that must be approached with

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[1] *Steve Martin, Saturday Night Live*, Season 3: Episode 9 (NBC television broadcast Jan. 21, 1978).

[2] Janet Maslin, Review, *John Hughes's 'Breakfast Club',* N.Y. TIMES, Feb. 15, 1985, at C18.

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the proper respect. Similar to developing parenting skills, the ability to negotiate through mediation can be cultivated only through practice and experience. And just as different golfers and different parents espouse different definitions of success, experienced mediators know that there is more than one way to be successful, and the ultimate definition of success may be different for different people.

This Article begins with a brief history of the growth of mediation in Part II. Part III discusses perspectives and recommendations, including the strategies, goals, and the process of mediation. In Part IV, the authors discuss mediation from the perspective of the traditional participants—the mediator, the claims professional, and attorneys. An account of an insurance underwriter's perspective is also included.

The perspectives offered throughout this article are personal perspectives. Understanding mediation from a variety of vantage points can inform the formulation of a strategic mediation plan. It is important to emphasize, however, that this Article is not intended as an all-inclusive, step-by-step guide. This Article is instead intended to provide a starting point for thoughtful reflection and to encourage respectful application of the mediation process.

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II.
A Brief History of the Growth of Mediation

Regardless of the particular context involved—be it a family, business, or personal injury dispute—the American legal system imposes the same procedural constraints on all civil disputes. First, a party files pleadings averring contested facts and circumstances and legal causes of action; then the case progresses to factual discovery; and finally it ends in judicial determination. As the volume of cases has dramatically increased, overburdened courts have been unable to meet demand, and expensive delays have resulted. In order to ameliorate this problem, courts and litigants have encouraged—and sometimes, required—informal settlement discussions, as well as formal settlement conferences. Alternatives to litigation—for example, arbitration and mediation—were developed.

Arbitration (both binding and non-binding) was one of the first alternatives to traditional litigation, and it surfaced as a reasonable alternative to costly and delayed trial resolution. Although arbitration provides an alternate route to parties seeking to avoid litigation, it proved to be of limited utility. Like litigation, arbitration is fundamentally an adversarial process. Moreover, limited time and resources prevented judges and magistrates from devoting significant efforts to third-party facilitation of complex cases. Indeed, in some instances the judges or magistrates were pressured to remove cases from the docket, and truly neutral third-party facilitation of settlements suffered. Over time, the original concept of arbitration as a simple, cost-effective solution has devolved into more complex and expensive procedures.

These challenges resulted in court programs directing parties to mediation. Private parties also voluntarily mediated disputes. Unlike both traditional litigation and arbitration, in mediation a neutral third party could devote the time and effort needed to discuss the disputed issues, deal with practical considerations, and help the parties to find a common ground essential to resolving the dispute without the need for a trial.

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Over time, the concept of mediation became more common. To fill the increasing need for mediators, private attorneys, professional mediators, and retired jurists became meditators, either privately or through accrediting institutions.[3] Of course, a lawyer's or judge's skill set does not always lend itself to effective mediation. Hence, as mediation increased and became more commonplace around the country, new mediators had to learn on the job and develop a new skill set. As mediation has continued to grow in popularity, mediators have continued to grow and adapt to accommodate the needs of contemporary dispute resolution.

III.
Perspectives and Recommendations

Mediators, underwriters, claims professionals, and attorneys have different perspectives on how information produced during mediation can be used. Mediators use the information generated before and during a mediation session to help the parties understand each other's positions and resolve the underlying dispute; in contrast, underwriters can use the information produced in a mediation to better analyze the risks associated with an insured's business and to more accurately set premiums for insurance policies. Claims professionals may use the information produced in mediation to help the parties objectively view what a claim is worth.

[3] *See, e.g.*, JAMS Arbitration, Mediation, and ADR Services, http://www.jamsadr.com (last visited February 27, 2012).

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The parties involved in mediation also have different perspectives on which mediation strategy is best. The strategy employed may depend upon what type of mediator is used and whether the settlement involves just determining the amount of damages payable or a more nuanced problem of understanding and incorporating the parties' varying understandings and positions regarding the facts and the law governing the dispute.

Despite this superficial diversity of perspectives, mediation participants often have much in common. In this section of the Article, each perspective is explained, but the overarching goal is to create a common understanding of the mediation process with a goal of fostering successful settlements.

A. *The Mediator's Perspective: Hon. Jack L. Lintner, Retired*

Whether a mediation session is successful depends upon several factors, including the preparation, experience, and professionalism of all parties involved. This section will provide an overview of these considerations, as well as practical advice on how to ensure that mediation is appropriate and well-timed.

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1. Deciding to Mediate

Whether mediation is appropriate is a fact-intensive inquiry and depends on the particular circumstances presented. For example, in a case where both liability and damages are clear, mediation is generally unnecessary—especially if both parties are represented by experienced professionals. On the other hand, mediation may be helpful even where liability is undisputed if one side is reluctant to settle because of inexperience, or because of a client's stubbornness regarding reasonable settlement value.

Mediation is not an appropriate tool to discern the other party's settlement position or to obtain discovery. Parties should go into mediation with the good faith intention of attempting to resolve the case.

2. Timing Issues

Once it is determined that mediation is appropriate, it is crucial to initiate mediation at the appropriate time. The right time for mediation depends on the type of case, the number of parties, and the complexity of the issues. Although usually a fair exchange of material facts and expert reports is essential before entering into the mediation process, there are circumstances where mediation can commence before this exchange of information occurs.

For example, if the mediation involves a claim based on personal injuries and either liability or damages (or both) are clear, early mediation can sometimes save litigation time and expense and produce essentially the same result that would be reached if the matter settled after the parties engaged in costly discovery.

Early mediation may also be appropriate in cases where damages are clear but liability is not. The following example is illustrative. A child is born with catastrophic retardation. The obstetric nurse is sued for failing to call a doctor after viewing the fetal heart rate monitor that may have indicated fetal distress. Liability experts disagree as to whether the fetal tracings established a non-reassuring pattern, requiring calling the doctor to intervene, and whether the retardation is causally related to the failure to have the baby delivered earlier. The nurse is insured with a $1,000,000 professional negligence policy. While a plaintiff's verdict would yield a verdict well in excess of the nurse's insurance coverage, the parties know that a jury could go either way on liability, and the case has settlement value at something less than the policy limit. If the parties are willing to negotiate, early mediation can be successful.

3. Selecting the Mediator

Usually the parties to a private mediation select the mediator through consensus or by contractual pre-arrangement. In contrast, court-ordered mediation may involve a court-selected mediator.[4] In the latter instance, parties are usually free to jointly suggest a different mediator and to move for a consent order appointing a different mediator if the court-selected mediator is unsatisfactory.[5] Regardless of how the mediator is initially selected, the parties to the mediation must have confidence that the mediator will act as a neutral third party and will honor the confidentiality of the parties' positions.

It is essential that a mediator possess excellent communication skills. These skills will be used throughout the mediation process. A good mediator will follow up with the parties by telephone, especially if they are close to reaching a resolution, or either party signals movement on its side of the negotiations. Moreover, it is often said that if you can keep the parties talking, you can resolve the dispute.

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[4] There are different types or formats of court-ordered mediation. Some state courts or federal district courts have mediation programs where parties are ordered to attend and to use a "panel" approved mediator assigned randomly. Sometimes a few "free" hours are donated by the attorney or professional mediator. Some programs do not even require that the mediator be a lawyer or retired judge. Additionally, the parties may be given little discretion on timing—the mediation may be required at too early a juncture and before the parties can make the process truly meaningful.

[5] Lawyers who do not have experience with mediators in a particular geographic location can ask local lawyers who have mediated the same type of case for the names of mediators who have a reputation for success in that field.

A mediator should also have trial experience and legal knowledge. These traits will permit the mediator to evaluate a case from both a liability and damages standpoint. Additionally, a mediator with trial expertise can help counsel see with more objectivity how a jury is likely to react to the evidence as well as the opening and closing arguments. In many contexts, a judge who has also been a trial lawyer has the optimal experience to succeed as a mediator. Experience also ensures that the mediator can "talk the talk," whether to a lay party, an attorney, or an insurance representative.

Mediators with proven track records for settling cases can generally be accepted as having the experience, training, and skill set required to overcome conflicts and move the parties towards resolution of their differences.

4. Preparation

The importance of preparation in successful mediation cannot be overstated. Successful mediators will have read everything provided by the parties before the mediation session and will have given thought to the legal and factual positions. A prepared mediator is ready to ask questions to clarify the parties' respective positions and is able to provide the attorneys and parties with give-and-take concerning their respective positions.

To ensure adequate preparation, it is important to provide the mediator with a confidential mediation statement that summarizes the material facts, demonstrative evidence, and expert reports. The mediation statement also explains the party's general position in the case and its views respecting settlement.

In some instances, a mediator's preparation may involve reviewing expert reports. Where expert reports cover complex areas that are not generally understood, it may be necessary to have the expert attend the mediation session to explain the bases of the expert's conclusions to the mediator.

Finally, in many instances *ex parte* communication is a crucial component to the mediator's preparation. Such communication is a part of mediation, and it is proper to contact the mediator before or after the session to provide information that will help the mediator fulfill his or her role.

5. Conducting the Mediation

Following introductions, some mediators ask for opening statements; others do not. My preference is to omit opening statements, unless a party insists. In my view, opening statements tend to create posturing by the parties. After introductions, it is my practice to separate the parties and have confidential conversations with the respective parties and their attorneys. In my experience, a mediator can learn more in a confidential session by asking questions about areas that may not have been adequately explored in the mediation statement and clarifying areas that were addressed in the statement.

Confidentiality is of the utmost importance. Indeed, confidentiality is the key to a mediator's ability to learn where each party would like to go or is willing to go. A party's "want" position and "take" position are often different. A mediator's ability to learn these positions is one of the keys to successful mediation, yet it is only when a party trusts a mediator to

keep the information in strict confidence that the mediator can acquire this information. To avoid divulging confidences or placing either party in a position where it is bidding against itself, a mediator should *always* ask permission to relate areas of confidential communication to the adverse party, if the mediator believes that the information will be helpful to the process.

6. Settlement

It is essential that a mediator has the resources to prepare a tentative written settlement agreement to be signed by the parties and attorneys once an agreement is reached. The tentative settlement agreement may indicate that it is subject to agreement on final language in a formal agreement and that disputes over the language are to be resolved and decided by the mediator. It may also indicate that it is binding and may be placed into evidence to enforce it. Such tentative agreements have been enforced by the courts.[6]

7. Summary

Mediation is a procedure that efficiently resolves disputes at a substantially lower cost than either litigation or arbitration. However, the mediation process is only as good as the mediator. Therefore, it is of the utmost importance that parties select a mediator with a proven track record and a reputation for professionalism.

B. *The Underwriter's Perspective: Lynnie T. Jenkins*

In the insurance context, underwriting is the process of "(1) deciding which accounts are acceptable, (2) determining the premiums to be charged and the terms and conditions of the insurance contract, and (3) monitoring each of those decisions."[7] In a broader business context, underwriting is essentially "what insurers do to be financially successful."[8] The ultimate goal of underwriting "is to ensure that the risk transfer is equitable and the insurer is able to develop and maintain a growing, profitable book of business."[9] Mediation can provide the underwriter with useful information to make this determination.

This section will provide an overview of the underwriter's role and insight into how mediation can help the underwriter make accurate determinations to the benefit of both insurance companies and insureds.

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[6] *See, e.g.,* Facebook, Inc. v. Pac. Nw. Software, Inc., Nos. 08-16745, 08-16873, 09-15021, 2011 U.S. App. LEXIS 7430, at *11–13 (9th Cir. Apr. 11, 2011).

[7] Joseph F. Mangan & Connor M. Harrison, American Institute for Chartered Property Casualty Underwriters/Insurance Institute of America, Underwriting Principles 1(2d. ed. 2003).

[8] *Id*.

[9] *Id*. at 2.

1. Determining Which Accounts are Acceptable

The first step of an underwriting decision is to determine whether an account is acceptable. This analysis applies at two distinct phases of insurance underwriting: first, when determining whether to insure a risk in the first instance, and second, when determining whether to renew existing business. Mediation can provide the underwriter with useful information to make this determination.

Whether in the "new applicant" or "renewal" context, an underwriter must assess the various hazards of the insured's business.[10] To gain a more accurate assessment of the hazards associated with an insured's business, the underwriter will categorize the insured's business and begin to gather information. Relevant information includes the business's management structure and financial condition as well as how the business manages risk and whether independent contractors or employees perform the work.[11]

When a loss has occurred and litigation ensues, information presented by the insured in a mediation session can provide greater clarity and insight into several factors that an underwriter evaluates when deciding whether to accept a risk. Indeed, the information obtained in mediation can be invaluable for assessing the insured's risk management practices and developing ways to improve the insured's risk management.

Even more significantly, mediation can provide the underwriter with an opportunity to develop its working relationship with the insureds. After carefully reviewing the plaintiff's case, the underwriter can make recommendations that will assist an insured if it needs to develop and improve its risk management program. This improved risk management potentially reduces the insured's future loss frequency and severity. By listening to the insurer's recommendations and showing an interest in implementing the insurer's recommendations, the insured demonstrates that it is interested in improving its business and maintaining its relationship with the insurer in a mutually beneficial way. This demonstration may result in a lower premium.

In sum, improving the working relationship between the underwriter and insured can reduce premiums for insureds and improve profitability for insurers. In the broader business context, underwriting is what insurers do to ensure profitability, and the information received in mediation often provides a cost-effective way to reach that goal.

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[10] Hazards are conditions that increase loss frequency (i.e. number of losses). Hazards can present themselves as physical, moral, or legal in nature. Ann E. Myhr & Doris Hoopes, American Institute for Chartered Property Casualty Underwriters/Insurance Institute of America, Surplus Lines Insurance Operations, 6.4–6.5, (1st ed. 2010).

[11] With regard to employees, an accurate assessment of hazards requires considering the quality of the employees and how much training they receive. Mangan & Harrison, *supra* note 7, at 62–67.

2. Determining Premiums and Terms and Conditions of the Insurance Contract

For underwriters, a key component of maintaining profitability involves analyzing the loss (indemnity) payments as well the loss adjustment expenses.[12] One key way underwriters measure their results is by using the "combined ratio," expressed as loss and loss adjustment expenses divided by premium earned.[13] The combined ratio is an important indicator of whether an account or book of business is profitable. If the loss ratio is greater than one, the account or book of business is not profitable. Consequently, as loss payments and loss adjustment expenses grow as a percentage of premiums earned, the less profitable the account or book of business.

Litigation can be a very expensive proposition for the insured and insurer. A successful mediation can greatly reduce the additional costs associated with going to trial—for example, attorneys' fees or injury to the insured's business. For the underwriter, experience has demonstrated that successful mediations can result in lower loss adjustment expenses and lower settlements than trials. This result translates into a more favorable loss ratio, which can ultimately lead to more favorable premiums and policy terms for insureds.

C. *The Claims Professional's Perspective: Joseph M. Junfola*

From a claims professional's perspective, the value lies in avoiding litigation expenses and the risk of unpredictable verdicts. The benefits of successful mediation are invaluable. Mediation can propel a stubborn dispute forward to resolution. Even if a mediation session does not result in settlement, it can allow parties to gather valuable information. Moreover, the formal mediation session often proves to be the starting point for a process that eventually results in resolution.

In order to yield the full benefit of mediation, however, it must be "done right." The following are "hot button" issues from the standpoint of the claims professional, or at least this one.

1. Timing

"Doing a mediation right" begins with doing it at the right time. Premature mediation wastes time and money and can poison future efforts to negotiate and mediate. Similarly, initiating mediation too late in the process nullifies one of the main benefits of mediation; namely, avoiding the costs of litigation.

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[12] Indemnity payments include amounts paid to settle cases as well as damages awarded after litigation concludes. Loss adjustment expenses include the fees paid to independent adjusters, experts, and attorneys.

[13] Mangan & Harrison, *supra* note 7, at 24.

a. Premature Mediation

Premature mediation produces problems. Early in the process, there may simply not be enough information for the claims professional to intelligently evaluate the claim and justify settlement. Given the potential dangers in settling without adequately analyzing all the facts, it is particularly important to be circumspect when confronted with a plaintiff who wants mediation before the exchange of information. As one commentator has warned,

> Be aware of plaintiffs who seem eager to enter into mediation prematurely, **usually immediately after a suit is filed or a claim is made.** Plaintiffs often use this tactic in an attempt to avoid discovery. Possibly, discovery may reveal unfavorable facts or that the relevant law does not support their complaints.
>
> The idea is to rush into mediation and have the mediator work with little or no information. Little is known about the fact pattern; there is not enough information to assess damages. They insist on early mediation as a good faith attempt to settle the matter and avoid costly litigation.[14]

Premature mediation is frequently the result of an inflexible case-management order that mandates mediation under the threat of sanctions. There is no question that mediation is a valuable tool; however, forced mediation under the threat of sanctions is anomalous to the underpinnings of successful mediations—motivated parties, cooperative efforts, open-mindedness, and willingness to compromise. As one court stated, "a case management conference order requiring that parties in complex cases attend and pay for mediation is . . . contrary to the voluntary nature of mediation. *The essence of mediation is its voluntariness.*"[15]

b. Duration of Mediation

Ensuring that a mediation session runs for the appropriate length of time is admittedly not always easy to accomplish. But it is critical that the mediation be structured so that time is utilized in the most efficient way possible. Discussions should be focused and goal-oriented. Posturing and histrionics must be minimized as they are major distractions and time-wasters.

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[14] Troy A. Galley, *Key Elements for Successful Mediation*, 51 Claims Mag. 44 (2003).

[15] Jeld-Wen, Inc. v. Sup. Ct. of San Diego Cnty, 53 Cal. Rptr. 3d 115, 119 (Ct. App. 2007) (emphasis added).

If at all possible, the insurer and insured should present a united front at the mediation session. Any lingering coverage issues should be resolved before mediation. Battles between insurers consume valuable time that is better utilized settling the dispute between the primary parties. If the carriers' controversies cannot be resolved, then perhaps a separate mediation session may be warranted.

2. The Participants

Prepared decision makers should attend the mediation. Any claims professionals in attendance should have a sufficient amount of authority—in terms of money and ability to make concessions or other decisions—and not merely be a conduit between the parties at the mediation and the insurance company. This principle does not preclude the claims professional from making a phone call or two to the insurance company to discuss, consult, and seek guidance in appropriate circumstances; however, only decision makers with sufficient authority should attend. As one commentator has explained,

> Very often, the dynamics of mediation are such that an ability to make a quick decision results in a more favorable concession. If the representative has to run every proposal up the chain of command, that powerful dynamic is lost.
>
> If the representative has less than full authority to make decisions, it is imperative that the necessary decision maker be available for *immediate* consultation. . . . [T]he line adjuster typically has a firm grasp of all the micro case/coverage issues. But often, the adjuster is not empowered to address the macro issues of whether . . . to take the matter to trial or the real consequences of failing to achieve a negotiated outcome.[16]

3. Preparation

Virtually nothing is more frustrating to parties to mediation than lack of preparation. The process of preparing begins *before* the actual mediation session.

Pre-mediation homework is vital. Whether in the form of formal briefs, or in more informational position statements, each side must provide a comprehensive and understandable explanation of its position[17]—and mediators should read those submissions before the session. If there are lingering conflicts between insurers, those conflicts should be resolved

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[16] Dennis M. Wade, Behind the Curtain: An Insider's Guide to Mediation 30–31 (2010). In the opinion of the author of this portion of this Article, full authority may not be necessary. A claims professional who has "sufficient" or "reasonable" authority to settle makes a good faith effort to mediate.

[17] If expert reports are critical to a position, then those should be shared as well. If experts need to be present at a mediation to explain their conclusions, then this should be arranged.

before the mediation, unless the controversy is a formal part of the mediation process. Finally, authority to settle should be determined before the mediation begins. If this authority cannot be achieved, then the claims professionals must know whom in their company to contact for authority if a settlement is reached.

4. The Mediator

Good mediators are—to borrow a phrase from the advertising world—priceless. But what makes a good mediator? A good mediator should exhibit several traits. First, a mediator should be knowledgeable about all aspects of the dispute—including technical issues. Second, a mediator should be well-trained and skilled in conflict resolution. The ability to communicate effectively is vital. Finally, a mediator should be able to identify and closely focus on the issues that separate the parties, and similarly should be able to identify commonalities to exploit.

Should the mediator be a facilitator, an evaluator, or both? In other words, should the mediator be a catalyst for the process and facilitate discussion, or should the mediator evaluate the merits of the parties' cases? From the claims professional's perspective, a mediator should do both. The evaluation of the merits of each side's position by a neutral mediator provides each party with the opportunity to recognize the strength and weaknesses of their respective positions, and the risks they face by not settling.

> [A] mediator often acts as an evaluator who, at some point in the process, expresses an opinion about how the matter may play on the stage of a trial. Indeed, most litigants prefer a neutral party who, by reason of experience, is capable of making objective predictions about how an issue will be decided or how a jury in a particular jurisdiction may react to a given scenario.[18]

Although biases are an unavoidable part of the human condition, the mediator must be able to recognize and guard against his or her biases to "create a neutral playing field for claimants or litigants."[19] In other words, a mediator can be neutral and impartial—and therefore an effective mediator—as long as he or she recognizes any bias in him or herself. Failure to recognize any bias can present an insurmountable barrier to resolving conflict.[20]

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[18] Wade, *supra* note 16, at 15.

[19] Elizabeth A. Moreno, *The Mediators' Role: Tackling the Illusion of Objectivity,* IRMI (April 2004), http://www.irmi.com/expert/articles/2004/kichaven04.aspx.

[20] *Id.*

5. Conclusion

Mediation is an effective alternative to litigation to resolve disputes. Success depends on motivated and prepared parties and an environment that is conducive to compromise and reconciliation under the guidance of an intelligent and skilled mediator. Mediation presents an opportunity that should not be wasted.

D. *The Attorney's Perspective: J. Scott Murphy and Michael J. Goldman*

As experienced attorneys know and newer attorneys quickly learn, litigation is stressful and all-consuming. Over the past two decades, the legal profession has migrated from rewarding time-intensive reflection, strategic planning, and forward thinking, to favoring volume claims and litigation handling driven by rigid guideline reporting time frames, detailed billing guidelines, and "best practices" considerations including deadlines, discovery end dates, motion dates, and other processing stressors.

One consequence of this shift is that legal professionals tend to handle ever increasing volumes of cases and claims—including hundreds of demand letters, offer letters, interrogatories, document requests, and depositions—simultaneously. Often, this press of business reduces opportunities to collaborate on individual cases to identify early resolution opportunities or strategic end-of-the-day strategies. In short, individual results can suffer because of economic and other pressures that can truncate the kind of individual attention that may be warranted.

In this context, attorneys must be proactive in seeking out opportunities to reflect, analyze, strategize, evaluate, and develop cases with input from clients and their risk managers, third-party administrators, and insurers. Mediation provides one such opportunity, because it functions like a settlement conference but also affords the parties the chance to use a neutral third party to break through the adversarial process and reach a pragmatic resolution to the dispute. While preparing for mediation—and even during mediation—attorneys have the opportunity to evaluate a case issue by issue. Even if the mediation does not result in settlement, it can be invaluable for analyzing the case for future resolution or for efficient and effective trial preparation.

1. Selecting a Mediator

Regardless of whether the mediator will be court-appointed or agreed to by the parties, an attorney should evaluate who is the best type of mediator for the case. To make this determination, the attorney must assess the nature of the case and determine what tactics the adversary will most likely employ. If the case involves complicated factual issues, or if the outcome of the case depends primarily on the resolution of a legal issue, an experienced, retired judge may be the best mediator. Retired judges have credibility and experience that helps to soothe egos and put insurers and principals at ease. Alternately, lawyers who are known and respected by both plaintiff and defense counsel may be equally suitable.

Another consideration when selecting a mediator is whether the mediator should possess a particular type of expertise. Disputes in certain areas—for example, intellectual property

or construction defects—may require a mediator with expertise in that area. Failure to select an appropriate mediator with specific expertise may prevent the issues in the dispute from being identified or fully developed—which can hinder settlement.

Finally, when selecting a mediator it is important to evaluate which approach to mediation will work best for the dispute at issue. Mediators tend to adopt one of two approaches. "Broker mediators" believe that their primary purpose is to settle the case at all costs. They tend to have little interest in developing or exploring the issues in a case. Instead, they usually prefer to have the parties just exchange demands and offers while they explain to each side privately that they could lose at trial and should settle now. Mediators fitting this description deemphasize reading all the materials, hearing all of the arguments, and offering a neutral, third-party opinion based upon the facts or law of the case. They tend to become part of the process or game-playing and they often try to press one party to move up with its offer and the other party to move down with its demand. In many circumstances, this approach tends to result in reaching a middle ground; however, anecdotal evidence suggests that the success rate for closing cases is lower when this style of mediation is used.

In contrast to the "broker mediator," an "evaluative mediator" believes that the parties are entitled to a neutral impression of the issues and claims. During private break-out sessions, evaluative mediators will offer a candid assessment of each party's case, including its financial value. This approach allows an attorney to explore arguments and theories without risk. It also allows clients and principals a chance to hear about the negative aspects of their cases. This opportunity is especially beneficial if the attorney is having difficulty broaching the downside of the case directly. While attorneys wear multiple hats (advocate/warrior, investigator, analyzer, and counselor), sometimes discharging all of the duties contemporaneously is difficult. In fact, when attorneys focus too much on their role as advocate to the exclusion their role as counselor, they may focus too much on the positive aspects of the case and fail to give adequate attention to the negative issues that should also be factored into analysis of the client's risk, liability, and exposure.

2. Preparing for the Mediation

After selecting the appropriate mediator and approach, counsel should approach mediation as an opportunity to thoroughly review the case—including evidence produced during discovery. This review will become the basis for providing advice and counsel. Attorneys should spend time with their clients and principals so that everyone is on the same page with regard to strategies, goals for mediation, and an acceptable resolution of the matter. Advance preparation may require making some assumptions about the adverse party's approach—even if the adverse party's approach will eventually be fleshed out during the mediation. A well-prepared attorney anticipates the adversary's goals and strategy and, when feasible, uses this preparation to work toward a resolution that accommodates some of the adversary's goals. Pushing an adversary into a corner with no room to negotiate and no opportunity to save face will assure a failed mediation.

As part of the preparation for the mediation, attorneys should draft a confidential mediation statement. Attorneys should not adopt the unwise practice of sending out a generic

confidential mediation statement. Instead, they should tailor the statement to the issues and goals of the particular case and the type of mediator who will be mediating the dispute. Instead of using the confidential mediation statement to present an opening statement or a closing argument, use it to address the case from a pragmatic legal issue and proofs position.

3. Selecting a Mediation Strategy

A well-conceived mediation strategy starts with deciding upon the style or approach that will guide the attorney's participation in the mediation and then factoring in whether the mediator is a "broker mediator" or an "evaluative mediator." For example, if an attorney decides on a dollar value approach to settlement, and the mediator is a "broker mediator," often a successful mediation strategy involves deciding on a favorable or acceptable end result and then providing the mediator with a roadmap. To use this strategy effectively, the attorney should decide how to increase the offer in each round of negotiations. As the "broker mediator" carries the offers back and forth, the attorney needs to have a strategy in place for the next round. For example, each offer can be an increment of the prior offer. Or, offers can be approached as brackets: if x is offered, then y will be the counteroffer. The point is to stay in control and plan while also maintaining credibility and developing a rapport with the mediator. Refusing to address or respond to developments during the fluid mediation process will guarantee failure.

If a case involves multiple defendants, another useful technique when mediating the dollar value of a claim with a "broker mediator" is to analyze each party's exposure when preparing for the mediation. Use this information to provide a substantive reason for your client's financial position. If this approach is used instead of asserting a principled settlement offer, the mediator is more likely to press the opposing party to move toward a figure that is acceptable to your client and that will resolve the case. To show that your offer has a substantive basis, provide the mediator with any available case law and jury verdicts that support your analysis. The mediator can use this information as ammunition to leverage an opponent's offer and encourage settlement on acceptable terms.

A different mediation strategy that is particularly effective when an "evaluative mediator" is selected involves approaching settlement from the vantage of substantive positions and probabilities. Here, the mediator facilitates discussion between the parties as each party develops a position and an understanding of the opposing party's position. When using this approach, provide opposing counsel with a statement that identifies the issues to be discussed. This statement also serves as a confidential statement to the mediator and provides support for your client's position in order to persuade and convince the mediator that your client's position is reasonable and perhaps even correct. Maintaining credibility and building rapport with the mediator are also important when this approach is used. Instead of hiding from or ignoring weaknesses in your case, deal with them and distinguish them in the same manner used when writing a persuasive brief in support of a motion for summary judgment. A mediator who is properly and fairly educated regarding the case is more likely to become your client's advocate while speaking with the parties on the other side.

4. Confronting Challenges

Be prepared to deal with attorneys who avoid engaging in a substantive discussion of a case. Do not make offers or demands. Instead, insist upon a substantive exchange, and encourage the mediator to work the process and force your adversary to take a more intellectual approach to the mediation. Do not link issues together. Do not accept generalizations. Make your adversary's counsel support all positions with facts from the case and applicable law. Insist that opposing counsel support any positions taken with admissible evidence and not merely with evidence that would be discoverable, but inadmissible at trial.

If global agreement cannot be reached, try addressing one issue at a time and narrowing those that can be agreed upon or narrowing those upon which you can agree to disagree. However, do not stop there. Take the time to discuss these difficult issues with the mediator and then listen to the impression of the neutral party. Also, listen to your adversary. Even if a settlement cannot be reached, leaving mediation with a better understanding of your adversary's position and a broader perspective on the case will help guide trial preparation and discovery in the future. An unsuccessful mediation can be a dry run for a future trial—but at a much lower cost than a mock trial.

5. Conclusion

In conclusion, attorneys should remember that mediation is more of a process than an event. Many cases settle as a result of mediation, but not necessarily at the formal mediation session. Similarly, cases that do not settle in the first mediation session may settle in a future session or by other means. Attorneys should identify their goals, work toward those goals, and get as much as possible out of the process. By mediating with these points in mind, you will find that your cases settle, your issues narrow, and your litigation results will improve. And after all, that is what our clients want and deserve.

IV.
CONCLUDING REMARKS

As this Article points out, while the insured, insurer, mediator and counsel all share a substantial commonality of interest, the way they react to litigation and the perspectives they bring to the negotiation table are not identical. Integrating these interests and achieving a facilitated resolution at the appropriate stage of litigation is a challenge, but with planning and effort—especially if a professional claims handler is involved—the goal can be achieved for both the insured and the insurer. The following practical tips can help to attain positive results.

- A successful negotiation requires that you avoid unnecessarily pushing your adversary into a corner. It is best to determine whether your mediation issues are about only money or whether there are substantive issues that may play an integral part of the negotiations. Figure out, in advance, what your adversaries

and participants need from the process and why they are at the mediation. Then leave room to show respect for each party and allow each to feel comfortable with a resolution that also advances the client's interests.

- Because they often must wear two hats (advocate and counselor), trial counsel may have difficulty viewing their positions from a neutral, objective, standpoint. Trial counsel often benefit from an active and knowledgeable claims professional. They should watch and listen and avoid the compulsive need to speak constantly and justify a pre-mediation position. Attorneys should also try to be aware of their body language and demeanor. Sometimes they may need to defer to the claims professional or mediator, especially if either of them indicates that posturing or other events are making it more difficult for the parties to reach a settlement.
- Leave open as many options and opportunities as possible – even if the session is unsuccessful. Mediation is a process. Remember that not all cases settle, and not all mediations result in settlement. Meeting the parties, exploring the issues, developing dollar discussions, and obtaining a neutral party's impression of the facts or issues in the case can yield valuable benefits even if a case needs to be tried.[21]
- Mediation discussions should not be viewed as a game of chess, a win or lose war, or a psychological battlefield. Litigation is merely a part of the larger business process (for the insured, the insurer, and the claimants). Engaging in the process of litigation needs to involve considering the goals and perspectives of everyone who is involved. Mediation, in the most basic sense, is using the intervention of a third person in a process that allows the parties to develop and adjust their positions in a manner that is both reasonable and conducive to settling their differences.

[21] Class action cases, whether involving only cash issues or a combination of cash and injunctive relief issues, are more complex. Unfortunately, the nature of class actions is fact and law dependent and not susceptible to discussion in the context of this global Article. In fact, the handling of class action negotiation and settlement is a topic worthy of a separate Article. However, we would not be complete if we did not at least address the topic in this discussion on perspectives relevant to mediation. Staying within the parameters of this Article, class action mediations require many of the same talents and efforts. However, class action cases often involve multiple plaintiffs and multiple-plaintiff law firms from around the country. Observing and responding in the context of the personalities and perspectives of all of the participants becomes even more important. Further, many counsel who handle class action cases have personal agendas, and it is imperative to do research about your adversaries and what their needs and desires may be – both attorneys and class representatives.

We hope that our multi-perspective approach to mediation has been useful and that this Article will spark a roundtable debate in your own office, whether you are employed by a large corporation, an insurer, or a law firm. Discussing the process and the people in the process will help each participant appreciate the others, especially if the discussion brings out both the similarities and differences.

Similarly to what Brian Johnson wrote to his teacher, Mr. Vernon, in *The Breakfast Club*, society and our industry tend to see each participant in a mediation—whether the plaintiff, defendant, defense lawyer, plaintiff lawyer, underwriter, claims professional, or mediator—"[i]n the simplest terms, in the most convenient definitions."[22] These oversimplifications and stereotypes create unnecessary barriers to settlement and make the prospect of resolution unlikely. Conversely, understanding and appreciating why each participant is involved in the process, what brings each of them into the litigation and eventually into the mediation, and what each of them needs to derive from the process can lead to a broader view that makes it more likely that a result can be reached that may be deemed favorable by all sides.

[22] John Hughes, *The Breakfast Club* 78 (Shooting Draft 1985) *available at* http://www.dailyscript.com/index.html (search www.dailyscript.com; enter "Breakfast Club"; then follow "The Breakfast Club – Daily Script" hyperlink).

The Case for Self-Interested Civility

Howard Merten

I.
Introduction

Since the early 1990s, the legal profession has focused on "professionalism" and "civility." A LEXIS search of leading law reviews from 1990 forward reveals no fewer than 879 articles containing the words "professionalism" or "civility" in the title. Many of those articles discuss a "crisis" in the current state of professionalism. That crisis, in turn, may be affecting our enjoyment of our work and our ability to do what we enjoy—trying cases and diligently advocating for our clients. After two decades of attention and discussion—and one might argue, little progress—the question that remains is whether we can improve our treatment of one another and in turn, the profession that is our life's work.

In this Article, I argue that it is in the best interests of each lawyer and of the practice of law generally to follow basic rules of civility and professionalism. As background, I define "civility" and "professionalism." I also explain why civility and professionalism will help the individual lawyer to be a more effective advocate and will help the practice of law generally by making it function more effectively and by producing benefits to members of the bar, such as an enhanced reputation, job satisfaction, and job security.

II.
Defining Civility and Professionalism

The dictionary definitions of "professionalism" and "civility" are rather straightforward. But what do these definitions mean in the context of being a lawyer? To put it simply, they call for a basic respect, kindness, and courtesy to one another. Though there are some enacted standards that govern professionalism and civility, many lawyers disregard them as unenforceable.

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Professionalism "is an elastic concept, the meaning and application of which are hard to pin down."[1] In a seminal article, Supreme Court Justice Sandra Day O'Connor cited to Dean Roscoe Pound for a definition of a "profession": "'a group . . . pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood.'"[2] "Professionalism" has been defined as "'voluntary conformity with legally unenforceable standards.'"[3]

No matter how artful the drafting, no one can enforce a code that requires, for example, polite phone calls, considerate treatment of requests for enlargements, or respect for a tribunal or process. Many have tried to codify such conduct. In 1992, the Seventh Circuit adopted

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[1] Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 Fordham L. Rev. 809, 814 (1998) (quoting ABA Commission on Professionalism, In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyers Professionalism 10 (1986)).

[2] The Hon. Sandra Day O'Connor, *Professionalism*, 76 Wash. U. L.Q. 5, 6 (1998) (quoting Douglas W. Hillman, *Professionalism—A Plea for Action!*, 69 Mich. B.J. 894, 895 (1990)).

[3] Susan Daicoff, *Lawyer, Know Thyself*: *A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 Am. U. L. Rev. 1337, 1343 n.12 (1997) (quoting Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 Tex. L. Rev. 259, 275 (1995)).

the original and most influential civility code—its Standards for Professional Conduct. That enactment has been called a "watershed event,"[4] and by 1995, nearly one hundred jurisdictions had adopted similar civility codes.[5] The Seventh Circuit's Standards for Professional Conduct are both a valuable resource and an excellent exposition of the 'legally unenforceable' standards that we should pursue as a profession. Indeed, the Preamble declares that the Standards "shall not be used as a basis for litigation or for sanctions or penalties."[6] Thus, the Preamble acknowledges the current state of the profession—one characterized by lack of civility and professionalism—by attempting to preempt any further conflict that the Standards themselves could create.

The literature on civility calls these codes "aspirational." To some attorneys, aspirational means "irrelevant" or "unenforceable." Some commentators, reacting to the onslaught of civility initiatives, have noted that an attorney's job is to win for his or her clients, not to make friends. One litigator put this sentiment bluntly:

> "So I get annoyed, and sometimes genuinely infuriated, at these self-anointed "civility" police who lately have pitched their tents at our local bar associations. Seemingly every lawyers' group in America now has a "civility" committee, chock full of patriotic citizens scolding their fellow practitioners into the belief that our highest duty is no longer to win for our clients, but rather to be nice to our adversaries."[7]

Even the most righteous of "civility police" would not try to dissuade attorneys from vigorously representing their clients. Civility and professionalism, however, are not impediments to effective representation, but rather a means to achieve that very goal. What is more, civility is not only a tool that makes an attorney a more effective advocate; it is a tool to improve their lives and careers. Voluntary adherence to higher, unenforceable standards is a good thing for attorneys, for the courts, and ultimately for clients.

III.
Why Civility is Important

Though many of the rules of professionalism and civility are legally unenforceable, I nonetheless argue that attorneys should voluntarily conform to basic standards because it will enable them to represent their clients more effectively and enable all attorneys to conduct

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[4] Christopher J. Piazzola, Comment, *Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted A Civility Rule*, 74 U. Colo. L. Rev. 1197, 1200 (2003).

[5] *Id.* at 1200 n.27 (citing Atkinson, *supra* note 3, at 278 n.74).

[6] Standards for Professional Conduct Within the Seventh Federal Judicial Court, preamble, *available at* http://www.ca7.uscourts.gov/Rules/rules.htm#standards.

[7] Judge Marvin E. Aspen, *Overcoming Barriers to Civility in Litigation*, 69 Miss. L.J. 1049, 1049 n.6 (2000) (quoting Shawn Collins, *Podium: Be Civil? I'm a Litigator!*, Nat'l L.J. Sept 20, 1999 at A21).

their matters more efficiently. Part A will use an appropriate analogy—the rude driver—to explain the benefits of civility and professionalism. Part B will then discuss some of the standards for civility and professionalism and discuss why following them benefits attorneys.

A. *The Rude Driver—An Analogy*

Why should I use civility and professionalism in my practice of law? I ask myself that question every morning at a particular intersection on the way into work. The road I travel expands to two lanes for about one hundred yards as it approaches a stop light at this intersection. After the intersection, the road immediately becomes only one lane again. Despite the fact that it expands to two lanes approaching the intersection, everyone merges into one lane and proceeds in an orderly fashion, one at a time, through the intersection, where the road becomes one lane again. Well, not everyone. Every so often, a more aggressive driver will seek to gain five or six car-lengths on everyone else by moving into the unused lane, passing several stopped cars, then merging back into traffic at the last minute, usually after a sparring match with the cars that followed the unwritten rules and stayed in line.

Consider the driver who moves into the unused lane. He or she does so to gain some immediate advantage over the dolts who dutifully wait their turn in line, and the driver usually succeeds in passing a few cars. But the gain of a few car-lengths comes with unseen costs. The driver's reputation will suffer as the other drivers will mutter to themselves about the failure of the offender's parents to raise their child properly. More importantly, other drivers will see the potential gain that comes from breaking the rules. As other drivers abandon civility for a perceived short-term gain, travelling through that intersection becomes time consuming and stressful for everyone. The aggressive driver gains the perceived advantage only because everyone else stays in other lane. Once everyone breaks for the shortest line, every single car becomes a combatant at the merge; any shortcut previously available when others were abiding by the rules evaporates, and everyone, including the aggressive driver, is worse off.

Finally, there is also the cost to the driver's integrity. Unless the driver actually believes that she is better than everyone else and that the rules of accepted conduct do not apply to her, she knows that what she is doing is wrong or at least unfair. Other drivers are there to remind her, by swinging into her lane to slow her down or by not letting her merge back in after the light.

B. *Using Civility in the Practice of Law*

Why have I spent so much time pondering my morning commute in this context? I ponder the rude driver because a lawyer who lacks civility presents these same temptations, problems, and hidden costs, all of which affect the profession, individual attorneys, and also clients. Just like the drivers at the stop light on my morning commute would be better off if everyone merged into a single lane, there is no question that the profession as a whole—and the clients we serve—would be better off if everyone followed the rules.

Many problems would be solved if lawyers followed the rules of civility and professionalism. For instance, the system would proceed more efficiently. Needless disputes would be

avoided. Everyone could focus on the merits of the case. For instance, consider the Standards for Professional Conduct, discussed in Part II. These standards ask that lawyers

- treat their clients with courtesy and respect;
- advise clients against pursuing meritless litigation and against using tactics that are intended to delay resolution of the matter, to harass, or to drain the financial resources of the opposing party;
- treat opposing counsel, parties, and witnesses in a civil and courteous manner;
- stipulate relevant matters if they are undisputed;
- refrain from using discovery as a means of harassment;
- refrain from obstructing questioning during a deposition;
- ask only those deposition questions that are necessary or appropriate for the prosecution or defense of an action;
- draft only those document requests and interrogatories that are necessary and appropriate for the resolution of the action;
- respond to the document requests and interrogatories truthfully, without straining to interpret requests in an artificially restrictive manner;
- refrain from filing frivolous motions; and
- be candid with the court and refrain from misrepresenting, mischaracterizing, misquoting, or misciting facts or authorities to the court.[8]

Looking at these standards, one is left to wonder why they have been characterized as "aspirational." If these are the standards to which our profession "aspires," what type of conduct do we currently consider acceptable? Do we accept conduct that is discourteous, disrespectful, dilatory, obstructionist, or deceptive? As discussed more fully in Part IV.B, that may indeed be how the public perceives our profession. It is hard to imagine a system that is fully functional if it accepts disrespectful and discourteous behavior.

In fact, in a number of instances, the rules of professionalism and civility are not merely "aspirational," but instead, are enforced by state bar associations and courts. For instance, many states have adopted the Model Rules of Professional Conduct, which, if violated, may lead to censure, suspension, fines, or disbarment. Rule 1.3, for example, requires lawyers to make reasonable efforts to expedite litigation. Rule 3.4 forbids frivolous discovery requests and lack of reasonable diligence in responding to discovery. Rule 3.5 forbids ex-parte communications with the court and conduct intended to disrupt a tribunal. Rule 4.4 prohibits attorneys from conduct that has no substantial purpose other than to embarrass, delay, or burden a third person.

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[8] *See* Standards for Professional Conduct, *supra* note 6.

Although these standards are enforceable by the state bar association and courts, as we all know, only extreme cases reach the point of formal bar discipline. Thus, the Rules do not and cannot effectively enforce "fair play." Attorneys will always have the opportunity to cut corners. As lawyers, we can gain 'a few car lengths' in any number of ways by ignoring the standards of conduct and by gaining a quick advantage.

IV.
Benefits of Civility

Why then, should individual lawyers join the "self-anointed civility police" referenced above? After all, we have a duty to represent our clients zealously. I submit that it is in the self-interest of individual lawyers, as well as the profession, to commit to high standards of professionalism and civility. Specifically, by following the rules of professional conduct, lawyers can maintain their reputations, can increase job satisfaction, and can ensure job security.

A. *Reputation and Job Satisfaction*

One advantage our discourteous driver has over attorneys is anonymity. No one knows the offending driver. He or she can be disrespectful and discourteous and will not be held accountable beyond a gesture or the honk of a horn. That anonymity does not exist for trial lawyers, particularly in a small state like Rhode Island where I practice. Rhode Island attorneys quickly recognize and remember a colleague who cuts corners or is difficult to deal with. From that point forward in the discourteous lawyer's career, every call will be confirmed with a letter, and every request will be met with resistance because his or her adversaries will remember the offending conduct. Costs to the discourteous lawyer's client will mount unnecessarily.

Because of these negative consequences, the discourteous lawyer's job will become more difficult and stressful. A simple test proves this proposition. Think of the more discourteous lawyers you have encountered. Do they seem happy? Do any of them appear to take any joy from their work? Now think of lawyers you know who observe high standards of civility and professionalism. How do the courteous lawyers compare in apparent job satisfaction to the discourteous lawyers? Further, I submit that if you think about lawyers who are most effective—the lawyers you would hire for your own case—those lawyers will be on the "courteous" list, and not on the "discourteous" list. Reputation matters.

Nationwide, the side effects from the more stressful practice of law are reaching systemic proportions. More than half of all practitioners report that they are dissatisfied with the profession.[9] Twenty percent of all lawyers are "extremely dissatisfied" with their jobs.[10]

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[9] O'Connor, *supra* note 2, at 5.

[10] Daicoff, *supra*, note 3, at 1347.

Lawyers also have significantly higher indices of depression and alcoholism than the general population.[11] More starkly, a National Law Journal Study reported that more than half of the attorneys surveyed described their colleagues as "obnoxious."[12] These are the people we deal with every day. As the cotton commercial says, other lawyers "are the fabric of our lives," as we are theirs. With fifty percent of us counted as "obnoxious" by our peers, perhaps we are more burlap than cotton.

B. *Economics*

Declining civility also affects attorneys' abilities to make a living. Much has been written about how law is becoming more of a business and less of a profession and about how this trend leads to a decline in civility. As a group, attorneys should resist practicing law with a strictly business approach, if not for high-minded principle, then out of self-interest. I recently had a discussion that brought this lesson home to me at a meeting of a national association of attorneys. A representative of a large insurer was discussing the company's latest methodologies and data respecting metrics in the provision of legal services. At one point, I raised my hand and suggested that the speaker might just as well be addressing the manufacture of toothpaste tubes or plastic lids as the hiring and managing of litigation counsel. I noted that his discussion reduced lawyers to widgets and that I hoped it had not come to that. The speaker responded that lawyers are much more like widgets than we would care to believe, and then turned back to continue a discussion of his charts.

Public perception of lawyers directly impacts their value. Is it coincidence that a decline in professionalism in the practice of law has been accompanied by an increase in exhaustive billing guidelines detailing what attorneys may and may not bill for and client audits of attorneys' bills? Common sense suggests that lack of trust in attorneys and increased scrutiny of attorney fees go hand-in-hand. In 2004, a Gallup poll on the ethical standards of various professions ranked lawyers above only members of Congress, advertising practitioners, and car salesmen.[13] In another study, sixty-two percent of a group of potential jurors believed that an attorney was "likely" to lie to them during a trial; less than ten percent of the respondents thought it was "very unlikely" that an attorney would lie during the course of a trial.[14] These poll participants might be our next client or juror. The declining reputation of attorneys directly affects how and whether we can do our job. Having clients, juries, and judges trust in our honesty is our life-blood.

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[11] *Id.*

[12] O'Connor, *supra* note 2, at 7.

[13] *See Nurses Top List for Honesty*, CBS News, (Dec. 8, 2004), http://www.cbsnews.com/stories/2004/12/08/health/webmd/main659857.shtml.

[14] Stephen D. Easton, *The Truth About Ethics and Ethics About the Truth: An Open Letter to Trial Attorneys*, 33 Gonz. L. Rev. 463, 463 (1997–1998).

There is another possible hidden cost to decreased civility. The civil justice system is teetering on failure. The jury trial is an endangered species. One of the leading reasons is cost. Clients simply cannot afford to take cases to trial. Motions and discovery consume resources at such an alarming rate that there is nothing left for the main event. The American College of Trial Lawyers has declared that, "[a]lthough the civil justice system is not broken, it is in serious need of repair."[15] In many jurisdictions, the civil justice system takes too long and costs too much. The United States Supreme Court declared that increasing discovery costs may prompt settlement of meritless cases.[16] Civility and professionalism make the judicial process proceed more efficiently. Cases tried between professional attorneys proceed more quickly through the system and are more often resolved on the merits. If attorneys want to preserve the system from which we all derive our livelihoods (and some enjoyment), we need to dedicate ourselves to making the system work.

V.
Conclusion

Preserving and improving civility starts with the realization that professionalism and civility have actual value to our practices and our lives. Civility and professionalism are not just about adhering to a higher calling, and they should not be discounted.

Civility helps build and maintain clients. Noted practice development author Jay Foonberg states that clients want ethical lawyers.[17] He also discusses the reasons why clients change lawyers, including unavailability, lack of attention, and lack of expertise.[18] Compare these foibles to the Standards of Professional Conduct referenced above. Under the Standards, lawyers must treat their clients with courtesy and respect, remain loyal to their clients, keep their clients informed, and reach clear understandings with their clients about such things as the scope of representation and fees. They are asked to keep current in their practice areas. These are not just proscriptions for civility; they are practices that promote good lawyering and good client relations.

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[15] Institute for the Advancement of the American Legal System, Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System 2 (Mar. 11, 2009), http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4053.

[16] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 559 (2007) (stating that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings").

[17] Jay G. Foonberg, How to Get and Keep Good Clients 229 (1986).

[18] *Id.* at 153-155.

Civility and professionalism also improve the quality of lawyers' daily lives. Committing ourselves to the ideal that we are participants in a higher calling—a learned art—provides some defense and protection against our being treated as interchangeable widgets. Attorneys deal with conflict and dispute as their stock in trade. Being an attorney is stressful enough without the added stress of discourteous and dishonest opposing counsel. Adhering to a universal set of principles will ease the potential conflict. Attorneys can choose a "Hobbesian life" that is solitary, poor, nasty, brutish, and short. But there is a better way.

The Federation of Insurance Counsel was organized in 1936 for the purpose of bringing together insurance attorneys and company representatives in order to assist in establishing a standard efficiency and competency in rendering legal service to insurance companies, and to disseminate information on insurance legal topics to its membership. In 1985, the name was changed to Federation of Insurance and Corporate Counsel, thereby reflecting the changing character of the law practice of its members and the increased role of corporate counsel in the defense of claims. In 2001, the name was again changed to Federation of Defense & Corporate Counsel to further reflect changes in the character of the law practice of its members.

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