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Court Review

Volume 50, Issue 3

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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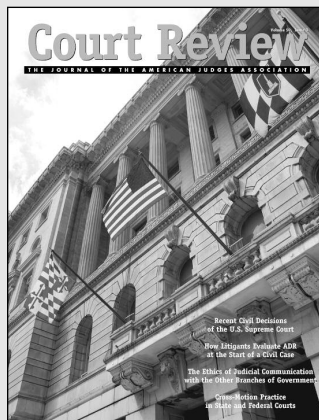
EDITOR'S NOTE

Our issue begins with Professor Todd Pettys' annual review of the United States Supreme Court's civil cases from the past Term. This Term, much of the notable action was on the civil side—rulings on the Affordable Care Act, the First Amendment, campaign finance, affirmative action, the religious rights of closely held corporations, and more. American Judges Association members who have given the AJA their e-mail addresses received this article as soon as it was published, only a month after the end of the Court's Term.

Professor Donna Shestowsky summarizes the findings of research she conducted in which she studied how litigants evaluate legal procedures (e.g., mediation, nonbinding arbitration, trial) at the inception of their civil cases. Her results are consistent with the procedural-justice findings *Court Review* articles have been highlighting for years: Litigants prefer procedures that provide them with the opportunity for direct participation in the resolution of their cases.

Federal law clerk Michael Langan and attorney Jason Halpin, a former clerk, provide an overview of civil practice involving cross-motions in both state and federal court. Judges handling civil cases will find helpful citations to both federal and state caselaw on the procedural rules that sometimes trip up practitioners—and judges—handling cross-motion practice.

Judge (now professor) Raymond McKoski takes up the problem of and opportunities for courts communicating with the “political branches,” including “judicial impact statements, state of the judiciary messages, judicial opinions, service on legislative and executive commissions, and testifying before, and consulting with, governmental committees and officials.” His article focuses on the ABA's Model Code of Judicial Conduct, and Judge McKoski concludes with specific recommendations for judges.—SL & AT



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 125 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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Cover photo, Mary S. Watkins (maryswatkins@mac.com). The cover photo is the Clarence M. Mitchell, Jr., Courthouse in Baltimore, Maryland. Constructed between 1895 and 1899, the courthouse occupies a full city block. The Circuit Court for Baltimore City occupies the building, which was rededicated in 1985 in the name of Mitchell, a well-known civil-rights leader from Baltimore. For more information about the courthouse and Mitchell, go to <http://goo.gl/Lg813p>.

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President's Column

Elliott Zide

It has been my privilege to represent the American Judges Association at a great many meetings and conferences over the past year. Our organization is widely respected.

The organization and its leadership are acknowledged as an effective "Voice of the Judiciary®," for "Making Better Judges®," for high-quality conferences, for excellent judicial-education programs, and for the developing AJA brand in the area of procedural fairness. At our midyear meeting in May, the new Arizona Chief Justice, Scott Bales, particularly commented on the value of *Court Review*, our quarterly journal, as a scholarly yet practical tool for judges at all levels to learn more about cutting-edge topics such as those in this edition.

During the many conversations I've had with judicial leaders, I've often heard the statement, "We need to collaborate." AJA is establishing itself as an important collaborator in the constellation of organizations seeking to improve access to fair and impartial justice for all.

AJA is now collaborating with state organizations in the United States, provincial court organizations in Canada, and volunteer organizations on a number of criminal- and civil-justice reforms. Here are some examples. In October, I represented AJA at the National Association of Drug Court Professionals' two-day Doing Justice Executive Summit on criminal sentencing and pretrial reform. That led to the development of an important resolution now adopted by CCJ/COSA and AJA calling for all criminal-justice reform efforts to be explicitly informed by evidence-based practices. The AJA has a designated place on the Pretrial Justice Working Group, a standing, multidisciplinary working group of national leaders in criminal justice, which works on issues of pretrial justice reform. In June, I participated in the Working Group's Pretrial Justice Reform Forum to foster state-court leadership on evidence-based pre-

trial practices. Attendees included representatives from the states of Arizona, Wisconsin, Idaho, and Indiana. The AJA boasts active membership in each of those states.

Next year, we look forward to a collaborative conference on "Justice for All" with the State of Washington's Administrative Office of the Courts and the National Association of State Judicial Educators to be held in Seattle on October 4-8, 2015. The AJA is collaborating with the National Association of Women Judges' award-winning Informed Voter Project. And our new

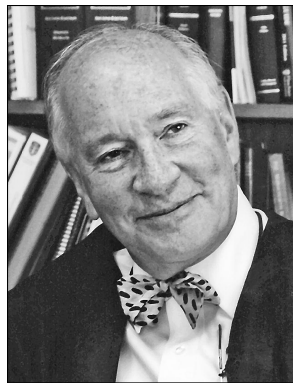
collaboration with the Conference of Chief Justices' Judicial Family Institute will bring a wide variety of resources that will support the security, mental, physical, and financial wellness of AJA members and their families.

Networking over the past year has informed me that all of our peer organizations are finding it challenging to attract new and younger members. It is key to the vitality of organizations like

AJA that new and younger members be added to our active rosters. It's equally important that new and younger judges appreciate the benefit of belonging to organizations like AJA, so we need to learn how to make a better case for that proposition.

Our members are nationally respected for work they do in their own states. The AJA is pleased to honor many at our annual meetings. This year AJA is very proud to congratulate Past President Steve Leben, a judge on the Kansas Court of Appeals and the coeditor of *Court Review*, on receiving this year's William H. Rehnquist Award for Judicial Excellence. That award will be presented to him by Chief Justice of the United States John H. Roberts Jr. at a dinner at the United States Supreme Court on November 20.

I've loved my year as your president, and I look forward to our annual conference in Las Vegas, October 5-10, 2014. Please come too.



Doubting Abood, Finding Religion at Hobby Lobby, and More: Civil Cases in the Supreme Court's 2013-2014 Term

Todd E. Pettys

The Court's 2013-2014 Term did not begin auspiciously. In *Madigan v. Levin*¹—the first orally argued case of the new session—the justices were slated to decide whether the Age Discrimination in Employment Act leaves employees of state and local governments free to bring age-discrimination claims under Section 1983 and the Equal Protection Clause. After a variety of procedural and substantive difficulties emerged during oral argument, however, the Court declared that its grant of certiorari had been improvident.² Happily, *Madigan* proved to be a quickly forgotten bump in the road. Over the following nine months, the Court handed down yet another set of important and interesting rulings in civil cases, on matters ranging from abortion clinics' buffer zones to *Younger* abstention. Like the civic leaders of Greece, New York, we will begin by turning our thoughts to prayer.

FIRST AMENDMENT: ESTABLISHMENT CLAUSE

In *Town of Greece v. Galloway*,³ a 5-4 Court upheld Greece's practice of inviting local clergy and laypeople to open each of the town's monthly board meetings with a prayer. During the 12-year period at issue, Greece never denied a non-Christian's request to serve as a prayer-giver, but the overwhelming majority of those who were solicited by the town's staff or who volunteered on their own initiative were Christian ministers.⁴ The town did not screen the prayers in advance, nor did it provide advice about the kinds of things that the prayers should or should not include. Many of the prayers were explicitly Christian in content.

Joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, Justice Kennedy found the Court's 1983 ruling in *Marsh v. Chambers*⁵ all but dispositive. Upholding the Nebraska legislature's practice of beginning each day with a prayer, the *Marsh* Court had relied heavily upon its histori-

cal survey of the legislative prayer practices that prevailed from the colonial era through the following two centuries. Writing in *Town of Greece*, Justice Kennedy found that "*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted."⁶ Many of the founding-era prayers offered in Congress and elsewhere were sectarian in nature, the Court said, and so the fact that tenets of Christianity appeared prominently in many of the prayers in Greece's town meetings was not constitutionally problematic. "Once it invites prayer into the public sphere," Justice Kennedy wrote, "government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian."⁷ That does not necessarily mean, however, that the Constitution places no limits on the prayers' contents:

If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.⁸

In a portion of his opinion joined only by Chief Justice Roberts and Justice Alito, Justice Kennedy found that nonbelievers in attendance at Greece's board meetings were not psychologically coerced into participating in the prayers. Justices Thomas and Scalia wrote separately to reiterate their view that, when it comes to finding Establishment Clause violations, the only kind of coercion that matters is "actual legal coercion," where those who resist face law-backed threats of penalties.⁹

Footnotes

1. No. 12-872.
2. 134 S. Ct. 2 (2013). For an account of the difficulties, see Lyle Denniston, *Argument Recap: A Bad Way to Open a Term*, SCOTUSBLOG, Oct. 7, 2013, <http://www.scotusblog.com/2013/10/argument-recap-a-bad-way-to-open-a-term>.
3. 134 S. Ct. 1811 (2014).
4. During that 12-year period, only four non-Christians provided the prayers, and all four of those appeared in 2008, when the town first heard rumblings of litigation.
5. 463 U.S. 783 (1983).
6. 134 S. Ct. at 1819.

7. *Id.* at 1822-23.
8. *Id.* at 1823; see also *id.* at 1824 ("Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation.").
9. *Id.* at 1838 (Thomas, J., concurring in part and concurring in the judgment); cf. *Van Orden v. Perry*, 545 U.S. 677, 693-94 (2005) (Thomas, J., concurring); *Lee v. Weisman*, 505 U.S. 577, 640-41 (1992) (Scalia, J., dissenting). Writing solely for himself, Justice Thomas also reiterated his view that the Establishment Clause is a "federalism provision" principally aimed at preventing Congress both from establishing a national religion and from interfering

Justice Kagan dissented, joined by Justices Ginsburg, Breyer, and Sotomayor. She found that Greece's actions differed from those of the Nebraska legislature in *Marsh* in problematic ways but that the town could have cured the constitutional defects either by advising the prayer-givers to "speak in nonsectarian terms, common to diverse religious groups," or by ensuring that clergy representing different faiths deliver the prayers so that "the government does not identify itself with one religion or align itself with that faith's citizens."¹⁰

FIRST AMENDMENT: SPEECH

ABORTION CLINICS AND BUFFER ZONES

In 2007, Massachusetts made it a crime to "knowingly enter or remain on a public way or sidewalk" within 35 feet of the entrance or driveway to a facility (other than a hospital) that performs abortions.¹¹ The statute exempted those who were entering or leaving such a facility, those who were agents or employees of the facility and acting within the scope of their employment, certain government officials, and people who were merely passing through. Several individuals challenged the law, saying that they wished to engage abortion-seeking women in non-confrontational "sidewalk counseling" and to offer them anti-abortion literature—things that they could not do nearly as easily when categorically barred from entering the buffer zones defined by state law. In *McCullen v. Coakley*,¹² all nine justices agreed that the statute violated the First Amendment, but they were divided on the reasons.

Chief Justice Roberts wrote for the majority, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. In their judgment, the Massachusetts statute was content-neutral. The law was driven not by a desire to squelch anti-abortion speech, the Court said, but rather by the need to deal with the safety and access issues that arise when large numbers of people congregate outside abortion clinics. The majority nevertheless held the law unconstitutional because it burdened substantially more speech than was necessary to achieve the state's objectives. The Court said that the state could, for example, rely more heavily upon an unchallenged state law that makes it a crime to knowingly impede a person's entry into a clinic; it could adopt legislation modeled on the federal Freedom of Access to Clinic Entrances Act (which bans the use of force, physical obstruction, and intimidation against a person seeking reproductive services); or it could adopt legislation modeled on a New York City ordinance that makes it a crime to follow and harass a person within close proximity to an abortion clinic's entrance.

Justice Scalia concurred in the judgment, joined by Justices Kennedy and Thomas. He insisted that the statute was content-based and that strict scrutiny thus ought to be applied. "Every objective indication shows," he wrote, "that

the [statute's] primary purpose is to restrict speech that opposes abortion."¹³ By finding the law content-neutral, he argued, the majority had "carrie[d] forward this Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents."¹⁴ He conceded that he likely agreed with the majority's finding that the law was insufficiently tailored but said that he declined to join that part of the Chief Justice's opinion because he "prefer[ed] not to take part in the assembling of an apparent but specious unanimity."¹⁵ Justice Alito similarly concurred in the judgment, finding that the statute "blatantly discriminates based on viewpoint."¹⁶

The majority . . . held the law unconstitutional because it burdened substantially more speech than was necessary to achieve the state's objectives.

CAMPAIGN FINANCE

In *McCutcheon v. FEC*,¹⁷ the Court voted 5-4 to strike down federal aggregate limits on campaign contributions. The Federal Election Campaign Act of 1971 (FECA), as amended by the Bipartisan Campaign Reform Act of 2002, imposes base limits on how much an individual may contribute per election cycle to a given federal candidate, party committee, or political action committee. That legislation also imposed *aggregate* limits on how much an individual could contribute in an election cycle to all federal candidates and to certain political committees. The government's primary rationale for the aggregate limits was that they prevented donors from circumventing the base limits and from thereby triggering the same *quid pro quo* corruption concerns that the base limits were intended to address.

Wishing to make sizable contributions to federal candidates across the country and to a variety of Republican national party committees, Shaun McCutcheon bumped up against the aggregate limits during the 2011-2012 election season and believed he would encounter the same difficulty in the future. He filed suit, alleging that those limits impinged upon his First Amendment rights of speech and association. The Republican National Committee (RNC) joined the challenge, arguing that this was a welcome opportunity for the justices to reject the constitutional distinction that the Court drew in *Buckley v. Valeo*¹⁸ between expenditures and contributions. Under *Buckley*, the Court strictly scrutinizes restrictions on campaign expenditures but reviews restrictions on campaign contributions somewhat more leniently. The RNC

with states' choices about whether to establish religions of their own. *Town of Greece*, 134 S. Ct. at 1835-37 (Thomas, J., concurring in part and concurring in the judgment).

10. *Id.* at 1851 (Kagan, J., dissenting).

11. MASS. GEN. LAWS ch. 266, § 120E1/2(b). The statute applied only during such facilities' business hours and required that the buffer zones be "clearly marked and posted." *Id.* § 120E1/2(c).

12. 134 S. Ct. 2518 (2014).

13. *Id.* at 2544 (Scalia, J., concurring in the judgment).

14. *Id.* at 2541 (Scalia, J., concurring in the judgment).

15. *Id.* at 2548 (Scalia, J., concurring in the judgment).

16. *Id.* at 2550 (Alito, J., concurring in the judgment).

17. 134 S. Ct. 1434 (2014).

18. 424 U.S. 1 (1976).

Taking a fresh look at the matter, . . . the plurality concluded that the aggregate limits placed unwarranted restraints on donors' First Amendment rights.

Chief Justice acknowledged that the *Buckley* Court had upheld FECA's aggregate limit, but he pointed out that the Court had only "spent a total of three sentences" on the issue and that the litigants in *Buckley* had focused most of their energies elsewhere.¹⁹ Taking a fresh look at the matter, and pointing to a range of ways in which circumventing the base limits is either illegal or impractical (or could be made so by Congress), the plurality concluded that the aggregate limits placed unwarranted constraints on donors' First Amendment rights. The Chief Justice acknowledged that the ruling was likely to be unpopular in some circles but insisted that it flowed from the demands of the First Amendment. "If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause," Chief Justice Robert wrote, "it surely protects political campaign speech despite popular opposition."²⁰

Concurring in the judgment, Justice Thomas reiterated his view that the Court should abandon *Buckley*'s distinction between contributions and expenditures and should review limitations on the former just as skeptically as it reviews limitations on the latter.²¹ He nevertheless expressed satisfaction that the plurality's opinion "continues to chip away at [*Buckley*'s] footings."²²

Joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Breyer dissented, embracing the Government's defense of the aggregate limits. "Taken together with *Citizens United v. Federal Election Commission*," he wrote, "today's decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve."²³

PUBLIC-SECTOR UNIONS

Two years ago, writing for a 5-4 majority in *Knox v. Service Employees International Union*,²⁴ Justice Alito stated in dictum

urged the Court to apply strict scrutiny across the board.

In a plurality opinion joined by Justices Scalia, Kennedy, and Alito, Chief Justice Roberts declined the RNC's invitation to abandon the expenditure-contribution distinction but nevertheless concluded that the aggregate limits on contributions did not adequately serve the Government's interest in avoiding *quid pro quo* corruption. The

that allowing state and local governments to force their employees to pay fees to unions—even if those employees are not themselves union members—raises serious First Amendment concerns. In *Harris v. Quinn*,²⁵ decided this past Term, litigants and their *amici* launched a full-fledged effort to persuade the Court to close that circle by overruling *Abood v. Detroit Board of Education*²⁶ and holding that public employees who decline to join a union have a First Amendment right to refuse to contribute to that union's expenses, even if they benefit from the union's collective-bargaining activities. Writing again for the same five-justice majority, Justice Alito declined that invitation but once again made it clear that *Abood*'s longevity is far from assured.

The dispute in *Harris* concerned individuals who work as "personal assistants" in Illinois, providing in-home care for Medicaid recipients. The personal assistants are jointly employed by the State of Illinois (which compensates them) and by Medicaid beneficiaries (who hire and supervise them). SEUI Illinois & Indiana serves as the personal assistants' exclusive bargaining representative with the state. The plaintiffs were personal assistants who declined to join the union and who objected to a requirement that they pay the union an "agency fee" to help cover the costs of collective bargaining. A ruling in the plaintiffs' favor on that point would have necessitated overruling *Abood*.

Led by Justice Alito, the Court refrained from abandoning *Abood*, choosing instead to find that precedent distinguishable. *Abood*, the Court reasoned, applies only to "full-fledged public employees," rather than to those whose work—like that of the personal assistants here—is controlled in significant ways by non-governmental employers.²⁷ Freed of *Abood*'s constraints, the majority found that the agency-fee requirement violated the plaintiffs' First Amendment rights by compelling them to speak. Justice Alito nevertheless devoted 13 pages of his slip opinion to dictum arguing that *Abood* was thinly reasoned and is "questionable on several grounds."²⁸

Justice Kagan wrote for the dissenters, finding *Abood* indistinguishable but expressing relief that the majority stopped short of overruling that decision altogether. Recognizing that *Abood*'s future nevertheless remains in doubt, Justice Kagan insisted that it be preserved. "Our precedent about precedent, fairly understood and applied," she wrote, "makes it impossible for this Court to reverse that decision."²⁹ The majority dismissed Justice Kagan's discussion of *stare decisis* as "beside the point."³⁰

PUBLIC EMPLOYEES' TESTIMONY

Suppose that a public employee testifies truthfully in a court proceeding about information he learned while doing

19. *McCutcheon*, 134 S. Ct. at 1446.

20. *Id.* at 1441.

21. *Cf.*, e.g., *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 412-20 (2000) (Thomas, J., dissenting).

22. *McCutcheon*, 134 S. Ct. at 1464 (Thomas, J., concurring in the judgment).

23. *Id.* at 1465 (Breyer, J., dissenting) (citing *Citizens United, Inc. v. FEC*, 558 U.S. 310 (2010)).

24. 132 S. Ct. 2277 (2012).

25. 134 S. Ct. 2618 (2014).

26. 431 U.S. 209 (1977).

27. *Harris*, 134 S. Ct. at 2638.

28. *Id.* at 2632.

29. *Id.* at 2645 (Kagan, J., dissenting).

30. *Id.* at 2638 n.19.

his job but that the act of testifying is not itself among that employee's typical job responsibilities. Does the First Amendment protect the employee against any adverse action that the testimony might provoke his employer to take against him? That was the question before the Court in *Lane v. Franks*.³¹ While working as the director of an Alabama-funded program, Edward Lane uncovered evidence that a member of the Alabama legislature was billing the state for work she never actually performed. When federal officials subsequently launched criminal proceedings against the legislator, Lane testified both before the grand jury and then again at trial. When Steve Franks, Lane's supervisor, terminated Lane's employment not long thereafter, Lane brought suit against Franks and others, claiming a retaliatory violation of his First Amendment rights. The Eleventh Circuit held that the First Amendment offered Lane no protection. Under *Garcetti v. Ceballos*,³² the court of appeals reasoned, Lane was testifying as a state employee—not as a citizen—because he was testifying about information he learned during the course of his employment.

Led by Justice Sotomayor, the Court unanimously reversed, explaining that “[t]he critical question under *Garcetti* is whether the speech at issue is *itself* ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.”³³ The Court declined to say whether the First Amendment protects employees (such as police officers and crime-lab technicians) whose jobs do ordinarily include testifying in judicial proceedings. In a brief concurring opinion joined by Justices Scalia and Alito, Justice Thomas reiterated that that important question was reserved “for another day.”³⁴

VIEWPOINT DISCRIMINATION

Nearly 10 years after President George W. Bush made a last-minute change of dinner plans while campaigning in Jacksonville, Oregon, a unanimous Court in *Wood v. Moss*³⁵ finally resolved the dinner decision's legal consequences. Scrambling to protect the President after he decided to eat in the outdoor patio area of a local restaurant, members of the Secret Service had moved a group of protestors to a location that was a little farther away from President Bush than a group that had gathered to voice their admiration of him. The protestors alleged that the Secret Service agents had committed viewpoint discrimination in violation of the First Amendment.

Just as it had done in several prior cases, the Court assumed, without deciding, that the First Amendment creates an implied right of action for damages against federal officials. Writing for

the Court, Justice Ginsburg explained that the agents were nevertheless entitled to qualified immunity because “[n]o decision of this Court so much as hinted [to the agents] that their on-the-spot action was unlawful because they failed to keep the protestors and supporters, throughout the episode, equidistant from the President.”³⁶ The Court relied heavily upon a map that the plaintiffs had attached to their complaint, which showed that, until the Secret Service moved them, the protestors had a direct line of sight to—and were within weapons range of—the President's dining location, while a two-story building stood between the President and the spot where his supporters had gathered.

Nearly 10 years after President George W. Bush made a last-minute change of dinner plans . . . , a unanimous Court in *Wood v. Moss* finally resolved the dinner decision's legal consequences.

FOURTEENTH AMENDMENT

RACE-BASED PREFERENCES IN PUBLIC UNIVERSITY ADMISSIONS

For the second consecutive year,³⁷ the Court handed down a major decision concerning racial preferences in public universities' admissions processes. At issue in *Schuetz v. Coalition to Defend Affirmative Action*³⁸ was a 2006 amendment to the Michigan Constitution forbidding racial preferences in (among other things) public education. A few years earlier, the Court had upheld the University of Michigan Law School's race-conscious efforts to assemble a diverse student body, finding that the school's efforts were narrowly tailored to achieve a compelling state purpose.³⁹ The Court had not said that such efforts were constitutionally *required*, however, and Michigan voters opted to bring them to an end.

Citing the “political-process doctrine”—a doctrine it traced to *Hunter v. Erickson*⁴⁰ and *Washington v. Seattle School District No. 1*⁴¹—the *en banc* Sixth Circuit found that the Michigan amendment violated the Equal Protection Clause because it “(1) has a racial focus, targeting a policy or program that ‘inures primarily to the benefit of the minority’; and (2) real-locates political power or reorders the decisionmaking process in a way that places special burdens on a minority group's ability to achieve its goals through that process.”⁴²

31. 134 S. Ct. 2369 (2014).

32. 547 U.S. 410 (2006).

33. *Lane*, 134 S. Ct. at 2379 (emphasis added). The Court further held, however, that because this doctrinal matter had not been clearly settled at the time Franks took action against Lane, Franks was protected by qualified immunity.

34. *Id.* at 2384 (Thomas, J., concurring).

35. 134 S. Ct. 2056 (2014).

36. *Id.* at 2061.

37. The Court ruled in *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013), that when reviewing a public university's race-conscious efforts to assemble a diverse class of entering students, a court

must not defer to the university's choice of means. The court “must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.” *Id.* at 2420.

38. 134 S. Ct. 1623 (2014).

39. *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

40. 393 U.S. 385 (1969).

41. 458 U.S. 457 (1982).

42. *Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 477 (6th Cir. 2012) (*en banc*) (quoting *Seattle Sch. Dist.*, 458 U.S. at 472), *rev'd sub nom.* *Schuetz v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

The plurality said that the political-process doctrine unwisely presumed that racial categories can be clearly delineated and that members of an identified racial group share common political interests.

A divided Supreme Court reversed.⁴³ In a plurality opinion joined by Chief Justice Roberts and Justice Alito, Justice Kennedy rejected the political-process doctrine and concluded that *Hunter* and *Seattle School District No. 1* were best understood as having been decided on other grounds.⁴⁴ The plurality said that the political-process doctrine unwisely presumed that racial categories can be clearly delineated and that members of an identified racial group share common political interests. Perhaps even more fundamentally, the plurality said, “[i]t is demeaning to

the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.”⁴⁵

Joined by Justice Thomas, Justice Scalia concurred in the judgment, arguing that the plurality had stretched too far to find rationales on which the outcomes in *Hunter* and *Seattle School District No. 1* could be justified. Justice Scalia feared that lurking in the plurality’s refusal to overrule those cases was a willingness to accept “the proposition that a facially neutral law may deny equal protection solely because it has a disparate racial impact.”⁴⁶ A party alleging racial discrimination in violation of the Equal Protection Clause must prove discriminatory purpose, Justice Scalia wrote, and those challenging Michigan’s constitutional amendment “do not have a prayer of proving it here.”⁴⁷

Justice Breyer concurred in the judgment, finding it unnecessary to decide whether to embrace the political-process doctrine because, in his view, Michigan voters had not reordered the political process.⁴⁸ He concluded that the Constitution posed no obstacles to the Michigan amendment.

Joined by Justice Ginsburg, Justice Sotomayor dissented,

strongly embracing the Sixth Circuit’s articulation of the political-process doctrine and arguing that it demanded invalidation of the Michigan amendment. Linking the Court’s contrary ruling to Chief Justice Roberts’s declaration in 2007 that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,”⁴⁹ she insisted that this was “a sentiment out of touch with reality.”⁵⁰ That claim prompted Chief Justice Roberts to file a brief concurrence, arguing that “[p]eople can disagree in good faith [about the desirability of racial preferences], but it . . . does more harm than good to question the openness and candor of those on either side of the debate.”⁵¹

EXECUTIVE POWER: RECESS APPOINTMENTS

Ordinarily, of course, the President must obtain the Senate’s “Advice and Consent” when appointing federal officers.⁵² In *NLRB v. Noel Canning*,⁵³ the Court resolved important issues concerning the President’s ability to evade Senate obstacles by exercising his power to “fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”⁵⁴ Led by Justice Breyer, a majority of the Court reached three significant conclusions. First, the Court held that the term “Recess” in the clause just quoted refers not only to breaks that happen between formal sessions of Congress but also to breaks “of substantial length” that occur within a given formal session.⁵⁵ Between the founding and the present day, Justice Breyer explained, presidents have made “countless” recess appointments during intra-session breaks, and the Senate has never taken the position that such appointments are categorically invalid.⁵⁶ With respect to how long an intra-session break must be in order to be deemed substantial, the Court found that “a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause.”⁵⁷

Second, the Court found that the recess-appointments power applies not only to vacancies that first arise during a recess (a point on which everyone agreed) but also to vacancies that arise before a recess and that continue to exist when the Senate breaks. The majority conceded that its interpretation was in tension with the language of Article II (“Vacancies

43. Justice Kagan did not participate in the case.

44. The plurality said that *Hunter* stands for “the unremarkable principle that the State may not alter the procedures of government to target racial minorities.” *Schuette*, 134 S. Ct. at 1632. As for *Seattle School District No. 1*, the plurality concluded that key passages on which the Sixth Circuit had seized “went well beyond the analysis needed to resolve the case.” *Id.* at 1634.

45. *Id.* at 1637.

46. *Id.* at 1647 (Scalia, J., concurring in the judgment).

47. *Id.* at 1648 (Scalia, J., concurring in the judgment).

48. He did, however, briefly express skepticism about the doctrine. See *id.* at 1651 (Breyer, J., concurring in the judgment) (“[T]he principle that underlies *Hunter* and *Seattle* runs up against a competing principle . . . favor[ing] decisionmaking through the democratic process.”).

49. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

50. *Schuette*, 134 S. Ct. at 1675 (Sotomayor, J., dissenting).

51. *Id.* at 1639 (Roberts, C.J., concurring).

52. U.S. CONST. art. II, § 2, cl. 2.

53. 134 S. Ct. 2550 (2014). The dispute in *Noel Canning* arose when the National Labor Relations Board ordered a Pepsi-Cola distributor to execute a collective-bargaining agreement with a labor union. The distributor argued that the board’s order was illegitimate because three of the board’s members had been invalidly appointed by President Obama during purported Senate recesses.

54. U.S. CONST. art. II, § 2, cl. 3.

55. *Noel Canning*, 134 S. Ct. at 2561.

56. *Id.* at 2564.

57. *Id.* at 2567. The Court noted that neither house of Congress is permitted to adjourn mid-session without the consent of the other for a period of “more than three days.” U.S. CONST. art. I, § 5, cl. 4. “A Senate recess that is so short that it does not require the consent of the House,” the majority reasoned, “is not long enough to trigger the President’s recess-appointments power.” *Noel Canning*, 134 S. Ct. at 2566.

that may *happen during* the Recess of the Senate”) but found that a broad reading best served the framers’ purpose of ensuring that the President can obtain the services of officers when the Senate is not available to confirm their appointments. The majority also relied heavily upon the fact that “[t]he tradition of applying the Clause to pre-recess vacancies dates at least to President James Madison” and has been followed over the ensuing generations on scores of occasions.⁵⁸

Finally, the Court held that, when calculating the length of a recess, *pro forma* sessions cannot be ignored. During the roughly month-long break at issue in this case, the Senate held twice-weekly *pro forma* sessions. President Obama had made the challenged appointments roughly in the middle of that month-long break, one day after one *pro forma* session and two days before the next. If the Court had disregarded those *pro forma* sessions, the Senate’s break easily would have been long enough to trigger the President’s recess-appointments power. The Court found, however, that “for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business.”⁵⁹ As a result, the challenged appointments in this case were made during a Senate break of only three days—a period not long enough to bring the recess-appointments power into play.

Joined by Chief Justice Roberts and Justices Thomas and Alito, Justice Scalia concurred only in the judgment. In his view, the recess-appointments power only comes into play during breaks between formal sessions of Congress and applies only “to vacancies that arise during the recess in which they are filled.”⁶⁰ Looking ahead to future separation-of-powers disputes, Justice Scalia worried that the majority’s “adverse-possession theory of executive power . . . will be cited in diverse contexts, including those presently unimagined, and will have the effect of aggrandizing the Presidency beyond its constitutional bounds.”⁶¹

RELIGIOUS FREEDOM RESTORATION ACT

In their final public sitting of the Term, the Court handed down one of the year’s most highly anticipated rulings. The issue in *Burwell v. Hobby Lobby Stores, Inc.*,⁶² was whether the Religious Freedom Restoration Act (RFRA) spares closely held for-profit corporations from the federal requirement that they provide their employees with health-insurance coverage for federally approved forms of birth control that the corporations’ owners regarded as methods of abortion.⁶³ By a 5-4 margin, the

Court held that RFRA does indeed lift that requirement from those corporations’ shoulders.⁶⁴

RFRA states that the federal government cannot “substantially burden” a person’s exercise of religion unless it can show “that application of the burden to the person . . . is the least restrictive means of furthering [a] compelling governmental interest.”⁶⁵ In an opinion by Justice Alito, the Court first found that for-profit corporations are “persons” within the meaning of the statute. The Dictionary Act explicitly includes corporations in that term’s definition, the Court said, and there is nothing about RFRA’s context that suggests Congress intended a narrower definition to apply. The Department of Health and Human Services had conceded during the litigation that non-profit corporations can be persons and can exercise religion within the meaning of RFRA, and the Court could find no persuasive reason to believe Congress intended otherwise with respect to corporations that seek a profit.

Having found RFRA applicable, the majority determined that the contraception mandate substantially burdens the exercise of religion by the plaintiff corporations and their owners because, if they ignored the mandate, the companies faced substantial annual fines. Assuming (rather than finding) that the contraception mandate furthered compelling governmental interests, the majority then determined that there were less restrictive means of achieving the government’s objectives. The federal government itself, for example, could assume the cost of providing the corporations’ female employees with full contraception coverage. Or the government could make available to closely held for-profit corporations the same accommodation that it already provides to nonprofit organizations with religious objections to the contraception mandate—namely, permit them to certify that they object to certain forms of contraception, thereby triggering a duty on the part of their insurance providers or third-party administrators to exclude those forms of contraception from the entities’ group health-insurance coverage and to provide separate payments for those contraceptive services.⁶⁶ The majority stressed that its decision “concerned solely . . . the contraceptive mandate” and “should not be understood to hold that an insurance-coverage mandate

In an opinion by Justice Alito, the Court first found that for-profit corporations are “persons” within the meaning of the statute.

58. *Id.* at 2570.

59. *Id.* at 2574.

60. *Id.* at 2606 (Scalia, J., concurring in the judgment). The majority replied that Justice Scalia’s reading of the Constitution “would render illegitimate thousands of recess appointments reaching all the way back to the founding era.” *Id.* at 2577.

61. *Id.* at 2618 (Scalia, J., concurring in the judgment).

62. Nos. 13-354, 13-356, 2014 U.S. LEXIS 4505 (June 30, 2014).

63. The birth-control methods to which the corporations objected were two kinds of morning-after pills and two kinds of intrauterine devices, all of which can terminate fertilized eggs’ development.

64. The three closely held for-profit corporations before the Court

were Conestoga Wood Specialties, Hobby Lobby Stores, Inc., and Mardel.

65. 42 U.S.C. §§ 2000bb-1(a), (b).

66. The majority reserved judgment, however, on whether this approach would itself violate RFRA—a reservation that would acquire great prominence just days after *Hobby Lobby Stores* came down. On July 3, 2014, the Court granted Wheaton College’s application for an order temporarily shielding it from having to follow the precise certification process prescribed by the government for nonprofit organizations with religious objections to the contraception mandate. That order drew a sharp dissent from the Court’s three female justices. See *Wheaton College v. Burwell*, No. 13A1284, __ S Ct. __, 2014 WL 3020426 (July 3, 2014).

Companies with substantial business operations in multiple states will be heartened by the Court's ruling in *Daimler AG v. Bauman*.

must necessarily fall if it conflicts with an employer's religious beliefs."⁶⁷ Justice Kennedy emphasized the decision's narrow scope in a separate concurrence.

Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan. Justice Ginsburg argued that the majority's decision would place significant burdens upon thousands of women who

worked for the plaintiff corporations and who desired the forms of contraception to which their employers objected. She found no reason to believe that Congress intended such a result, noting (in a portion of her opinion joined only by Justice Sotomayor) that "[u]ntil this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA."⁶⁸ Even if RFRA did apply, Justice Ginsburg wrote, the contraception mandate did not substantially burden the plaintiffs' exercise of religion because neither the corporations nor their owners were themselves required to purchase or provide the contraceptives at issue, and because women and their health-care providers—not the corporations or their owners—would be the ones deciding whether the contraception was desirable. By issuing what she regarded as "a decision of startling breadth,"⁶⁹ she warned that the Court was "ventur[ing] into a minefield."⁷⁰

**FEDERAL JURISDICTION
FORUM-SELECTION CLAUSES**

In *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*,⁷¹ the Court clarified when and how forum-selection clauses should be enforced. When a dispute erupted between Virginia-based Atlantic Marine Construction and Texas-based J-Crew Management, J-Crew filed suit in the Western District of Texas, rather than in the Eastern District of Virginia as prescribed by a forum-selection clause in the parties' contract. Atlantic Marine moved to dismiss the case altogether under Section 1406(a) or under Rule 12(b)(3) of the Federal Rules of Civil Procedure or, in the alternative, to transfer the case to Virginia under 28 U.S.C. § 1404(a). The District Court denied both motions, and the

Fifth Circuit affirmed.

Led by Justice Alito, the Court unanimously reversed. The justices agreed with the courts below that the forum-selection clause did not render venue in Texas "wrong" or "improper" and that dismissal under Section 1406(a) or Rule 12(b)(3) was thus unwarranted.⁷² With respect to the motion to transfer, however, the Court concluded that when a federal civil litigant moves to transfer a case in accordance with a forum-selection clause, "[o]nly under extraordinary circumstances unrelated to the convenience of the parties should [the] § 1404(a) motion be denied."⁷³ The plaintiff bears the burden of demonstrating that the forum-selection clause should be disregarded due to public-interest concerns, the Court said, and J-Crew had not carried that burden here.⁷⁴

PERSONAL JURISDICTION

Companies with substantial business operations in multiple states will be heartened by the Court's ruling in *Daimler AG v. Bauman*.⁷⁵ Argentinian plaintiffs had filed a federal suit in California against Daimler AG (Daimler), a German company. The plaintiffs argued that Daimler was subject to general jurisdiction in California due to the operations in that state of Mercedes-Benz USA (MBUSA), a Daimler subsidiary.⁷⁶ The Ninth Circuit held that MBUSA was Daimler's agent for jurisdictional purposes, that MBUSA's California contacts were thus attributable to Daimler, and that those contacts were sufficient to subject Daimler to general jurisdiction.

The Supreme Court reversed. In an opinion for eight members, Justice Ginsburg first found that the Ninth Circuit's agency analysis was too lenient because it "appear[ed] to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate."⁷⁷ More significantly, the Court found that, even if MBUSA's California contacts were attributable to Daimler, it would violate the Due Process Clause to subject Daimler to general jurisdiction there. While acknowledging that a company could be subject to general jurisdiction in states other than those of its place of incorporation and principal place of business, the Court recoiled from the suggestion that Daimler was subject to general jurisdiction in every state where MBUSA had a significant presence. "Such exorbitant exercises of all-purpose jurisdiction," Justice Ginsburg wrote, "would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'"⁷⁸

67. *Hobby Lobby Stores*, 2014 U.S. LEXIS 4505, at *86-87.

68. *Id.* at *117 (Ginsburg, J., dissenting).

69. *Id.* at *97 (Ginsburg, J., dissenting).

70. *Id.* at *154 (Ginsburg, J., dissenting).

71. 134 S. Ct. 568 (2013).

72. *Id.* at 577-79. The Court reserved judgment on whether dismissal was appropriate under Rule 12(b)(6), an issue not briefed by the parties. *See id.* at 580.

73. *Id.* at 581.

74. The Court further explained that, "when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules." *Id.* at 582.

75. 134 S. Ct. 746 (2014).

76. MBUSA distributed Daimler vehicles to dealerships throughout the United States, including California.

77. *Daimler AG*, 134 S. Ct. at 760.

78. *Id.* at 761-62 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). Justice Sotomayor preferred to ground the Court's judgment on the finding that it would be unreasonable to allow a California-based court to take jurisdiction in this instance, "given that the case involves foreign plaintiffs suing a foreign defendant based on foreign conduct, and given that a more appropriate forum is available." *Id.* at 764 (Sotomayor, J., concurring in the judgment).

The Court again underscored the limitations on federal courts' jurisdictional reach in *Walden v. Fiore*.⁷⁹ Anthony Walden was a Georgia police officer who had been deputized by the Drug Enforcement Administration (DEA) to work at the Hartsfield-Jackson Atlanta International Airport. Suspecting illegal drug activity, Walden seized roughly \$97,000 in cash that Gina Fiore and Keith Gipson were carrying with them while changing planes in Atlanta en route from Puerto Rico to Nevada. Fiore and Gipson explained that they were professional gamblers and that the cash represented their "bank" and lawful winnings. Walden and his colleagues were unpersuaded, however, and so Fiore and Gipson returned home to Nevada empty-handed. After months of wrangling, the DEA finally returned the money. Fiore and Gipson then filed a *Bivens* action against Walden in federal district court in Nevada, alleging (among other things) that he had resisted the funds' return by filing a false affidavit with the U.S. Attorney in Georgia. Walden moved to dismiss, arguing that he was not subject to personal jurisdiction in Nevada. The Ninth Circuit rejected Walden's argument, but the Supreme Court unanimously embraced it.

Writing for the Court, Justice Thomas explained that, under the familiar "minimum contacts" analysis, a federal court must focus on "the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."⁸⁰ The Ninth Circuit had erred, the Court said, by focusing on Walden's knowledge that Fiore and Gipson resided in Nevada and on the fact that those two plaintiffs suffered foreseeable harm in that state, rather than on Walden's actual contacts with Nevada. Fiore and Gipson

lacked access to their funds in Nevada not because anything independently occurred there, but because Nevada is where [they] chose to be at a time when they desired to use the funds seized by [Walden]. [They] would have experienced this same lack of access in California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had.⁸¹

The Court acknowledged Fiore and Gipson's warning that this ruling could "bring about unfairness in cases where intentional torts are committed via the Internet or other electronic media," but the justices said they were leaving "questions about virtual contacts for another day."⁸²

PRUDENTIAL STANDING AND THE "ZONE OF INTERESTS"

Over the past few decades, the Court had occasionally indicated that whether a plaintiff falls within the "zone of interests" that Congress intended to protect with a given statute is a jurisdictional issue concerning "prudential" or "statutory" standing.⁸³ Taking their cue from those and other precedents, the parties in *Lexmark International, Inc. v. Static Control Components, Inc.*⁸⁴ used the jurisdictional language of standing when framing their disagreement about whether Static Control could bring a false-advertising claim against Lexmark under the Lanham Act.⁸⁵ Writing for a unanimous Court, Justice Scalia explained that whether a plaintiff falls within a statute's zone of interests is really just a question of whether the plaintiff has a federal cause of action. It is "misleading" to call that a question of standing, Justice Scalia wrote, "since the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction, i.e., the court's statutory or constitutional power to adjudicate the case."⁸⁶

The dispute in *Lexmark* thus raised "a straightforward question of statutory interpretation: Does the cause of action [provided in the Lanham Act] extend to plaintiffs like Static Control?"⁸⁷ The Court concluded that it did. Sweeping aside alternative formulations devised by the lower courts, Justice Scalia and his colleagues held that a party has a false-advertising claim under the Lanham Act if the defendant's "deception of consumers causes them to withhold trade from the plaintiff" and thus inflicts upon the plaintiff an "economic or reputational injury flowing directly from the deception wrought by the defendant's advertising."⁸⁸

STANDING AND RIPENESS

With one important exception, the Court's ruling in *Susan B. Anthony List v. Driehaus*⁸⁹ was unremarkable. Susan B. Anthony List (SBAL)—an organization that opposes abortion—filed a federal action for declaratory and injunctive

Justice Thomas explained that, under the familiar "minimum contacts" analysis, a federal court must focus on "the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."

79. 134 S. Ct. 1115 (2014).

80. *Id.* at 1122.

81. *Id.* at 1125.

82. *Id.* at 1125 n.9.

83. See, e.g., *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 97 (1998) (statutory standing); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)) (prudential standing).

84. 134 S. Ct. 1377 (2014).

85. Static Control alleged that Lexmark made false statements about its own products and about those manufactured by Static Control.

86. *Id.* at 1387 n.4 (internal quotation omitted). The Court dropped an additional footnote to address, in dictum, one other self-inflicted misunderstanding. The jurisdictional ban on "generalized grievances" flows from the requirements of Article III, Justice Scalia explained, rather than—as the Court had elsewhere indicated—from the Court's assessment of prudential concerns. See *id.* at 1387 n.3.

87. *Id.* at 1388.

88. *Id.* at 1391.

89. 134 S. Ct. 2334 (2014).

In a pair of rulings handed down on the same day in early June, the Court unanimously and pointedly reversed the Federal Circuit on patent matters.

relief, arguing that its First Amendment rights were violated by an Ohio statute rendering it a crime to make false statements about candidates for public office. SBAL had already run into trouble with state officials when it ran a political advertisement asserting that then-Congressman Steven Driehaus voted in favor of taxpayer-funded abortions, and it feared it would encounter similar trouble in future elections. In an opinion

by Justice Thomas, the Court unanimously found that SBAL faced an injury that was sufficiently imminent to satisfy the requirements of Article III.

Of greater interest are the Court's closing remarks concerning the prudential requirements of ripeness. The Sixth Circuit had found the case unripe, reasoning that SBAL would not suffer undue hardship if adjudication of its constitutional claims were delayed and that the factual record concerning SBAL's future political advocacy was insufficiently developed. The Court cast at least a modicum of doubt on "the continuing vitality" of those prudential requirements, noting that they are "in some tension with our recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'"⁹⁰ But the Court found that it did not yet need to resolve that tension because those prudential requirements were "easily satisfied here."⁹¹

YOUNGER ABSTENTION

Emphasizing federal courts' "virtually unflagging" obligation to adjudicate cases within their jurisdiction,⁹² the Court in *Sprint Communications, Inc. v. Jacobs* clarified the limits of the abstention doctrines eponymously associated with *Younger v. Harris*.⁹³ The dispute arose from Sprint's claim that federal law preempted Iowa's regulation of intrastate access charges for certain calls placed over the Internet. An Iowa administrative agency had rejected that claim. While that ruling was under review in an Iowa court, Sprint filed a federal suit against the agency. The Eighth Circuit concluded that abstention was appropriate, reasoning that *Younger* abstention

is warranted whenever "(1) there is an ongoing state judicial proceeding, which (2) implicates important state interests, and (3) the state proceedings provide an adequate opportunity to raise constitutional challenges."⁹⁴

Led by Justice Ginsburg, the Court unanimously found that the Eighth Circuit's criteria swept too broadly. The Court previously had indicated that *Younger* abstention is appropriate if there are parallel state proceedings of one of three kinds: criminal prosecutions, civil enforcement proceedings, or "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions."⁹⁵ Stressing that *Younger* abstention "extends to th[os]e three exceptional circumstances, but no further,"⁹⁶ the *Sprint Communications* Court explained that civil enforcement proceedings render *Younger* abstention appropriate only if those proceedings are "akin to a criminal prosecution" in the sense that they were initiated by a state actor (typically following an investigation) to sanction a party for wrongful conduct.⁹⁷ The justices found those circumstances absent here.

COPYRIGHTS

In *American Broadcasting Companies, Inc. v. Aereo, Inc.*,⁹⁸ the Court ruled 6-3 that Aereo was violating copyrights held by television broadcasters, producers, and others in broadcast television programs. For a monthly fee, Aereo's technology enables a person to watch broadcast television programs on Internet-connected devices. Upon receiving a request for a specific program from a prospective viewer, Aereo devotes one of its thousands of tiny antennae to the task of pulling down the selected program's broadcast signal for that viewer; it saves a copy of that program on its hard drive (in a file dedicated to that viewer) and then, with only a several-second delay behind the original broadcast, it streams the program to the viewer in an Internet-compatible format. Led by Justice Breyer, a majority of the Court found that, with technological updates, Aereo was replicating processes used by community antenna television (CATV) systems—systems that the Court had found permissible in a pair of rulings in 1968 and 1974,⁹⁹ prompting Congress to amend the Copyright Act in 1976. Under those 1976 amendments, the Court held, Aereo was violating the copyright holders' exclusive right to publicly perform the copyrighted works.¹⁰⁰

Joined by Justices Thomas and Alito, Justice Scalia dissented. He argued that, because "Aereo's automated system does not relay any program, copyrighted or not, until a sub-

90. *Id.* at 2347 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013))).

91. *Id.*

92. *Sprint Commc'ns v. Jacobs*, 134 S. Ct. 584, 591 (2013) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

93. 401 U.S. 37 (1971).

94. *Sprint Commc'ns, Inc. v. Jacobs*, 690 F.3d 864, 867 (8th Cir. 2012) (citing *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)), *rev'd*, 134 S. Ct. 584 (2013).

95. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*,

491 U.S. 350, 368 (1989).

96. *Sprint Commc'ns*, 134 S. Ct. at 593-94 (internal quotation omitted).

97. *Id.* at 592 (quoting *Huffman v. Pursue*, 420 U.S. 592, 604 (1975)).

98. 134 S. Ct. 2498 (2014).

99. See *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

100. In their quest to fend off competitors, broadcasters are hardly out of the woods. See Emily Steel, *After Ruling, Aereo's Rivals Prepare to Pounce*, N.Y. TIMES, June 30, 2014, at B1.

scriber selects the program and tells Aereo to play it,” Aereo was not itself performing the works.¹⁰¹ Justice Scalia reserved judgment on whether Aereo could be held “secondarily” liable under the Act for facilitating copyright infringements by others.

PATENTS

In a pair of rulings handed down on the same day in early June, the Court unanimously and pointedly reversed the Federal Circuit on patent matters. In *Limelight Networks, Inc. v. Akamai Technologies, Inc.*¹⁰²—a case concerning a patented method of delivering electronic data—the Court held that a party cannot be held liable for inducing patent infringement under 35 U.S.C. § 271(b) if no one has directly infringed the patent in violation of 35 U.S.C. § 271(a) or some other statutory provision. The Court said that, in reaching a contrary conclusion on the facts of this case, “[t]he Federal Circuit’s analysis fundamentally misunderstands what it means to infringe a method patent.”¹⁰³

In *Nautilus, Inc. v. Biosig Instruments, Inc.*,¹⁰⁴ the Court held that a patent is not void for indefiniteness if the “patent’s claims, viewed in light of the specification and prosecution history, inform those skilled in the art about the scope of the invention with reasonable certainty.”¹⁰⁵ By finding the definiteness requirement met if a patent’s claims are not “insolubly ambiguous,” the Court said, the Federal Circuit had adopted a test that was not “probative of the essential inquiry” and was “breed[ing] lower court confusion.”¹⁰⁶

SECURITIES FRAUD

In *Chadbourne & Parke LLP v. Troice*,¹⁰⁷ the Court held that the plaintiffs’ state-law class actions were not precluded by the Securities Litigation Uniform Standards Act of 1998 (SLUSA). One of several measures aimed at curbing “perceived abuses of the class-action vehicle in litigation involving nationally traded securities,”¹⁰⁸ SLUSA prohibits state-law class actions alleging “a misrepresentation or omission of material fact in connection with the purchase or sale of a covered security.”¹⁰⁹ “Covered securities” consist primarily of those traded on national exchanges.¹¹⁰ The plaintiffs here alleged that they had purchased certificates of deposit on the strength of the

issuer’s fraudulent assurance that their funds would be invested, at least in part, in nationally traded securities. The defendants contended that SLUSA precluded the plaintiffs’ class actions.

A majority of the justices rejected the defendants’ argument, finding that “[a] fraudulent misrepresentation or omission is not made ‘in connection with’ . . . a ‘purchase or sale of a covered security’ unless it is material to a decision by one or more individuals (other than the fraudster) to buy or to sell a ‘covered security.’”¹¹¹ In this case, the only entity that was making decisions about whether to buy or sell covered securities was one of the alleged fraudsters—the bank that issued the certificates of deposit. Because their state-law claims fell beyond the reach of SLUSA’s preclusion provision, the plaintiffs were allowed to proceed.¹¹²

In *Halliburton Co. v. Erica P. John Fund*,¹¹³ a majority of the Court declined Halliburton’s suggestion that the Court make it more difficult for private securities-fraud plaintiffs to prove reliance upon defendants’ material misrepresentations. Under the Court’s 1988 ruling in *Basic Inc. v. Levinson*,¹¹⁴ investors are allowed to invoke a rebuttable presumption of reliance—a presumption that is grounded in the assumption that the price of a stock reflects all publicly available information about that stock, including fraudulent statements made by company officials. In an opinion by Chief Justice Roberts, the Court found that Halliburton’s arguments against the *Basic* framework were not sufficiently persuasive to overcome the weight of *stare decisis*.¹¹⁵ Joined by Justices Scalia and Alito, Justice Thomas concurred only in the judgment, finding that “[l]ogic, economic realities, and our subsequent jurisprudence have undermined the foundations of the *Basic* presumption, and *stare decisis* cannot prop up the façade that remains.”¹¹⁶

[A] majority of the court declined Halliburton’s suggestion that the Court make it more difficult for private securities-fraud plaintiffs to prove reliance upon defendants’ material misrepresentations.

101. *American Broadcasting Companies*, 134 S. Ct. at 2514 (Scalia, J., dissenting).

102. 134 S. Ct. 2111 (2014).

103. *Id.* at 2117.

104. 134 S. Ct. 2120 (2014).

105. *Id.* at 2129.

106. *Id.* at 2130 (quoting *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 40 (1997)).

107. 134 S. Ct. 1058 (2014).

108. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006).

109. 15 U.S.C. § 78bb(f)(1) (emphasis added).

110. *See id.* §§ 78bb(f)(5)(E) and 77r(b)(1)-(2) (defining the types of securities falling within SLUSA’s ambit).

111. *Chadbourne & Parke*, 134 S. Ct. at 1066.

112. Justices Kennedy and Alito dissented, arguing that the Court’s narrow reading of SLUSA’s preclusion provision

will permit proliferation of state-law class actions, forcing defendants to defend against multiple suits in various state fora. This state-law litigation will drive up legal costs for market participants and the secondary actors, such as lawyers, accountants, brokers, and advisers, who seek to rely on the stability that results from a national securities market regulated by federal law.

Id. at 1074 (Kennedy, J., dissenting).

113. 134 S. Ct. 2398 (2014).

114. 485 U.S. 224 (1988).

115. The news for Halliburton was not all bad. The Court held that defendants must be permitted to try to rebut the *Basic* presumption of reliance at the class-certification stage, rather than having to wait until trial. The Fifth Circuit had ruled to the contrary.

116. *Halliburton Co.*, 134 S. Ct. at 2418 (Thomas, J., concurring in the judgment).

In *CTS Corp. v. Waldburger*, the Court found important differences between statutes of limitation and statutes of repose.

SUPREMACY CLAUSE: PREEMPTION

In *Northwest, Inc. v. Ginsberg*,¹¹⁷ the Court took up the claim of Rabbi S. Binyomin Ginsberg, whom Northwest Airlines had terminated from its frequent-flyer program after the airlines concluded that Ginsberg was “abusing” the program by (among other things) complaining too frequently about such matters as delayed luggage

delivery. Ginsberg claimed that, by terminating him on those grounds, Northwest had breached its duty of good faith and fair dealing. Northwest contended, however, that Ginsberg’s state-law claim was preempted by the Airline Deregulation Act of 1978 (ADA), which explicitly preempts any state “law, regulation, or other provision having the force and effect of law related to [an air carrier’s] price, route, or service.”¹¹⁸

With Justice Alito writing for the Court, the justices unanimously found Ginsberg’s claim preempted. The Court observed that states vary with respect to how they view the duty on which Ginsberg’s claim relied. In some states, the duty of good faith and fair dealing is regarded as springing from contracting parties’ reasonable expectations, while in other states the duty is imposed upon parties pursuant to the community’s public-policy judgments. When it comes to ADA preemption, the source of the duty makes all the difference. If a state regards the duty as flowing from the contracting parties’ reasonable expectations, the Court said, then the duty is essentially imposed by the parties themselves and falls outside the terms of the ADA’s preemption provision. But if the duty is imposed upon the parties by the state—as it was here—then the duty flows from a “law, regulation, or other provision having the force and effect of law” and so is explicitly preempted by the ADA.

In *CTS Corp. v. Waldburger*,¹¹⁹ the Court found important differences between statutes of limitations and statutes of repose. Twenty-four years after CTS Corporation sold property on which it had operated an electronics plant in North Carolina, Peter Waldburger and others filed a state-law action against CTS, alleging they had been harmed by toxic chemicals CTS had stored there. North Carolina’s statute of repose shielded tort defendants from lawsuits brought more than 10 years after their last culpable act. CTS sought the protection of that statute, saying that its last culpable act was its sale of the plant more than two decades earlier. Waldburger argued, however, that North Carolina’s statute of repose was preempted by the Comprehensive Environmental Response,

Compensation, and Liability Act (CERCLA).

Writing for a 7-2 majority, Justice Kennedy found no preemption. He explained that a statute of limitations typically establishes a period within which a harmed individual must sue after being injured or discovering that he or she has been harmed, while a statute of repose “puts an outer limit on the right to bring a civil action,” typically measured “from the date of the last culpable act or omission of the defendant.”¹²⁰ Justice Kennedy pointed out that CERCLA’s preemption provision explicitly refers to states’ statutes of limitations but says nothing explicitly about states’ statutes of repose. A congressionally commissioned study group had acknowledged those two different kinds of state statutes and had urged state lawmakers to remove both sets of obstacles for future plaintiffs. Rather than await state action, however, Congress opted to legislate—and when it did, it adopted a preemption provision that dealt only with state statutes of limitations, evidently opting to leave the fate of state statutes of repose in state lawmakers’ hands.¹²¹

TRIBAL SOVEREIGN IMMUNITY

In a 5-4 ruling that did not break along familiar lines, the Court ruled in *Michigan v. Bay Mills Indian Community*¹²² that Bay Mills—a federally recognized Indian tribe—was protected by tribal sovereign immunity against an action brought against it by the State of Michigan. Michigan had alleged that, by opening a casino off tribal lands, the Tribe had violated both the federal Indian Gaming Regulatory Act (IGRA) and a compact that the state and Bay Mills entered in 1993.

Joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Sotomayor, Justice Kagan took as her starting premises that Indian tribes are subject to Congress’s “plenary control” as “domestic dependent nations,” yet enjoy sovereign immunity to the extent Congress has chosen not to abrogate it.¹²³ She then pointed out that IGRA partially abrogates the tribes’ immunity for actions brought in federal court concerning certain gaming activities “located on Indian lands”¹²⁴ but lacks a comparable provision concerning gaming activities off Indian lands. “This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear [statutory] language,” Justice Kagan wrote, and is “still less” empowered to rewrite statutes “when the consequence would be to expand an abrogation of immunity.”¹²⁵

Likely recognizing that its abrogation argument was not airtight, Michigan had urged the Court to hold that tribal sovereign immunity does not extend in the first instance to legal actions concerning tribes’ commercial activities off tribal lands. The Court had rejected that very proposition in its 1998 ruling in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,¹²⁶ however, and the Court declined to backtrack here. Cit-

117. 134 S. Ct. 1422 (2014).

118. 49 U.S.C. § 41713(b)(1).

119. 134 S. Ct. 2175 (2014).

120. *Id.* at 2182.

121. Joined by Justice Breyer, Justice Ginsburg dissented, arguing that the majority’s reading of the statute thwarted Congress’s desire to ensure that plaintiffs would not be barred from bringing suit when it takes many years for harm suffered from environmental

contamination to manifest itself.

122. 134 S. Ct. 2024 (2014).

123. *Id.* at 2030 (quoting *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)).

124. 25 U.S.C. § 2710(d)(7)(A)(ii).

125. *Bay Mills*, 134 S. Ct. at 2034.

126. 523 U.S. 751 (1998).

ing the principle of *stare decisis* as “a foundation stone of the rule of law,”¹²⁷ the majority concluded that Congress is now the appropriate entity to decide whether the policy course charted in *Kiowa* remains desirable.

The Court’s ruling in *Kiowa* provided the focal point of Justice Thomas’s dissent. Joined by Justices Scalia, Ginsburg, and Alito, he argued that *Kiowa* was “unsupported by any rationale . . . , inconsistent with the limits on tribal sovereignty, and an affront to state sovereignty.”¹²⁸ Emphasizing that tribal immunity is a doctrine of the Court—not Congress’s—creation, Justice Thomas believed the majority’s reluctance to overturn *Kiowa* was misplaced. In the 16 years since *Kiowa* was decided, he wrote, tribes’ gaming revenues had “more than tripled,” giving rise to numerous concerns that—at least when arising from tribes’ commercial activities off tribal lands—states should be free to address without having to deal with the obstacles that tribal immunity poses.¹²⁹

Justice Scalia filed a separate, one-paragraph opinion, expressing regret for having joined the majority in *Kiowa* and saying that the Court itself should “clean up [the] mess that I helped make,” rather than leave that task to Congress.¹³⁰ Justice Ginsburg also filed a short separate opinion, drawing an unfavorable connection between the Court’s broad construction of tribal immunity in *Kiowa* and the Court’s expansive rulings in other cases concerning states’ sovereign immunity. She predicted that “[n]either brand of immoderate, judicially confirmed immunity . . . will have staying power.”¹³¹

OTHER NOTABLE RULINGS

In *Ray Haluch Gravel Co. v. Central Pension Fund*,¹³² the Court unanimously held that “[w]hether [a] claim for attorney’s fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.”¹³³ In the case before it, the Court thus ruled that the 30-day clock for filing a notice of appeal began to run when the district court issued its ruling on the merits, rather than when the district court subsequently ruled on a motion for attorney’s fees.

In *Mississippi ex rel. Hood v. AU Optronics Corp.*,¹³⁴ the Court unanimously held that a civil suit does not qualify as a “mass action” under the Class Action Fairness Act of 2005—and so is not removable from state to federal court under that legislation’s mass-action provisions¹³⁵—when a state is the lone named plaintiff in a lawsuit aimed at redressing injuries

suffered by many of that state’s citizens.

Contributing to what cannot be a good public-relations story for the Coca-Cola Company, the Court held in *POM Wonderful LLC v. Coca-Cola Co.*¹³⁶ that POM Wonderful—the producer of a pomegranate-blueberry juice blend—could bring a Lanham Act unfair-competition suit against Coca-Cola for prominently placing the words “pomegranate blueberry” on the label of a product that, in reality, contains only minuscule amounts of those juices. The Ninth Circuit had ruled that POM Wonderful’s suit was precluded by the Food, Drug, and Cosmetic Act, but the Court unanimously reversed, finding that “the FDCA and the Lanham Act complement each other in the federal regulation of misleading food and beverage labels.”¹³⁷

In *Lawson v. FMR LLC*,¹³⁸ the Court held that a whistleblower-protecting provision of the Sarbanes-Oxley Act of 2002 extends not only to the employees of public companies but also to the employees of those companies’ contractors and subcontractors.

Pointing out that equitable tolling is available only when it comports with the lawmakers’ intent, the Court in *Lozano v. Montoya Alvarez*¹³⁹ held that the parties to the Hague Convention on the Civil Aspects of International Child Abduction did not want courts to toll the one-year period after which it becomes more difficult for a parent to secure the return of a child who was taken to a different country by the other parent.

Citing the familiar *Chevron*-deference framework,¹⁴⁰ the Court in *EPA v. EME Homer City Generation, L.P.*,¹⁴¹ upheld the Environmental Protection Agency’s cost-efficiency formula for determining the amount of air pollution that an upwind state must eliminate to bring downwind states into compliance with air-quality standards established pursuant to the Clean Air Act.

The EPA received a mostly favorable split decision in *Utility Air Regulatory Group v. EPA*.¹⁴² Piecing together the results handed down by a splintered Court, one finds that the EPA

[T]he Court . . . ruled that the 30-day clock for filing a notice of appeal begins to run when the district court issued its ruling on the merits, rather than when [it] subsequently ruled on a motion for attorney’s fees.

127. *Bay Mills*, 134 S. Ct. at 2036.

128. *Id.* at 2045 (Thomas, J., dissenting).

129. *Id.* at 2050 (Thomas, J., dissenting).

130. *Id.* at 2045 (Scalia, J., dissenting).

131. *Id.* at 2056 (Ginsburg, J., dissenting).

132. 134 S. Ct. 773 (2014).

133. *Id.* at 777.

134. 134 S. Ct. 736 (2014).

135. See 28 U.S.C. § 1332(d)(11) (stating the conditions under which a “mass action” may be removed to federal court, and defining a “mass action” as a civil action in which, among other things, “monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve

common questions of law or fact”).

136. 134 S. Ct. 2228 (2014).

137. *Id.* at 2233. Justice Breyer took no part in the case.

138. 134 S. Ct. 1158 (2014).

139. 134 S. Ct. 1224 (2014).

140. See *Chevron, U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984).

141. 134 S. Ct. 1584 (2014).

142. 134 S. Ct. 2427 (2014). As Justice Scalia observed when announcing the decision from the bench, the EPA got most—but not all—of what it wanted in the case. See Adam Liptak, *With Limits, Justices Allow the U.S. to Curb Power-Plant Gases*, N.Y. TIMES, June 24, 2014, at 8.

currently lacks statutory authority to impose permitting requirements on stationary entities based solely on their potential to emit large amounts of greenhouse gases, but that the agency may require stationary entities to employ “best available control technology” for greenhouse-gas emissions if those entities already are subject to permitting requirements for more conventional pollutants.

In *United States v. Quality Stores, Inc.*,¹⁴³ the Court unanimously concluded that severance payments made to involuntarily terminated employees are taxable wages under the Federal Insurance Contributions Act.

Rejecting the reasoning of several lower federal appellate courts, the Court unanimously held in *Fifth Third Bancorp v. Dudenhoeffer*¹⁴⁴ that fiduciaries of employee-stock-ownership plans are not entitled to a special presumption that they have behaved prudently.

LOOKING AHEAD

At the time of this writing, the Court already has slated a wide range of significant cases for its 2014-2015 docket. The issues it intends to confront include, among others, the constitutionality of redistricting efforts in Alabama;¹⁴⁵ the constitutionality of a state’s effort to tax all of the income of its residents, including income earned and taxed in other states;¹⁴⁶ the evidentiary requirements for removal from state to federal

court;¹⁴⁷ whether a state prison’s ban on beards violates the Religious Land Use and Institutionalized Persons Act of 2000;¹⁴⁸ whether and how a court may enforce the Equal Employment Opportunity Commission’s statutory duty to try to conciliate discrimination claims before filing suit;¹⁴⁹ whether federal agencies may revise their interpretive rules without a notice-and-comment period;¹⁵⁰ how to determine whether a city’s sign ordinance is content-based or content-neutral;¹⁵¹ whether the deadlines for filings claims under the Federal Tort Claims Act are subject to equitable tolling;¹⁵² and the scope of employers’ duty to accommodate pregnant employees under the Pregnancy Discrimination Act.¹⁵³



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143. 134 S. Ct. 1395 (2014). Justice Kagan did not participate in the case.

144. 134 S. Ct. 2459 (2014).

145. *Alabama Democratic Conference v. Alabama*, No. 13-1138; *Alabama Legislative Black Caucus v. Alabama*, No. 13-895.

146. *Comptroller v. Wynne*, No. 13-485.

147. *Dart Cherokee Basin Operating Co., LLC v. Owens*, No. 13-719.

148. *Holt v. Hobbs*, No. 13-6827.

149. *Mach Mining v. EEOC*, No. 13-1019.

150. *Nickols v. Mortgage Bankers Ass’n*, No. 13-1052; *Perez v. Mortgage Bankers Ass’n*, No. 13-1041.

151. *Reed v. Town of Gilbert*, No. 13-502.

152. *United States v. June*, No. 13-1075; *United States v. Wong*, No. 13-1074.

153. *Young v. United Parcel Service*, No. 12-1226.

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Research Report:

How Litigants Evaluate Legal Procedures at the Start of Their Cases

Donna Shestowsky

Although portions of the United States economy have begun to recover from the economic crisis that the country experienced from 2007 to 2009, the nation's judicial system has rebounded more slowly. Forty-three states have substantially cut their judicial budgets.¹ In many jurisdictions, the waiting time for civil trials in state courts has dramatically increased—in at least one major metropolitan area, the waiting time for many litigants has risen to five years.² Budgets for alternative dispute resolution (“ADR”) programs have also shrunk considerably.³ In light of these realities, many litigants struggle to obtain civil justice.

Empirical research designed to elucidate litigants' preferences for legal procedures can help courts better serve their constituents moving forward. For example, many courts offer either mediation or arbitration as the only alternative to trial. But which of these two procedures do litigants prefer? Procedural preference research can provide such information and consequently help inform program design. Such research can also help lawyers be more responsive to their clients' needs as they consider their procedural options and better predict the preferences of opposing parties.

It is important for empirical research to elucidate how litigants perceive procedures *ex ante* (before a legal procedure resolves the dispute) as well as how they evaluate them *ex post* (after the case has received a final disposition). *Ex ante* perceptions are relevant for understanding litigants' viewpoints regarding how to “fit the forum to the fuss.”⁴ Research on such perceptions can help court personnel effectively “market” ADR

options to litigants, thereby mitigating burdens related to overstretched budgets, court dockets, and the waiting time for trial. It can also be useful for anticipating resistance toward, or over-eagerness to engage in, certain procedures in light of the case-related, demographic, or relationship factors at play in a given dispute. For these reasons, an understanding of litigants' pre-experience conceptualizations of legal procedures should be considered foundational.

In contrast, litigants' *ex post* perceptions are important because they tend to affect how inclined litigants are to voluntarily comply with the terms of the agreement or decision that is reached for their case and how willing they are to abide by the law moving forward.⁵ Although the architects of court policy are rightfully influenced by multiple factors, research on litigants' perceptions—both *ex ante* and *ex post*—can help to inform the design and use of procedures that maximize the subjective satisfaction of litigants and increase citizens' respect for the legal system.

To contribute to this body of psychological literature, my research team and I spearheaded the first multi-court study of how civil litigants assess legal procedures *ex ante*.⁶ We noticed that several aspects of litigant perceptions had not been fully examined through empirical research. One open issue concerned how litigants compare legal procedures such as mediation, judge trials, and non-binding arbitration. Nearly all of the past studies had consisted of laboratory research, which typically involved surveying undergraduates who evaluated options for resolving hypothetical disputes.⁷ How *actual* civil litigants

This article was adapted from Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637 (2014), available at <http://ssrn.com/abstract=2378622>. Additional findings can be found in the original work. The research was funded by the National Science Foundation under Grant Number 0920995. The American Bar Association, Section on Litigation, and the Institute for Governmental Affairs at the University of California, Davis, provided financial support during the first year of the study. The University of California, Davis, School of Law also provided ongoing financial and human resources to support this project.

Footnotes

1. Mary McQueen, President, Nat'l Ctr. for State Courts, National Public Radio Interview (Oct. 4, 2011).
2. Stephen Stock, *California Superior Courts in Crisis*, NBC BAY AREA, July 24, 2013, <http://www.nbcbayarea.com/news/local/California-Superior-Courts-in-Crisis-216668081.html>.
3. See Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, n.5 (2014), available at <http://ssrn.com/abstract=2378622>.
4. The idea of “marketing” ADR options to litigants is reminiscent of Frank Sander's work during the 1970s, which focused on “fitting

the forum to the fuss” through *ex ante* screening and determination of the most appropriate procedures to be used, based on the particulars of individual cases. See, e.g., Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994); see also Timothy Hedeon, *Remodeling the Multi-Door Courthouse to “Fit the Forum to the Folks”: How Screening and Preparation Will Enhance ADR*, 95 MARQ. L. REV. 941, 941 (2012) (proposing a structural change in the delivery of ADR services through a pre-mediation consultation process of screening and preparation that focuses not only on disputes but on litigants as well).

5. Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 577-79 (2008) (providing an overview of the relevant findings); see also TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 4-5 (2006) (discussing the benefits of voluntary compliance from the perspective of the authorities).
6. We are currently collecting data on the same litigants regarding their *ex post* perceptions.
7. See Shestowsky, *supra* note 5, for review of the relevant literature.

assess their options with respect to actual cases was not clear.⁸ To our knowledge, only two past field studies had examined the *ex ante* perceptions of real litigants, and both were conducted in a single jurisdiction and made limited inquiries into litigant decision-making.⁹ Another open issue was whether litigants' attraction to procedures is associated with demographic, relationship or attitudinal factors, or the substantive issues involved in their cases. Laboratory research on *ex ante* preferences, and arguably even lawyer intuition, suggest that many factors influence how desirable litigants perceive procedures to be, including their culture, race or ethnicity, gender, the role they have in the case (*i.e.*, defendant or plaintiff), and the causes of action that are involved.¹⁰ A third open issue was whether litigants have a preference between the two ADR procedures that courts commonly offer—namely, mediation and non-binding arbitration.

Our project differs from past field research on *ex ante* litigant assessments of procedures in several ways. First, it surveys litigants from three distinct state court systems, making it the first multi-jurisdictional study of litigants' *ex ante* preferences. Second, the courts from which litigants were recruited offered *both* mediation and non-binding arbitration, in addition to trial, for the *same* cases. Thus, the study investigates preferences within a real-world environment while maintaining a "laboratory-like" setting by keeping the most important variables (*i.e.*, the procedures offered by the courts) relatively constant. Third, compared to earlier research, this work examines how litigants evaluate a much larger variety of procedures and assesses a broader set of factors that might predict attraction to procedures.

METHOD

Participants were recruited from general jurisdiction trial courts (the "study courts") in three states:

Third Judicial District Court, Salt Lake City, Utah ("Utah Court");¹¹

Superior Court of Solano County, California ("California Court");¹² and

Fourth Judicial District, Multnomah County, Oregon ("Oregon Court").¹³

For six two-week periods between May 2010 and May 2011, we identified litigants who met the following study criteria in each study court: their case must have been filed in one of the courts during the two-week period and have been eligible for trial as well as both mediation and non-binding arbitration at that court. When the court did not provide litigant contact information, the team researched addresses for the litigants to prevent the data contamination that may have occurred by sending the surveys to the attorneys to distribute to their clients. Surveys were mailed to litigants within three weeks of the date on which their case was filed. An introductory letter and consent form explained that they would be compensated for returning the survey.

The survey collected demographic information (*e.g.*, gender, age group) about the litigants, the kind of litigants they were (*e.g.*, whether they were involved in the case as an individual or were representing a company, organization, or group) as well as some details about their case (*e.g.*, whether they were the plaintiff, the defendant, or both (in cases involving counter-claims), the type of legal issues that were involved, whether the parties had a pre-existing relationship with each other, and how much they valued a future relationship with the other party). They rated the confidence they had in their case by providing a 0-100% chance estimate of winning their case ("If you go to trial for this case, what do you think your chances are of 'winning'?"). They also indicated their impression of the court where the case was filed (1 = extremely negative to 9 = extremely positive). See Table 1 for more details regarding the information that was collected.

Other questions assessed how attractive litigants regarded the following legal procedures: (1) Attorneys Negotiate without Clients, (2) Attorneys Negotiate with Clients Present, (3) Mediation, (4) Judge Decides without Trial,¹⁴ (5) Jury Trial, (6) Judge Trial, (7) Binding Arbitration, and (8) Non-binding Arbitration. Litigants read brief descriptions of these procedures¹⁵ to ensure construct validity and then rated each in terms of how attractive they perceived it to be for their own case (1 = not attractive at all to 9 = extremely attractive).¹⁶

8. See Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 173 (2005).

9. For review, see Shestowsky, *supra* note 3, at 651-53.

10. *Id.*

11. The Utah Court is located in Salt Lake City. In 2010, litigants filed 55,074 civil cases in the Utah Court. See UTAH DIST. COURTS, FY2010 CASE TYPE BY COURT (2010), available at <http://www.utcourts.gov/stats/files/2010FY/district/3-Summary.pdf>.

12. The California Court is located in northern California, with branches in Fairfield and Vallejo. For the 2010-2011 fiscal year, the Solano County Court received 13,910 civil filings. JUDICIAL COUNCIL OF CAL., 2012 COURT STATISTICS REPORT: STATE CASELOAD TRENDS: 2001-2002 THROUGH 2010-2011, at 94 tbl.4b (2012), available at <http://www.courts.ca.gov/documents/2012-Court-Statistics-Report.pdf>.

13. The Oregon Court is located in Multnomah County. In 2010, the Oregon Court received 18,203 civil-case filings. OR. JUDICIAL DEP'T, STATISTICAL REPORT RELATING TO THE CIRCUIT COURTS OF THE STATE OF OREGON, at 2 tbl.1 (2010), available at <http://courts.oregon.gov/>

OJD/docs/OSCA/2010_Stats_Table_1.pdf.

14. This procedure was described to participants as follows: Sometimes a judge can decide a case early on, so that a trial is never required. This is because the judge has determined there is no question about the facts, and the case can be decided on the basis of law alone. The lawyers submit documents to the court and may make a presentation to the judge at a hearing. Clients rarely attend and, if they do, they do not speak during the hearing. The judge later announces the outcome in writing, and explains why they decided as they did. This outcome is based on legal rules or principles. A party who is dissatisfied with the outcome can appeal it to a higher court, which will require additional time and proceedings.

15. For a full set of descriptions, see Shestowsky, *supra* note 3, 701-03. "Construct validity" refers to the "degree to which certain explanatory concepts or constructs account for performance on [a] test." SAMUEL MESSICK, VALIDITY OF TEST INTERPRETATION AND USE 7 (1990), available at <http://www.eric.ed.gov/PDFS/ED395031.pdf>.

16. We created three versions of the survey, with the same questions presented in different orders in each version.

TABLE 1: PARTICIPANT INFORMATION

	FREQUENCY	%
Court Location		
California	59	14.3
Oregon	190	46.0
Utah	155	37.5
Missing Data	9	2.2
Role in Case		
Defendant Only	156	37.8
Plaintiff Only	235	56.9
Both	12	2.9
Other	1	0.2
Missing Data	9	2.2
Party Type (Litigant)		
Individual	287	69.5
Company	97	23.5
Group/Organization	27	6.5
Missing Data	6	1.5
Party Type (Opposing Party)		
Individual	202	48.9
Company	156	37.8
Group/Organization	32	7.7
Missing Data	30	7.3
Was the Litigant a Defendant or Plaintiff Before?		
Yes, Defendant Only	52	12.6
Yes, Plaintiff Only	70	16.9
Yes, Both	69	16.7
No, Neither	176	42.6
Missing Data	46	11.1
Litigant Age Group		
18-25	14	3.4
26-35	80	19.4
36-45	74	17.9
46-55	92	22.3
56-65	82	19.9
66-75	48	11.6
76-80	6	1.5
Over 80	5	1.2
Missing Data	12	2.9

TABLE 1: PARTICIPANT INFORMATION (CONTINUED)

	FREQUENCY	%
Litigant Ethnicity/Race		
American Indian or Alaska Native	6	1.5
Asian	17	4.1
Hispanic	12	2.9
Black or African American	20	4.8
Native Hawaiian or Other Pacific Islander	4	1.0
White Non-Hispanic	324	78.5
Other	16	3.9
Missing Data	14	3.4
Litigant Gender		
Female	176	42.6
Male	225	54.5
Missing Data	12	2.9
Relationship with Opposing Party Before Filing?		
No	218	52.8
Yes	180	43.6
Missing Data	15	3.6
Insurance Company has an Interest in the Outcome?		
Yes, Plaintiff's insurance has an interest	26	6.3
Yes, Defendant's insurance has an interest	83	20.1
Yes, Both Parties' insurance have an interest	42	10.2
No, Neither Party's insurance has an interest	190	46.0
Don't Know	57	13.8
Missing Data	15	3.6
Note: N = 413. Missing data indicates litigants for whom a response to the question was not obtained. Party Type and Opposing Party Type calculations include participants (n = 4 and n = 7, respectively) who indicated that more than one type applied to their case.		

PARTICIPANTS AND TYPES OF CASES

Four hundred thirteen litigants participated in this study.¹⁷ The majority of their cases involved only personal injury (28.6%) or contracts (24.5%) issues. A variety of other types of cases were included in the sample: property (11.1%), civil rights (2.9%), employment (5.3%), medical practice (1.7%),

17. Ultimately, the mailings resulted in a 10% response rate. The data set includes litigants with mailing addresses from 19 states; 7.02% had addresses from outside of the states where the study courts were located.

and “other” (10.9%). About one-eighth of cases (12.6%) involved multiple causes of action.¹⁸

RESULTS AND DISCUSSION

We used our data to determine (1) litigants’ relative preferences for the various legal procedures and (2) whether case-type, demographic, relationship or attitudinal factors predicted how desirable litigants regarded each procedure. As with any empirical study, it is important to keep in mind how to interpret our findings. First, because ours was not a controlled laboratory study, our data cannot be used to conclusively determine causal relationships between litigants’ attraction to certain procedures and the other factors we measured (e.g., that litigants’ attitudes toward the court *causes* their level of attraction to the Judge Trial, or that being female *causes* a relative dislike for Binding Arbitration). Thus, although our interpretations of the findings are certainly consistent with the analyses that we report, they should not be taken as evidence that we discovered particular causal relationships. Second, it is important to note that the results do not necessarily generalize to how litigants might evaluate these same procedures *ex post*. Third, although, to our knowledge, the data collected for this study represents the largest data set of litigants’ *ex ante* perceptions of procedures published to date, the response rate was 10%.¹⁹ Notably, and perhaps expectedly, defendants opted out of the research at higher rates than plaintiffs did.

A. PROCEDURAL PREFERENCES

Litigants evaluated the attractiveness of each procedure for their case (1 = not attractive at all to 9 = extremely attractive). To determine their relative preferences, we compared how attractive they found the Judge Trial—the default legal procedure²⁰—to the other options. Litigants found the Judge Trial significantly more attractive than all other examined procedures except for Attorneys Negotiate with Clients Present and Mediation. Litigant attraction to these two procedures did not significantly differ from that of the Judge Trial. See Figure 1.

Additional analyses revealed that litigants preferred Mediation to all other procedures except for the Judge Trial and Attorneys Negotiate with Clients Present (whose attractiveness ratings did not significantly differ from that of Mediation). They also liked Attorneys Negotiate with Clients Present more than all of the other procedures except for the Judge Trial and

FIGURE 1: HOW LITIGANTS EVALUATED THE ATTRACTIVENESS OF LEGAL PROCEDURES

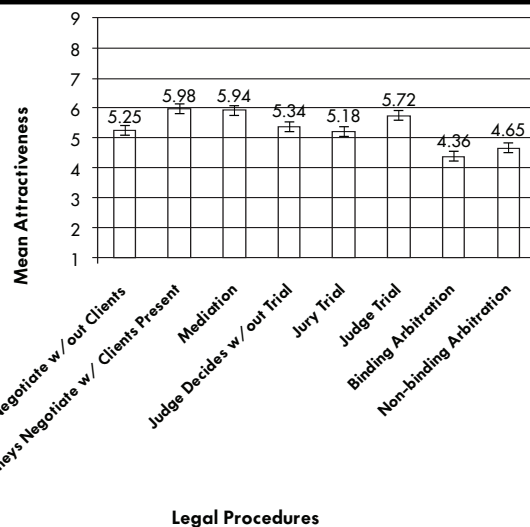


Figure 1. Mean litigant attraction ratings of legal procedures. Error bars are SEs of the ratings. Reported above each bar is the average litigant rating for that procedure. Litigants rated their attraction to each procedure using a 9-point Likert scale.

Mediation (whose attractiveness ratings did not significantly differ from that of Attorneys Negotiate with Clients Present). Thus, litigants preferred the Judge Trial, Mediation, and Attorneys Negotiate with Clients Present to all other examined procedures,²¹ and within this group of best-liked procedures, they did not have a statistically significant preference.

Together, these findings have important implications for courts because court administrators who want to encourage the use of their voluntary programs should strive not only to offer ADR options that litigants find especially appealing relative to each other, but ones that litigants find more appealing (or at least not significantly *less* appealing) than trial itself, *ex ante*. Our study found that not only did litigants prefer Mediation to Non-binding Arbitration, but they liked Mediation significantly more than the Jury Trial (and viewed the attractiveness of Mediation and the Judge trial as statistically equivalent). By contrast, litigants found Non-binding Arbitration significantly *less* appealing than *both* the Judge and Jury Trial.²² From this perspective, Mediation seems like a better choice for

18. The percentages were calculated using $n = 403$, due to missing data regarding case types.

19. As calculated, the 10% response rate likely reflects a gross underestimate of the true response rate and may significantly understate the representativeness of the sample. Significant research was often required to locate the addresses of litigants; it is possible that in many cases none of the addresses used to reach a particular litigant were correct, and thus, we should not have expected any of our attempts to yield a completed survey. A 10% response rate is not unusual for a survey study of laypeople who are contacted randomly through the mail.

20. A civil litigant must take affirmative action to demand a jury trial. See CAL. CIV. PROC. CODE § 631(f) (West 2012) (stating that “A party waives trial by jury . . . (4) By failing to announce that a jury is required, at the time the cause is first set for trial . . . or within

five days after notice of setting . . .”); OR. REV. STAT. ANN. § 52.570 (West 2013) (stating that “[I]f either party . . . demands a jury trial and deposits with the justice such trial fee as is required . . . the issue must be tried by a jury and not the justice; but otherwise it must be tried by the justice”); UTAH R. CIV. P. 38(b) (stating that “Any party may demand a trial by jury . . . not later than 10 days after the service of the last pleading directed to such issue”).

21. Hierarchical Linear Model analysis using Attorneys Negotiate with Clients Present as the reference group confirmed this conclusion. The results of this analysis are on file with the author. Other preference results are reported in Shestowsky, *supra* note 3 at 663-66.

22. See Shestowsky, *supra* note 3, at 663-64 (reporting that litigants preferred the Judge Trial to Non-binding Arbitration). A follow-up analysis demonstrated that litigants also preferred the Jury Trial to Non-binding Arbitration, $t(406) = 3.45$, $p = .001$.

voluntary programs. Insofar as litigants might be more apt to participate in good faith in settlement procedures they find especially attractive, the fact that litigants favored Mediation to Non-binding Arbitration could be an important finding for mandatory programs as well.

Litigants also preferred negotiations that would include the attorneys along with their clients to negotiations that would involve only the attorneys. They liked Mediation as much as the former but significantly more than the latter. This finding—along with the fact that litigants preferred Mediation to all adjudicative procedures except the Judge Trial—suggests that they want to be present for, and have the option to informally participate in, the resolution process.²³ This finding may come as a surprise to attorneys who assume that they should conduct settlement discussions on their own. Although case strategy might sometimes call for excluding litigants from settlement negotiations, lawyers might anticipate a desire on the part of clients to observe or participate in the discussions themselves and should discuss the advantages and disadvantages of that option in light of their particular case.

Litigants also liked the Judge Trial significantly more than the Jury Trial. At this juncture, explanations for this finding are speculative. Perhaps litigants prefer the judge as fact-finder based on negative depictions of jury trials in the mainstream American media.²⁴ Alternatively, some litigants may believe that judges are better able to keep an open mind during the trial and not predetermine the outcome.²⁵ Other litigants may value expediency and suspect that bench trials are more likely to promote it.²⁶ Future research should seek to explore the greater enthusiasm for the Judge Trial as compared to the Jury Trial.

B. PREDICTORS OF ATTRACTION TO SPECIFIC PROCEDURES

One goal of this project was to determine whether case-type, demographic, relationship or attitudinal variables predicted litigants' attraction to each procedure. To accomplish this goal, we

23. The "shuttle" model of mediation was not mentioned in the description of Mediation that was provided to the participants. See Shestowsky, *supra* note 3, at Appendix D. Shuttle mediation occurs when mediators meet with the parties separately rather than in joint session and "shuttle" information back and forth between the parties in an effort to reach an agreement.

24. See, e.g., Valerie P. Hans, *Jury Jokes and Legal Culture*, CORNELL LAW FACULTY PUBLICATIONS, Paper 635 (2013) (conducting a systemic analysis of a body of jokes about the jury system, collected from a variety of print and online sources).

25. Studies show that jurors tend to discuss the case before deliberation, despite admonition to the contrary. See Natasha K. Lakamp, *Deliberating Juror Predeliberation Discussions: Should California Follow the Arizona Model?*, 45 UCLA L. REV. 845, 853-54 (1998).

26. See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 131 (2002) (explaining that the waiting time for a judge's trial and decision in federal court is shorter than the waiting time in the jury queue).

27. To explore this issue, simultaneous multiple regression analyses were conducted using the attraction rating for each procedure as the outcome variable and a series of case-type, demographic, relationship, and attitudinal variables as predictors. Multiple regres-

TABLE 2: VARIABLES USED AS PREDICTORS	
VARIABLE NAME	LEVELS OF VARIABLE
Case Type/ Substantive Issue	personal injury, contract, employment, property, other, or two or more case types
Role in Case	defendant, plaintiff, or both
Party Type	individual, company, or group or organization
Opposing Party Type	individual, company, or group or organization
Defendant or Plaintiff Before	whether the litigant had been involved as either a defendant or plaintiff in a previous case; yes or no
Age Group	whether the litigant was 18–25, 26–35, 36–45, 46–55, 56–65, 66–75, 76–80, or over 80
Race	white/Caucasian or other
Gender	male or female
Relationship Before Filing	whether the litigant knew or had a relationship with the opposing party before the case was filed; yes or no
Insurance	whether an insurance company had any interest in the outcome of the case; yes or no
Importance of Future Relationship	1 to 5 rating of the importance of having a relationship with the opposing party in the future; 1 = not at all important, 5 = extremely important
Confidence in Trial Win	0–100% estimate of chances of winning at trial
Court Location	California, Oregon, or Utah
Impression of Court	1 to 9 rating of the litigant's impression of the court where the case has been filed; 1 = extremely negative, 9 = extremely positive

used multiple regression analysis. The variables used as predictors are catalogued in Table 2.²⁷ The model significantly predicted how attracted litigants were to every legal procedure except for Mediation and Non-binding Arbitration. The latter point suggests that court personnel can choose to offer one of these two procedures without fearing (at least in light of the predictor variables that we examined) that they will inadver-

sion is a common type of analysis used to predict an outcome (in this case, the attractiveness rating for a procedure) based on multiple predictor variables. For each procedure, the intercept of the regression models represents the mean attractiveness of the reference group. Thus, significant nominal predictors in the regression model indicate groups within the variable that are associated with a significant change in the attractiveness rating for a procedure compared to the reference group's average attractiveness rating for that procedure. Similarly, significant continuous predictor variables are variables for which changes in the outcome variable correspond significantly with changes in the predictor. The reference group used in our model consisted of individual white males, between 18 and 25 years of age, who have an individual opposing party with whom they did not have a relationship before the lawsuit and have no interest in having a future relationship, who have a personal injury case, where an insurance company had no interest in the outcome of the case, who have not had experience as either a plaintiff or defendant before, who have zero expectancy of winning in trial, who filed in Oregon, who are plaintiffs in the current case, and who have an extremely negative perception of the court where their case is filed.

TABLE 3

	ATTYS NEGOTIATE W/O CLIENTS PRESENT	ATTYS NEGOTIATE W/ CLIENTS PRESENT	MEDIATION	NON-BINDING ARBITRATION	BINDING ARBITRATION	JUDGE DECIDES W/O TRIAL	JUDGE TRIAL	JURY TRIAL
Case Type/ Substantive Issue		Litigants whose cases concerned personal injury issues only liked this option less than those with "other" case types				Litigants with 2+ case types liked this option more than those whose cases concerned personal injury issues only	Litigants with 2+ case types liked the judge trial more than those whose cases concerned personal injury issues only	Litigants whose cases involved property issues only liked the jury trial less than those whose cases concerned personal injury issues only
Role in Case					Litigants acting as both plaintiff and defendant liked binding arbitration more than those acting as plaintiff only			
Party Type	Companies liked this option more than individuals	Groups and organizations liked this option less than individuals						
Opposing Party Type					Those opposing a company liked binding arbitration more than those opposing an individual			Litigants liked the jury trial more when the opposing party was a group or organization vs. an individual
Defendant or Plaintiff Before					Repeat litigants liked binding arbitration more than first-time litigants			
Relationship Before	Those who had a previous relationship with opposing party liked this option less than those who did not							
Gender					Women liked binding arbitration less than men			Women liked the jury trial less than men
Race								
Age Group		Younger litigants liked this option more than older litigants						
Insurance		Those reporting that an insurance company had an interest in the case liked this option more than those who did not						
Future Relationship		Those who desired a future relationship with the opposing party liked this option more than those who did not						
Confidence in Trial Win	The more confidence litigants had in their case, the less they liked this option					The more confidence they had in their case, the more they liked this option	The more confidence they had in their case, the more they liked the judge trial	The more confidence they had in their case, the more they liked the jury trial
Court Location								CA litigants liked the jury trial less than OR litigants
Impression of Court	The more favorably the litigants viewed the court, the more they liked this option					The more favorably litigants viewed the court, the more they liked this option	The more favorably litigants viewed the court, the more they liked the judge trial	

tently favor the predilections of a subset of the litigants they serve. Table 3 reports the statistically significant predictors for each procedure. Some of these findings are especially worthy of discussion.

1. Repeat Litigants Liked Binding Arbitration More Than First-Time Litigants

Binding Arbitration was the only procedure for which attraction was significantly associated with litigants' past litigation experience. Specifically, repeat litigants liked Binding Arbitration more than their first-time counterparts. This finding resonates with empirical research suggesting that Binding Arbitration awards tend to favor repeat players.²⁸ It also aligns with the notion that repeat litigants are more likely to appreciate the hardship of protracted discovery and the threat of an appeal following a trial. This appreciation might lead repeat litigants to prefer Binding Arbitration because it can limit the likelihood of both extensive discovery and appeals. In light of this finding, lawyers might attempt to "even the information playing field" by having early discussions about the possible advantages associated with Binding Arbitration, even for cases already filed in court. Courts, too, can provide such information to litigants on their websites or in informational material that explains different alternatives to trial.

The comparative benefits of Binding Arbitration may be mitigated in large commercial disputes, which could explain why companies did not like Binding Arbitration significantly more than individual litigants did. Such disputes tend to introduce costs traditionally associated with "big case" litigation.²⁹ What is unexpected is that litigants whose opposing party was a company liked Binding Arbitration more than litigants who opposed an individual. This result is surprising given the bad press concerning consumer and employment arbitration, which typically involves cases wherein an individual opposes a corporation.

2. Confidence in Trial Win was Associated with Attraction to Court-Sponsored Adjudicative Procedures

The more confidence that litigants expressed regarding a trial win, the more they liked the Judge Decides without Trial, Jury Trial, and Judge Trial options. One interpretation of this pattern is that the more confident litigants were about their

case, the more they expected jurors and judges to feel positively about their case too, and vice versa.

The only other procedure significantly associated with trial-win estimates was Attorneys Negotiate without the Clients. The more litigants believed they would win at trial, the less they wanted a negotiation that opened the door for compromise if they would not be present for settlement discussions.³⁰ The fact that their estimates of success at trial were not associated with how favorably they regarded the other procedures—including trial-like Binding Arbitration—suggests that they were more agnostic about whether these options would produce results that reflected their own predictions.

From a psychological perspective, litigants' attraction to court-sponsored adjudication as a function of the confidence they have in their case might be due in part to the egocentric bias. The egocentric bias, which is observed when individuals construe information in a self-serving way, can lead litigants to believe their case is much stronger than it is. In our study, 57% of litigants thought they had at least a 90% chance of prevailing at trial, and 24% believed they had a 100% chance. Only 16% thought they had at most a 50% chance of winning. The fact that higher confidence was associated with greater interest in time-consuming and expensive procedures such as jury and judge trials reinforces the importance of lawyers having early discussions about procedures with their clients. Conversations about the risks (as well as the financial and emotional costs) associated with trial might provide litigants a broader perspective from which to consider their options. Courts can encourage such litigant education by enacting court rules that require lawyers to have such discussions early in the litigation process, and can reinforce it themselves via pamphlets or court websites. The latter set of options would be especially important for litigants who represent themselves.

3. Women Liked Jury Trial and Binding Arbitration Less Than Men

Another intriguing finding that emerged was that women liked the Jury Trial and Binding Arbitration less than men did. In fact, these procedures were the only ones for which gender was found to significantly predict procedure attraction. In light of research suggesting that women favor conflict avoidance,³¹

28. See, e.g., Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Arbitration Awards*, 29 McGEORGE L. REV. 223 (1998); Lisa B. Bingham, *The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997).

29. See PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION: KEY STEPS FOR BUSINESS USERS, COUNSEL, ARBITRATORS & ARBITRATION PROVIDER INSTITUTIONS 6 (Thomas J. Stipanowich et al. eds., College of Commercial Arbitrators 2010), available at <http://apps.americanbar.org/litigation/committees/corporate/docs/2011-cle-materials/10-Prevent-the-Runaway/10c-protocols-expeditious.pdf> ("Although many arbitrators and some arbitration rules aim to hold the line on excessive discovery, it is not unusual for legal advocates to agree to litigation-like procedures for discovery, even to the extent of employing standard civil procedural rules.").

30. This interpretation resonates with laboratory research suggesting that when participants have a strong case, they favor procedures in which a third party has decision control. See, e.g., Larry B. Heuer

& Steven Penrod, *Procedural Preference as a Function of Conflict Intensity*, 51 J. PERSONALITY & SOC. PSYCHOL. 700, 704 (1986) (reporting on laboratory research in which they found "unequivocal support" for the notion "that disputants with a strong case . . . prefer the autocratic and arbitration procedures, whereas their weak-case counterparts . . . prefer the moot, mediation, and bargaining procedures").

31. Some research has found that women exhibit enhanced concern for the other party, a greater willingness to make concessions, and a preference for collaborative strategies. See, e.g., Kwok Leung & Michael Harris Bond, *Effects of Cultural Femininity on Preferences for Methods of Conflict Processing: A Cross-Cultural Study*, 26 J. EXPERIMENTAL SOC. PSYCHOL. 373, 388 (1990); Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the MetroCourt Study*, 20 HAMLINE J. PUB. L. & POL'Y 211, 220-24 (1999).

this pattern makes sense. What is unexpected, however, is that no gender difference emerged with regard to the Judge Trial, which is also adversarial in character. An implication of the lack of gender differences in this category is that women find an exception for Judge Trials compared to these other forms of adjudication.

4. Personal Injury Litigants Liked Jury Trial More Than Property Litigants, but Case Type Was Not a Major Predictor Otherwise

Litigants whose cases concerned personal injury matters only liked the Jury Trial significantly more than those whose cases involved property issues only. This finding fits with the widely held perception that jury sympathy in personal injury cases results in high damage awards to plaintiffs.³² Yet, the appeal of the Jury Trial was not higher for plaintiffs than defendants. This pattern is curious until one considers that attraction to the Jury Trial was found to be related to confidence (*i.e.*, higher confidence was associated with greater attraction to the Jury Trial, and vice versa). Thus, it is possible that plaintiffs and defendants in personal injury cases were equally attracted to the Jury Trial but that their confidence in a trial win better explained how attracted they were to this procedure. A follow-up analysis designed to test this possibility revealed that the relation between attraction to the Jury Trial and confidence in a trial win for personal injury litigants did not differ significantly between plaintiffs and defendants.³³ This result supports the notion that litigants' attraction to the Jury Trial in personal injury cases was better explained by the confidence they had in their case than by their role as either a plaintiff or defendant.

Case type mattered in relatively few other instances. Those whose cases concerned personal injury issues only liked the Attorneys Negotiate with Clients Present option less than those with other kinds of cases and liked the Judge Decides without Trial option and the Judge Trial significantly less than those with multiple causes of action. The latter result suggests that those with more substantively complicated disputes valued the prospect of having a judge decide their case more than did those whose cases concerned personal injury matters only.

5. Relationship Variables Were Associated with Attraction to the Negotiation Options, but Not with Attraction to Adversarial Procedures such as Binding Arbitration or Trial

An interesting pattern emerged regarding the parties' relationship with one another and how they perceived the two

negotiation options. Litigants who had a *pre-existing* relationship with the opposing party liked Attorneys Negotiate without the Clients Present less than those who did not, and vice versa. But those with pre-existing relationships did not differ from litigants without one in terms of how much they liked the Attorneys Negotiate with the Clients Present option. This somewhat counterintuitive pattern suggests that although litigants with a relationship history were agnostic about the negotiations that would allow them to interact with the other party, the idea of negotiations that would take place without them was relatively unappealing. By contrast, the more litigants valued a *future* relationship with the other party, the more they liked Attorneys Negotiate with the Clients Present, and vice versa. Thus, the more litigants desired a future relationship, the more interested they were in informally collaborating to resolve the conflict.

Although one might intuit that the more interested litigants are in a future relationship with the opposing party, the less interested they would be in adjudicative or adversarial procedures (*i.e.*, Judge Trial, Jury Trial, Judge Decides without Trial, and Binding Arbitration), the data did not support this theory. Accordingly, these findings suggest that litigants might not appreciate the negative effects that such procedures might have on their relationships³⁴ or that they expect the benefits of having a third party decide their case to outweigh any negative consequences.

6. Court Impressions Related to Attraction to Judicial Procedures

The more favorably the litigants rated the court where their case was filed, the more they liked the two options that granted decision control to a judge—namely, the Judge Trial and Judge Decides without Trial. The less favorably they viewed the court, the less attracted they were to these two options. This pattern resonates with findings by Tom Tyler and others, suggesting that greater perceived institutional legitimacy is associated with a greater preference for, and acceptance of, court decisions.³⁵ The only other procedure that was significantly associated with litigants' regard for the court was Attorneys Negotiate without the Clients Present: the more litigants liked the court, the more they liked this procedure, and vice versa.

7. Demographic Variables

Surprisingly, the findings suggest that factors that previous scholars have speculated or observed to be associated with procedural preferences were rarely, if ever, significant predictors of attraction to procedures. For example, litigants' role in the case

32. See Alissa J. Strong, "But He Told Me It Was Safe!": The Expanding Tort of Negligent Misrepresentation, 40 U. MEM. L. REV. 105, 142 (2009) ("A problem that arises in personal injury cases is that juries sympathize with and strongly desire to compensate the victim."). But see Philip G. Peters, Jr., *Hindsight Bias and Tort Liability: Avoiding Premature Conclusions*, 31 ARIZ. ST. L.J. 1277, 1293 (1999) ("It is widely believed that plaintiffs benefit from jury sympathies. Yet, an increasing body of evidence suggests that jurors begin their job favoring tort defendants and doubting the motives of personal injury plaintiffs . . .").

33. See Shestowsky, *supra* note 3, at 685.

34. Some empirical research suggests that trial has more of a negative

impact on underlying relationships between the parties than mediation. See Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 256-68 (1981); Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323, 351, 354-58 (1995). But see RICHARD J. MAIMAN, AN EVALUATION OF SELECTED MEDIATION PROGRAMS IN THE MASSACHUSETTS TRIAL COURT 7-9, 35, 37 (1997) (finding that litigants were as likely to report that mediation had not improved their relationship as to indicate that it had).

35. See Tyler, *supra* note 5, at 25.

was statistically significant only for Binding Arbitration (i.e., litigants acting as both a plaintiff and defendant liked Binding Arbitration more than those acting only as plaintiffs), and court location was a significant predictor only for the Jury Trial (i.e., those with cases in California liked the Jury Trial less than those with cases in Oregon).

Even though previous studies found some factors to be predictive when evaluated individually, the overall pattern suggests that when a multitude of case-type, demographic, relationship, and attitudinal factors are considered simultaneously, relatively few may actually be associated with attraction to procedures. This finding is likely to come as a surprise to lawyers or court administrators who have strong views regarding which procedure is likely to appeal to a “certain kind of litigant” or “someone with a certain kind of case.”

CONCLUSION

An important conclusion from this study is that litigants do indeed have procedural preferences. They have great enthusiasm for procedures that theoretically provide litigants with the opportunity for direct participation in the resolution of their cases—namely, Mediation and negotiations that include the parties along with their attorneys. They also have great interest in the Judge Trial, which might reflect respect for authority and perceived procedural fairness through the democratic functioning of the courts. In terms of court-connected ADR, our findings support the choice of Mediation over Non-binding Arbitration.³⁶

To the extent that lawyers’ attitudes toward procedures differ from those of litigants, some of these differences might be due to litigants’ misconceptions about those procedures, whereas others might reflect incorrect assumptions that lawyers have about how litigants view those same options. Rather than relying on their own intuitions about the litigant point-of-view, legal actors could use research findings such as those presented here to anticipate how litigants will perceive their options as a function of factors such as how much litigants value a future relationship with the other party or their perception of the court where their case was filed.

More globally, using research to uncover litigants’ perceptions of procedures could lead to a more nuanced understanding of the need for court intervention in the regulation of disputes in the first place. Past research suggests that litigants are less likely to continue their dispute, and more likely to voluntarily comply with the terms of settlement agreements, when they are satisfied with the legal procedures used to resolve their dispute.³⁷ Thus, offering litigants ADR options that they find subjectively attractive could lead to fewer breach-of-contract

claims due to noncompliance with settlement agreements. This scenario would result in diminished demand for scarce court resources. Moreover, when people regard the government as offering subjectively attractive and fair procedures, they subsequently demonstrate greater respect for the legal system and tend to more readily comply with even unrelated laws and regulations.³⁸ Courts undoubtedly benefit from such voluntary compliance with the law. Thus, as applied to court-connected programs, this kind of empirical research can have important implications for governments stricken by budgetary crises. By better understanding litigants’ preferences and designing their programs accordingly, governments might be able to reduce some of the challenges associated with maintaining the civil justice system.

Further research on litigants’ perceptions of procedures can continue to fill gaps in the literature in ways that will be useful to lawyers as they serve their clients, as well to court policy. Ultimately, the advancement of procedural justice in light of litigants’ preferences will depend on legal actors doing their part to implement such research.



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36. See *supra* Figure 1.

37. See, e.g., Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 20-22 (1984) (concluding that litigants in consensual procedures such as mediation are more likely to perceive the outcome as fair and just and, subsequently, are more likely to comply with the outcome than in adjudicated cases); Mark S. Umbreit et al., *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RESOL. Q. 279, 298 (2004) (concluding

that offenders who participate in programs that offer them more opportunity to shape the outcome are more likely to comply with the outcome and are less likely to re-offend than those who engage in procedures that are more adjudicative).

38. As Tom Tyler has argued, on the basis of compelling empirical research, procedures that subjectively appeal to litigants can inspire them to “obey the law” and reduce the need for governmental intervention to ensure legal compliance. See Tyler, *supra* note 5, at 3-4, 62.

ACCII LIFE SKILLS

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The Filing and Briefing of Cross-Motions in State and Federal Court

Michael G. Langan & Jason C. Halpin

Misunderstandings regarding the definition of a cross-motion often lead to problems during the filing and briefing of cross-motions in state and federal courts. This article focuses on defining and illustrating the elements of a proper cross-motion, identifying and illustrating common problems caused by the filing and briefing of improper cross-motions, and offering solutions to those problems.

As most commonly understood by judges and practitioners, a cross-motion in state or federal court possesses three elements: (1) it is filed against the originally moving party; (2) it is filed by a party against whom the original motion was filed; and (3) it requests an order similar to that requested by the originally moving party against the cross-moving party. Common problems posed by the filing and briefing of improper cross-motions in state and federal court include (1) a violation of the action's motion-filing deadline, (2) a violation of the court's proscription against the filing of replies on cross-motions, (3) a violation of

the court's proscription against the filing of sur-replies on dispositive motions, and (4) a violation of the court's page limitation on memoranda of law. Possible solutions to those common problems include (1) filing a motion before the opposing party files its motion, (2) requesting leave to depart from the action's scheduling order or the court's local rules, (3) moving to strike the improper cross-motion, and (4) in the context of pleading amendments, filing a timely amended complaint rather than a cross-motion for leave to file an amended complaint in response to a motion to dismiss for failure to state a claim.

I. DEFINITION OF A CROSS-MOTION

A. TERM AS COMPARED TO "COUNTER-MOTION"

Sometimes, a motion is referred to as both a "cross-motion" and a "counter-motion."¹ In such cases, either the terms are used interchangeably or the term "counter-motion" refers to a particular type of "cross-motion": specifically, that type of

Footnotes

1. **State Cases:** *Luciano v. WMC Mortg. Corp.*, No. 1 CA-CV 08-0566, 2010 WL 1491952, at *7-8 (Ariz. Ct. App. Apr. 13, 2010) (referring to motion as both a "counter motion" and a "cross motion"); *accord*, *Brumgard v. Rios*, No. 2 CA-CV 2010-0007, 2010 WL 3489159, at *1 & n.3 (Ariz. Ct. App. Sept. 7, 2010); *Leatherby Ins. Co. v. City of Tustin*, 143 Cal. Rptr. 153, 156 (Cal. App. 1977); *Kootenai Elec. Co-op., Inc. v. Lamar Corp.*, 219 P.3d 440, 443 (Idaho 2009); *Robinson v. Builders Supply & Lumber Co.*, 586 N.E.2d 316, 319 (Ill. App. Ct. 1991); *Lemen v. 21st Century Nat'l Ins. Co.*, 286 P.3d 240, at *8 (Kan. Ct. App. 2012); *Univ. of Cumberlandlands v. Pennybacker*, 308 S.W.3d 668, 672 (Ky. 2010); *Sci. Drilling Intern., Inc. v. Meche*, 29 So.3d 1283, 1284-85 (La. Ct. App. 2010); *Salamon v. Progressive Classic Ins. Co.*, 841 A.2d 858, 861 (Md. 2004); *Dep't of Natural Res. v. Leukuma*, No. 287802, 2009 WL 5194517, at *1 (Mich. Ct. App. Dec. 17, 2009); *Carlton v. Walters*, 294 S.W.3d 513, 515-16 (Mo. Ct. App. 2009); *Harris v. Vasquez*, 288 P.3d 924, 925 (N.M. Ct. App. 2012); *Lawrence Twp., Stark Cnty., Ohio, Bd. of Twp. Tr. v. Canal Fulton*, No. 2007 CA 00010, 2007 WL 3408448, at *1 (Ohio Ct. App. Nov. 5, 2007); *Am. Condo. Ass'n, Inc. v. IDC, Inc.*, 844 A.2d 117, 125-26 (R.I. 2004); *Robertson v. George*, No. M2000-02661-COA-R3-CV, 2001 WL 1173270, at *2 (Tenn. Ct. App. Oct. 5, 2001); *Salt Lake Cnty. Comm'n v. Salt Lake Co. Atty.*, 985 P.2d 899, 901 & n.1 (Utah 1999).

State Court Rules and Standing Orders: Eighth Judicial Dist. Ct. of the State of Nev., Rule 2.20(f) ("An opposition to a motion which contains a motion related to the same subject matter will be considered as a counter-motion."); *cf.* Utah Rules of Civ. Proc., Family Law Rule 101(g) ("Opposing a motion is not sufficient to grant relief to the responding party. An application for an order may be raised by counter motion."); Local Rules of the Super. Ct.

for Pierce Cnty., Wash., Rule 7(b)(1)(D)(ii) ("In the event there is an existing motion and the responding party wishes to file a counter motion to be heard the same date they may do so without leave of the court by electronically filing and scheduling in accordance with PCLR 7(b)(1)(D) a Note for Commissioner's Calendar, as long as the counter motion and all supporting pleadings are filed and served at least fourteen (14) calendar days before the hearing.").

Federal Cases: *Brockert v. Skornicka*, 711 F.2d 1376, 1382 (7th Cir. 1983) (referring to motion both as a "counter motion" and a "cross motion"); *accord*, *White v. Cinemark USA, Inc.*, 04-CV-0397, 2005 WL 1865495, at *1 (E.D. Cal. Aug. 3, 2005); *Parra v. Life Ins. Co. of N. Am.*, 258 F. Supp. 2d 1058, 1063 & n.3 (N.D. Cal. 2003); *Advanced Semiconductor Materials Am., Inc. v. Applied Materials, Inc.*, 93-CV-20853, 1994 WL 715634, at *1 (N.D. Cal. Dec. 16, 1994); *Roberts v. Heim*, 130 F.R.D. 430, 433 (N.D. Cal. 1990); *George v. United States*, 94-CV-2769, 1996 WL 437532, at *1 (D. Colo. June 14, 1996); *United States v. Charboneau*, 04-CV-0442, 2005 WL 2346947, at *5 (M.D. Fla. Sept. 26, 2005); *Ill. Tool Works, Inc. v. Metro Mark Prods., Ltd.*, 43 F. Supp. 2d 951, 953 & n.1 (N.D. Ill. 1999); *Maneikis v. St. Paul Ins. Co. of Ill.*, 79-CV-3731, 1980 WL 343874, at *1 (N.D. Ill. May 23, 1980); *AAR, Inc. v. Century Inv. Group, LLC*, 08-CV-0007, 2010 WL 497747, at *1 (E.D. La. Feb. 5, 2010); *Wells v. Home Depot USA, Inc.*, 11-CV-12884, 2012 WL 995206, at *1 & n.1 (E.D. Mich. Mar. 13, 2012); *Barrett v. Detroit Heading, LLC*, 05-CV-72341, 2006 WL 1662553, at *6 (E.D. Mich. June 8, 2006); *St. Louis Trimming, Inc. v. Am. Credit Indem. Co.*, 924 F. Supp. 99, 100 (E.D. Mo. 1996); *Interface Group-Nev., Inc. v. Men's Apparel Guild in Cal. Inc.*, 04-CV-0351, 2007 WL 923952, at *2 (D. Nev. Mar. 23, 2007); *Dehne v. Avano*, 219 F. Supp. 2d 1096, 1100 (D. Nev. 2001); *Moultrie v.*

cross-motion filed responsively as opposed to originally. For example, when a party files a motion and another party files a “counter-motion,” some courts treat that counter-motion as rendering the original motion and counter-motion together as “cross-motions.”²

Other times, however, a nominal distinction is recognized between a “cross-motion” and a “counter-motion.”³ Still other times, a material distinction is recognized between the two terms. For example, sometimes a “counter-motion” refers to a motion filed subsequent, and in opposition, to an initial

motion but based on different grounds as those of the initial motion.⁴ Other times, a “counter-motion” refers to a motion related to the subject matter of the original motion, while a “cross-motion” refers to an independent motion unrelated to the subject matter of the original motion.⁵ Yet other times, a “counter-motion” refers to a motion filed against a moving party seeking relief *dissimilar* to that sought in the original motion (as opposed to a “cross-motion,” which refers to a motion filed against a moving party seeking relief that is *similar* to that sought in the original motion).⁶

S. Carolina Election Com’n, 06-CV-3073, 2007 WL 445383, at *1 (D.S.C. Feb. 6, 2007); *United States v. Hill*, 533 F. Supp. 810, 813 (D. Tenn. 1982).

Federal Court Rules and Standing Orders: E.D. Cal. Civ. L.R. 230(e) (“Any counter-motion or other motion that a party may desire to make that is related to the general subject matter of the original motion shall be served and filed in the manner and on the date prescribed for the filing of opposition.”); N.D. Cal. Civil L.R. 16-5 (“Defendant must serve and file any opposition or counter-motion within 28 days of service of plaintiff’s motion.”); U.S. Bankr. Ct. Rules N.D.Cal., B.L.R. 7007-1(d) (“Together with an opposition, a party responding to a motion may file a counter-motion related to the subject matter of the original motion.”); E.D. Mich. L.R. Appendix ECF, R5(e) (“[A] response or reply to a motion must not be combined with a counter-motion. Papers filed in violation of this rule will be stricken.”); N.D. Miss. L.R. 7(b)(3)(C) (“A response to a motion may not include a counter-motion in the same document. Any motion must be an item docketed separately from a response.”).

2. **State Cases:** *Leatherby Ins. Co. v. City of Tustin*, 143 Cal. Rptr. 153, 156 (Cal. Ct. App. 1977); *Kootenai Elec. Co-op., Inc. v. Lamar Corp.*, 219 P.3d 440, 443 (Idaho 2009); *Robinson v. Builders Supply & Lumber Co.*, 586 N.E.2d 316, 319 (Ill. App. Ct. 1991); *Lemen v. 21st Century Nat’l Ins. Co.*, 286 P.3d 240, at *8 (Kan. Ct. App. 2012); *Salamon v. Progressive Classic Ins. Co.*, 841 A.2d 858, 861 (Md. 2004); *Dep’t of Natural Res. v. Leukuma*, No. 287802, 2009 WL 5194517, at *1 (Mich. Ct. App. Dec. 17, 2009); *Carlton v. Walters*, 294 S.W.3d 513, 515-16 (Mo. Ct. App. 2009); *Harris v. Vasquez*, 288 P.3d 924, 925 (N.M. Ct. App. 2012); *Am. Condo. Ass’n, Inc. v. IDC, Inc.*, 844 A.2d 117, 125-26 (R.I. 2004); *Robertson v. George*, No. M2000-02661-COA-R3-CV, 2001 WL 1173270, at *2 (Tenn. Ct. App. Oct. 5, 2001); *Salt Lake County Com’n v. Salt Lake Co. Atty.*, 985 P.2d 899, 901 & n.1 (Utah 1999).

Federal Cases: *Brockert v. Skornicka*, 711 F.2d 1376, 1382 (7th Cir. 1983); *White v. Cinemark USA, Inc.*, 04-CV-0397, 2005 WL 1865495, at *1 (E.D. Cal. Aug. 3, 2005); *Roberts v. Heim*, 130 F.R.D. 430, 433 (N.D. Cal. 1990); *George v. United States*, 94-CV-2769, 1996 WL 437532, at *1 (D. Colo. June 14, 1996); *Maneikis v. St. Paul Ins. Co. of Ill.*, 79-CV-3731, 1980 WL 343874, at *1 (N.D. Ill. May 23, 1980); *AAR, Inc. v. Century Inv. Group, LLC*, 08-CV-0007, 2010 WL 497747, at *1 (E.D. La. Feb. 5, 2010); *Wells v. Home Depot USA, Inc.*, 11-CV-12884, 2012 WL 995206, at *1 & n.1 (E.D. Mich. Mar. 13, 2012); *St. Louis Trimming, Inc. v. Am. Credit Indem. Co.*, 924 F. Supp. 99, 100 (E.D. Mo. 1996); *Moultrie v. S. Carolina Election Com’n*, 06-CV-3073, 2007 WL 445383, at *1 (D.S.C. Feb. 6, 2007); *United States v. Hill*, 533 F. Supp. 810, 813 (D. Tenn. 1982).

3. **State Cases:** *Bohac v. Akbani*, 29 S.W.3d 407, 414, n.6 (Mo. Ct. App. 2000) (“The parties refer to Father’s [motion] as a ‘cross-motion’ to modify, although it should be denominated a ‘counter-motion’ to modify.”); *Vives v. Verzino*, 213 P.3d 823, 825 (N.M. Ct.

App. 2009) (“The parties refer to Respondents’ counter-motion for summary judgment as a cross-motion, a fact this Court does not change for consistency.”); *Tex. v. Rhodes*, No. 04-96-00040-CV, 1997 WL 81257, at *1, n.7 (Tex. App. Feb. 26, 1997) (“Appellant has denominated its motion a cross-motion rather than a counter motion. We will do the same.”).

Federal Cases: *Copas v. E. Bay Mun. Util. Dist.*, 61 F. Supp. 2d 1017, 1041, n.9 (N.D. Cal. 1999) (“The court does not consider a ‘counter-motion’ filed two weeks after the dispositive motions filing deadline to be a cross-motion.”); *Tyler v. Butler*, 06-CV-0861, 2009 WL 2447918, at *6, n.10 (E.D. Cal. July 29, 2009) (“Buried within this exhibit is a putative cross-motion for summary judgment, which plaintiff calls a ‘counter-motion’”); *Stringham v. Lee*, 04-CV-1530 2008 WL 2880406, at *1 (E.D. Cal. July 22, 2008) (“Pending before the court are . . . plaintiff’s cross-motion for summary judgment (denominated by plaintiff a ‘counter motion’)”); *Cook v. Cashler*, 11-CV-0637, 2013 WL 1213678, at *2 (W.D. Mich. Mar. 5, 2013) (“Plaintiff refers to his cross-motions for summary judgment as ‘counter motions’ for summary judgment.”); *Cannon v. City of Phila.*, 86 F. Supp. 2d 460, 462, n.1 (E.D. Pa. 2000) (“Plaintiff refers to her motion as a counter-motion. I will interpret plaintiff’s motion as a cross-motion for summary judgment.”); cf. *PAETEC Commc’ns, Inc. v. Comm-Partners, LLC*, 08-CV-0397, 2010 WL 1767193, at *1 (D.D.C. Feb. 18, 2010) (calling defendant’s motion a “cross motion” even though defendant labeled it a “counter-motion,” which term the court placed in quotation marks).

4. **State Case:** *Zaloudek Grain Co. v. CompSource Okla.*, No. 110,662, 2012 WL 4077382, at *1 (Okla. Sept. 18, 2012) (describing how plaintiff filed a “motion” for summary judgment on a certain ground, then defendant filed a “cross motion” for summary judgment with regard to the same ground, and then plaintiff filed a “counter motion” for summary judgment on a different ground).

Federal Case: *Forkwar v. Empire Fire and Marine Ins. Co.*, 487 F. App’x 775, 777 (4th Cir. June 27, 2012) (“The district court denied Forkwar’s motion for summary judgment, granted Empire’s cross-motion for summary judgment, and denied Forkwar’s counter motion for summary judgment.”).

5. **Federal Case:** *Kowalski v. Mommy Gina Tuna Resources*, 05-CV-00679, 2008 WL 4216267, at *1 (D. Haw. Sept. 15, 2008) (drawing distinction between a counter-motion and a cross-motion, noting that the former refers to a motion raising the same subject matter as an original motion, and the latter refers to an “independent” motion unrelated to the subject matter of the original motion).

Federal Rule: D. Haw. L.R. 7.9 (“Counter Motions. . . . Any motion raising the same subject matter as an original motion may be filed by the responding party together with the party’s opposition”).

6. **State Cases:** *Berger v. Pubco Corp.*, 976 A.2d 132, 135 (Del. 2009) (describing how defendants filed a “motion to dismiss,” plaintiff filed a “counter-motion for summary judgment,” and defendants filed a “cross-motion for summary judgment”); *Dillon v. Typaldos*,

Because of the different definitions of the term “counter-motion,” the practice of vacillating between “cross-motion” and “counter-motion” to refer to the same motion in the same brief or decision, without explanation, is not recommended. Moreover, because the term “cross-motion” appears to be common and have a generally accepted meaning, while the term “counter-motion” is relatively rare and used in different ways, this article will focus on the term “cross-motion,” as well as the most common meaning of that term.

B. THREE ELEMENTS OF A “CROSS-MOTION”

The definition of a “cross-motion” that is most commonly provided in law dictionaries, and the definition that is most commonly applied in state and federal courts, is a competing request for an order similar to that requested by another party against the cross-moving party. *See infra* notes 7-16. As a result, as the term is most widely understood, a “cross-motion” has three elements.

First, a cross-motion is a motion filed against the originally moving party.⁷ Second, a cross-motion is filed by a party

2006 WL 1381625, at *1, 6, 13 (N.J. Super. Ct. Ch. Div., May 19, 2006) (describing how plaintiff filed a “motion” to reinstate the complaint, defendants filed a “cross-motion to dismiss” the complaint, and plaintiff filed a “counter motion” to add defendants).

Federal Cases: Wang Labs., Inc. v. Ma Labs., Inc., 95-CV-2274, 1995 WL 729298, at *1 (N.D. Cal. Dec. 1, 1995) (“Ma . . . and Wang . . . bring cross motions for summary judgment based on the provisions of a license agreement executed between the parties. Ma also brings a counter motion for summary judgment arguing that certain accused devices fall outside of the licensing agreement.”); Kingdom 5-KR-41, Ltd. v. Star Cruises PLC, 01-CV-2946, 2005 WL 110434, at *1, 3 (S.D.N.Y. Jan. 20, 2005) (referring to NCLs motion to revive a claim under Fed. R. Civ. P. 60[b], filed in response to motion to alter or amend judgment under Fed. R. Civ. P. 59 [e] or 60, as a “countermotion,” and referring to NCLs motion for summary judgment on that claim, filed in response to motion for summary judgment on that claim, as a “cross-motion”); Healthpoint, Ltd. v. Ethex Corp., 273 F. Supp. 2d 817, 826 (W.D. Tex. 2001) (“Beginning March 22, 2001 . . . , the Court held a consolidated evidentiary hearing on Ethex’s motion for preliminary injunction and Healthpoint’s cross motion for preliminary injunction. . . . In addition, this report also addresses Ethex’s related motion to dismiss or to stay and Healthpoint’s counter-motion to partially dismiss”); cf. Hawkins v. Sup. Ct. of NJ, 04-CV-1317, 2005 WL 2133588, at *10, n.11 (D.N.J. Aug. 31, 2005) (noting that “Plaintiff’s brief filed in response to the motion to dismiss is entitled a ‘Brief in Opposition to Defendants’ Motion to Dismiss the Complaint and in Support of Plaintiff’s Countermotion to Disqualify the Attorney General’s Office From Representing Itself and Codefendants Herein and In Support of Plaintiff’s Cross Motion for Summary Judgment”).

7. **Law Dictionaries and Encyclopedias:** BLACK’S LAW DICTIONARY 1106 (9th ed. 2009) (defining a “cross-motion” as “a competing request for relief or order similar to that requested by another party against the cross-moving party”); MERRIAM-WEBSTER’S DICTIONARY OF LAW 116 (1996) (defining a “cross-motion” as “[a] motion that attempts to counter a similar motion filed by an opposing party”); MELLINKOFF’S DICTIONARY OF AM. LEGAL USAGE 143 (1992) (defining a “cross-motion” as an “opposing motion, usually requesting a result opposite to original motion”); THE WOLTERS KLUWER BOUVIER LAW DICTIONARY 714 (2011) (defining “cross-motion” as “[a] motion similar to a motion filed earlier by another party. A cross motion is a motion for some ruling or order filed by a party to an action that is similar in its request to another motion already pending. . . . Note: a cross-motion must seek the same order or similar relief or ruling as a prior motion, with the cross-motion seeking an order or rule to the benefit of the cross-movant, while the original movant sought the original order for its own benefit.”); Lawyers.com Legal Dictionary, <http://research.lawyers.com/glossary/cross-motion.html> (defining a “cross-motion” as “a motion that attempts to counter a similar

motion filed by an opposing party”); cf. 56 AM. JUR. 2D *Motions, Rules, and Orders* § 29 (2011) (“A cross-motion generally is an improper vehicle for seeking affirmative relief from a non-moving party.”); *accord*, 60 C.J.S. *Motions and Orders* § 33 (2012); 7A FED. PROC. LAWYERS ED. § 19:146 (2011) (“A cross-motion must be contained in the same document as the response to the original motion, and a response to the cross-motion must be contained in the same document as the reply”).

State Cases: Barrett v. Watkins, 860 N.Y.S.2d 246, 248 (N.Y. App. Div. 2008) (“A cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party.”); *accord*, Terio v. Spodek, 809 N.Y.S.2d 145, 149 (N.Y. App. Div. 2006); Mango v. Long Is. Jewish-Hillside Med. Ctr., 507 N.Y.S.2d 456, 458 (N.Y. App. Div. 1986); Barber v. Cornell Univ. Co-op., 37 Misc.3d 1217, 2012 WL 5392228, at *2 (N.Y. Sup. Ct. Sept. 27, 2012); Sandler v. Sophie D. Ltd., 936 N.Y.S.2d 61, 2011 WL 3558224, at *1 (N.Y. Sup. Ct. Aug. 11, 2011); Cardona-Torres v. City of N.Y., 2011 N.Y. Misc. LEXIS 6557, at *10 (N.Y. Sup. Ct. Dec. 9, 2011) (“A cross-motion is merely a motion by any party against the party who made the original motion, made returnable at the same time as the original motion.”); *accord*, Hisen v. 754 Fifth Ave. Assoc., L.P., 886 N.Y.S.2d 67, 2009 WL 1098985, at *6, n.4 (N.Y. Sup. Ct. 2009); XO Communs., LLC v. Level 3 Communs., Inc., 948 A.2d 1111, 1117 (Del. Ch. 2007) (calling motion filed against moving party a “cross-motion”); *accord*, Shulas v. Estabrook, 385 N.J. Super. 91, 94 (N.J. Super. Ct. App. Div. 2006); Nelson v. Planet Ins. Co., 111 Nev. 1373, 1376 (Nev. 1995).

State Court Rules and Standing Orders: Eighth Judicial Dist. of Nev. Civ. Rule 2.20(f) (“An opposition to a motion which contains a motion related to the same subject matter will be considered as a counter-motion.”); N.J. Rules of Court § 1:6-3(b) (“A cross-motion may be filed and served by the responding party together with that party’s opposition to the motion”); N.Y. C.P.L.R. § 2215(b) (“[A] party may serve upon the moving party a notice of cross-motion demanding relief, with or without supporting papers”); Mass. Super. Ct. Rule 9A(b)(3) (“A cross-motion, accompanied by the other documents specified in Paragraph (a)(1) of this rule, shall be served on the moving party with the opposition to the original motion. A party opposing a cross-motion may serve a memorandum in opposition within (A) 10 days after service of a cross-motion other than a cross-motion for summary judgment, (B) 21 days after service of a cross-motion for summary judgment or (C) such additional time as is allowed by statute or order of the court.”).

Federal Cases: Miller v. Elexco Land Servs., Inc., 09-CV-0038, 2011 WL 4499281, at *1, n.2 (N.D.N.Y. Sept. 27, 2011) (applying definition from *Black’s Law Dictionary*); *accord*, Horton v. Williams, 08-CV-0513, 2010 WL 3338920, at *2 & n.2 (N.D.N.Y. Aug. 24, 2010); Lent v. Fashion Mall Partners, L.P., 243 F.R.D. 97, 100 (S.D.N.Y. 2007); New Hampshire Ins. Co. v. Diller, 678 F. Supp. 2d 288, 292, n.1 (D.N.J. 2009); Oxford v. Anthem Life Ins. Co., 11-

against whom the original motion was filed.⁸

Example 1: Defendant moves for summary judgment against Plaintiff, then Plaintiff moves for summary judgment against Defendant. Plaintiff's motion is a "cross-motion."⁹

Example 2: Defendant 1 moves for summary judgment against Plaintiff, then Defendant 2 moves for

summary judgment against Plaintiff. Defendant 2's motion is *not* a "cross-motion."¹⁰

Third, a cross-motion requests an order that is similar to, or competes with, the order requested by another party.¹¹

Example 1: Plaintiff moves for summary judgment on its first claim (as well as its other claims), then Defendant moves for partial summary judgment on

CV-0507, 2012 U.S. Dist. LEXIS 137050, at *25 (S.D. Ind. Sept. 25, 2012); *S. Md. Equine Veterinary Serv. v. Hartford Cas. Ins. Co.*, 10-CV-1850, 2011 U.S. Dist. LEXIS 60794, at *1-2 (D. Md. June 3, 2011); *Rodriguez v. Astrue*, 09-CV-2668, 2010 U.S. Dist. LEXIS 7049, at *2 (N.D. Cal. Jan. 28, 2010).

Federal Court Rules and Standing Orders: N.D.N.Y. L.R. 7.1(c) (defining a "cross-motion" as "a competing request for relief or order similar to that requested by another party against the cross-moving party"); D. Md. Rule 105(2)(c) (defining, in summary-judgment context, a "cross-motion" as a motion filed "[a]fter th[e] [original] motion has been filed" in "a two-party case"); W.D.N.Y. L.R. Civ. P. 7(b)(2)(A) (noting, in summary-judgment context, that a "cross-motion" is against "the moving party"); *cf.* N.D. Cal., B.L.R. 7007-1(d) ("Together with an opposition, a party responding to a motion may file a counter-motion related to the subject matter of the original motion.").

8. **Law Dictionaries and Encyclopedias:** BLACK'S LAW DICTIONARY 1106 (9th ed. 2009) (defining a "cross-motion" as "a competing request for relief or order similar to that requested by another party against the cross-moving party . . ."); *cf.* 7A FED. PROC. LAWYERS ED. § 19:146 (2011) ("A cross-motion must be contained in the same document as the response to the original motion, and a response to the cross-motion must be contained in the same document as the reply . . .").

State Cases: *Van Horn v. Van Horn*, 415 N.J. Super. 398, 409-10 (N.J. Super. Ct. App. Div. 2010) (explaining that a properly filed cross-motion must "relate[] to the subject matter of the original motion"); *XO Communs., LLC v. Level 3 Communs., Inc.*, 948 A.2d 1111, 1117 (Del. Ch. 2007) (calling motion filed by responding party a "cross-motion"); *accord*, *Shulas v. Estabrook*, 385 N.J. Super. 91, 94 (N.J. Super. Ct. App. Div. 2006); *Nelson v. Planet Ins. Co.*, 111 Nev. 1373, 1376 (Nev. 1995); *Smaland Beach Ass'n v. Genova*, 2006 Mass. Super. LEXIS 306, at *9 (Mass. May 31, 2006) (noting that a party responding to an original motion may file a "cross-motion or opposition").

State Court Rules and Standing Orders: Eighth Judicial Dist. of Nev. Civ. Rule 2.20(f) ("An opposition to a motion which contains a motion related to the same subject matter will be considered as a counter-motion."); N.J. Rules of Court § 1:6-3(b) ("A cross-motion may be filed and served by the responding party together with that party's opposition to the motion and noticed for the same return date only if it relates to the subject matter of the original motion."); *cf.* Mont. D.R. Rule 4.41(G) ("Except in CSEA cases, a party served with a motion may file a counter-motion . . ."); Wash. State Pierce Cnty. Super. Ct. PCLR 7(b)(1)(D)(ii) ("In the event there is an existing motion and the responding party wishes to file a counter motion to be heard the same date they may do so without leave of the court . . ."), *accord*, Wash. State Pierce Cnty. Super. Ct. PCLSPR 94.04(c)(2).

Federal Cases: *Miller v. Elexco Land Servs., Inc.*, 2011 WL 4499281, at *1, n.2 (N.D.N.Y. Sept. 27, 2011) (applying definition from *Black's Law Dictionary*); *Horton v. Williams*, 08-CV-0513, 2010 WL 3338920, at *2 & n.2 (N.D.N.Y. Aug. 24, 2010) (applying

definition from *Black's Law Dictionary*); *Lent v. Fashion Mall Partners, L.P.*, 243 F.R.D. 97, 100 (S.D.N.Y. 2007) (applying definition from *Black's Law Dictionary*); *New Hampshire Ins. Co. v. Diller*, 678 F. Supp. 2d 288, 292, n.1 (D.N.J. 2009) (applying definition from *Black's Law Dictionary*); *see also* *Willingam v. Cnty. of Albany*, 593 F. Supp. 2d 446, 451 (N.D.N.Y. 2006).

Federal Court Rules and Standing Orders: N.D. Cal., B.L.R. 7007-1(d) ("Together with an opposition, a party responding to a motion may file a counter-motion related to the subject matter of the original motion."); D. Md. Rule 105(2)(c) (defining, in summary-judgment context, a "cross-motion" as a motion filed "[a]fter th[e] [original] motion has been filed" in "a two-party case," both "opposing the first party's motion and in support of its own cross-motion"); N.D.N.Y. L.R. 7.1(c) (defining a "cross-motion" as "a competing request for relief or order similar to that requested by another party against the cross-moving party"); D. Nev. L.R. 7056(e)(1) ("A countermotion for summary judgment that relates to the same claim or partial claim may be filed against the movant(s) . . ."); W.D.N.Y. L.R. Civ. P. 7(b)(2)(A) (noting, in summary-judgment context, that a "cross-motion" is filed by "the party opposing the original motion").

9. *See Elexco Land Servs., Inc.*, 2011 WL 4499281, at *1 & n.2 (finding that, where plaintiff filed motions for partial summary judgment against two defendants on two trespass claims, two defendants' two motions for partial summary judgment on those two trespass claims were each "cross-motions").
10. *See Horton*, 2010 WL 3338920, at *2 ("Defendant Keller's 'cross-motion' for summary judgment, which in no way opposes Defendant Williams's motion to dismiss for failure to state a claim, and requests dismissal of Plaintiff's Complaint on a different basis than does Defendant Williams's motion, is not a *cross-motion* for summary judgment but is instead a motion for summary judgment.") [emphasis in original]; *Lent*, 243 F.R.D. at 100 ("[A] party cannot file a 'cross motion' against a party that has not already moved against it."); *Willingam v. Cnty. of Albany*, 593 F. Supp. 2d 446, 451 (N.D.N.Y. 2006) (finding that, where plaintiff filed a motion for summary judgment against first two defendants, then the third defendant filed a motion for summary judgment against the plaintiff, the third defendant's motion was "improperly cast and filed as a cross-motion rather than as a regular motion"); *cf.* *Diller*, 678 F. Supp. 2d 288, 292 & n.1 (finding that, where plaintiff moved for summary judgment against defendant, third-party defendant's motion for summary judgment against defendant was not a "cross-motion").

11. **Law Dictionaries and Encyclopedias:** BLACK'S LAW DICTIONARY 1106 (9th ed. 2009) (defining a "cross-motion" as "a competing request for relief or order similar to that requested by another party against the cross-moving party . . ."); MERRIAM-WEBSTER'S DICTIONARY OF LAW 116 (1996) (defining a "cross-motion" as "[a] motion that attempts to counter a similar motion filed by an opposing party . . ."); MELLINKOFF'S DICTIONARY OF AM. LEGAL USAGE 143 (1992) (defining a "cross-motion" as an "opposing motion, usually requesting a result opposite to original motion"); THE WOLTERS

Plaintiff's first claim. Defendant's motion is a "cross-motion."¹²

Example 2: Defendant moves for partial summary judgment on Claim 2 (which seeks X as relief), then

Plaintiff moves for partial summary judgment on Claim 3 (which seeks Y as relief). Plaintiff's motion is *not* a "cross-motion."¹³

Granted, in some courts, a cross-motion may seek relief that is unresponsive or unrelated to the relief sought in the original

KLUWER BOUVIER LAW DICTIONARY 714 (2011) (defining "cross-motion" as "[a] motion similar to a motion filed earlier by another party. A cross motion is a motion for some ruling or order filed by a party to an action that is similar in its request to another motion already pending. . . . Note: a cross-motion must seek the same order or similar relief or ruling as a prior motion, with the cross-motion seeking an order or rule to the benefit of the cross-movant, while the original movant sought the original order for its own benefit."); Lawyers.com Legal Dictionary, <http://research.lawyers.com/glossary/cross-motion.html> (defining a "cross-motion" as "a motion that attempts to counter a similar motion filed by an opposing party . . ."); WILLIAM C. BURTON, BURTON'S LEGAL THESAURUS 136 (3d ed. 1999) (defining "cross" as to "conflict with . . . contradict, contravene, controvert . . . oppose . . . [and] run counter to . . .," and listing "cross-motions" under the words "Associated Concepts").

State Cases: *Berger v. Pubco Corp.*, 76 A.2d 132, 135 (Del. 2009) (referring to a motion for summary judgment filed in response to a motion to dismiss as a "counter-motion" and a motion for summary judgment filed in response to a motion for summary judgment as a "cross-motion"); *Columbus Steel Castings Co. v. Transp. & Transit Assocs.*, No. 06AP-1247, 2007 WL 4340558, at *2 (Ohio Ct. App. Dec. 13, 2007) ("TTA made a competing request for relief by filing a cross-motion for summary judgment."); *Dillon v. Typaldos*, 2006 WL 1381625, at *1, 6, 13 (N.J. Super. Ct. Ch. Div. May 19, 2006) (referring to a motion to dismiss a complaint filed in response to a motion to reinstate the complaint as a "cross-motion" and a subsequent motion to add defendants as a "counter motion").

State Court Rules and Standing Orders: Eighth Judicial Dist. of Nev. Civ. Rule 2.20(f) ("An opposition to a motion which contains a motion related to the same subject matter will be considered as a counter-motion."); N.J. Rules of Court § 1:6-3(b) ("A cross-motion may be filed and served by the responding party together with that party's opposition to the motion and noticed for the same return date only if it relates to the subject matter of the original motion.").

Federal Cases: *Miller v. Elexco Land Servs., Inc.*, 09-CV-0038, 2011 WL 4499281, at *1, n.2 (N.D.N.Y. Sept. 27, 2011) (applying definition from *Black's Law Dictionary*); *Horton v. Williams*, 08-CV-0513, 2010 WL 3338920, at *2 & n.2 (N.D.N.Y. Aug. 24, 2010) (applying definition from *Black's Law Dictionary*); *Lent v. Fashion Mall Partners, L.P.*, 243 F.R.D. 97, 100 (S.D.N.Y. 2007) (applying definition from *Black's Law Dictionary*); *New Hampshire Ins. Co. v. Diller*, 678 F. Supp. 2d 288, 292, n.1 (D.N.J. 2009) (applying definition from *Black's Law Dictionary*); see also *Birmingham v. Mizuno USA, Inc.*, 09-CV-0566, 2011 WL 1299356, at *2 & n.1 (N.D.N.Y. Mar. 31, 2011); *Ramos v. Bonilla*, No. 03-2683, 2006 WL 4452844, at *3 (Bankr. D.N.J. Apr. 12, 2006); *FDIC v. Modular Homes, Inc.*, 859 F. Supp. 117, 125 & n.8 (D.N.J. 1994); *Mulee v. United States*, 648 F. Supp. 1181, 1182 & n.1 (N.D. Ill. 1986).

Federal Court Rules and Standing Orders: D. Haw. L.R. 7.9 ("Any motion raising the same subject matter as an original motion may be filed by the responding party together with the party's opposition A party's memorandum in support of the counter motion must be combined into one document with the party's memorandum in opposition to the original motion . . ."); D. Haw. LBR 9013-1(d)(1)

("A respondent may file, together with the response to the motion, a countermotion raising only the same specific issues, claims, or defenses presented in the original motion."); D.N.J. L.R. 7.1(h) (requiring a "cross-motion" to be "related to the subject-matter of the original motion"); D.N.J. L. Bankr. R. 9013-1(d) ("No motion shall be designated a cross motion unless it is related to the original motion."); N.D.N.Y. L.R. 7.1(c) (defining a "cross-motion" as "a competing request for relief or order similar to that requested by another party against the cross-moving party"); D. Nev. L.R. 7056(e)(1) ("A countermotion for summary judgment that relates to the same claim or partial claim [as the original motion for summary judgment] may be filed against the movant(s) . . ."); cf. N.D. Cal., B.L.R. 7007-1(d) ("Together with an opposition, a party responding to a motion may file a counter-motion related to the subject matter of the original motion."); E.D. Cal. Order 13-0911(e) ("Any counter-motion or other motion that a party may desire to make that is related to the general subject matter of the original motion shall be served and filed in the manner and on the date prescribed for the filing of opposition."); E.D. Cal. LBR 9014-1(i) ("Any countermotion or other motion related to the general subject matter of the original motion set for hearing pursuant to this Local Rule may be filed and served no later than the time opposition to the original motion is required to be filed.").

12. See *Elexco Land Servs., Inc.*, 2011 WL 4499281, at *1 & n.2 (finding that, where plaintiff filed motions for partial summary judgment against two defendants on two trespass claims, two defendants' two motions for partial summary judgment on those two trespass claims were each "cross-motions").

13. See *Elexco Land Servs., Inc.*, 2011 WL 4499281, at *1 & n.2 (finding that, where plaintiff filed motion for partial summary judgment against first defendant on two trespass claims, first defendant's motion for partial summary judgment on those two trespass claims was a "cross-motion," but first defendant's motion for partial summary judgment on plaintiff's third claim, for conversion, was a "motion"; also finding that, where plaintiff filed motion for partial summary judgment against second defendant on two trespass claims, second defendant's motion for partial summary judgment on those two trespass claims was a "cross-motion," but second defendant's motion for partial summary judgment on plaintiff's third claim, for conversion, was a "motion," as was second defendant's motion to dismiss plaintiff's complaint); *Birmingham v. Mizuno USA, Inc.*, 09-CV-0566, 2011 WL 1299356, at *2 & n.1 (N.D.N.Y. Mar. 31, 2011) ("The reason the Court does not characterize Defendant's motion as a 'cross-motion' is that it seeks relief that appears predominantly dissimilar to that requested by Plaintiffs, who moved for summary judgment on only three of the seven counts of their Complaint."); *Horton*, 2010 WL 3338920, at *2 & n.2 (finding that second defendant's motion for summary judgment against plaintiff, filed after first defendant's motion to dismiss plaintiff's complaint, was not a "cross-motion"); *Diller*, 678 F. Supp. 2d 288, 292 (finding that, where plaintiff moved for summary judgment against defendant, defendant's motion for partial summary judgment against plaintiff was a "cross-motion," but defendant's motion for leave to file sur-reply on its motion for partial summary judgment was not a "cross-motion," nor was third-party defendant's motion for summary judgment against defendant

motion.¹⁴ However, this is the minority view. *Compare* note 14 with notes 11-13.

Note that, while cross-motions must seek relief that competes with the relief sought in the original motion, cross-motions to “deny” or “dismiss” those original motions are superfluous and improper because they request no relief other

than that which may be provided through a decision of the original motions.¹⁵

Note also that a motion to amend a pleading is a cross-motion if, and only if, that motion seeks (through the proposed amendment) to remedy the defects in the original pleading identified in the motion to dismiss.¹⁶

a “cross-motion”); *Ramos v. Bonilla*, No. 03-2683, 2006 WL 4452844, at *3 (Bankr. D.N.J. Apr. 12, 2006) (“Ramos’s cross-motion [seeking to revoke a discharge from bankruptcy, as well as for sanctions and damages] is procedurally improper . . . because it does not relate to the original motion to dismiss filed by Bonilla.”); *FDIC v. Modular Homes, Inc.*, 859 F. Supp. 117, 125 & n.8 (D.N.J. 1994) (“[Modular’s] cross-motion [to dismiss the FDIC’s complaint for failing to comply with discovery] is procedurally improper . . . because it does not relate to the subject matter of the FDIC’s motion to dismiss Modular’s affirmative defenses.”); *Mulee v. United States*, 648 F. Supp. 1181, 1182 & n.1 (N.D. Ill. 1986) (“Although the government has styled its motion as to Mulee’s complaint as one for dismissal, it is more properly a cross-motion for summary judgment in its favor and denial of Mulee’s motion for summary judgment.”).

14. **State Cases:** *Burke Secur., Inc. v. Nat’l Union Fire Ins. Co.*, 184 A.D.2d 1046, 1046 (N.Y. App. Div. 1992) (“Brownyard’s cross motion was proper even though plaintiffs, in making the original motion, did not seek any relief against Brownyard.”); *cf. Van Horn v. Van Horn*, 415 N.J. Super. 398, 409-10 (N.J. Super. Ct. App. Div. 2010) (explaining that a properly filed cross-motion responds to the subject matter of the original motion, but noting that the judge has the discretion to relax the rules, and deeming a non-responsive motion to be a cross-motion).

State Court Rules and Standing Orders: N.J. Rules of Court, § 1:6-3(b) (“[I]n Family Part motions brought under Part V of these Rules . . . [,] a notice of cross-motion may seek relief unrelated to that sought in the original motion.”); N.Y. C.P.L.R. § 2215(b) (McKinney 2010) (“[The] relief [sought in the cross-motion] need not be responsive to that demanded by the moving party.”); Patrick M. Connors, *Practice Commentaries*, in *McKINNEY’S CONS. LAWS OF N.Y.*, Book 7B, CPLR C2215:1, at 149 (“A cross-motion is merely a motion by any party against the party who made the original motion, made returnable at the same time as the original motion.”); Patrick M. Connors, *Practice Commentaries*, in *McKINNEY’S CONS. LAWS OF N.Y.*, Book 7B, CPLR C2215:1D, at 185 (“The relief sought in the cross-motion need not be responsive or even related to the relief sought in the main motion. It can be of an entirely different kind.”).

Federal Case: *Kowalski v. Mommy Gina Tuna Resources*, 05-CV-00679, 2008 WL 4216267, at *1 (D. Haw. Sept. 15, 2008) (drawing distinction between a counter-motion and a cross-motion, noting that the former refers to a motion raising the same subject matter as an original motion, and the latter refers to an “independent” motion unrelated to the subject matter of the original motion).

Federal Rule: U.S. Dist. Ct. for the Dist. of Haw. L.R. 7.9 (“Counter Motions. . . . Any motion raising the same subject matter as an original motion may be filed by the responding party together with the party’s opposition . . .”).

15. **State Cases:** *Linn v. Linn*, 8 So.2d 187, 188 (Alaska 1942); *Kitch v. Moslander*, 50 N.E.2d 933, 937 (Ind. Ct. App. 1943); *Ryan v. City of Emmetsburg*, 293 N.W. 29, 31 (Iowa 1940); *Donovan v. Donovan*, 200 N.E. 884, 886 (Mass. 1936); *State ex rel. McVay v. Dist. Court of Fourth Judicial Dist.*, 251 P.2d 840, 846 (Mont. 1952); *Kress v. Corey*, 189 P.2d 352, 361-62 (Nev. 1948); *N.*

Laramie Land Co. v. Hoffman, 195 P. 988, 989 (Wyo. 1921).

State Court Rules and Standing Orders: See NY Westchester County Justice Tolbert Rules Doc. 1 (“Cross-motions which seek only the denial of the relief in the original motion will not be recognized as motions with respect to which a reply may be submitted.”).

Federal Cases: *C.H.R.I.S.T., Inc. v. Meyers*, 00-CV-50402, 2002 WL 257814, at *1 (N.D. Ill. Feb. 20, 2002) (“[A] separate motion to deny an opposing party’s motion for summary judgment is obviously unnecessary.”); *Kan.-Neb. Natural Gas Co. v. City of St. Edward, Neb.*, 135 F. Supp. 629, 633 (D. Neb. 1955) (“The defendants in each case served and filed a motion to deny motion of plaintiff for temporary injunction. Such a pleading is of no real service. A motion to deny an antecedent motion already set for hearing accomplishes nothing that could not be done by a simple appearance in resistance to the earlier motion. Reasonable professional case is laudable. When it degenerates into illogical timidity it approaches the status of absurdity.”); *Fox v. Am. Airlines, Inc.*, 00-CV-0368, 2001 WL 1597851, at *1 (N.D. Tex. Dec. 12, 2001) (“Although styled as a Motion to Deny Summary Judgment, Plaintiff’s motion is in essence a response to Defendant’s summary judgment motion. In light of Plaintiff’s response, a separate motion to deny summary judgment is unnecessary, and accordingly Plaintiff’s Motion to Deny Summary Judgment is denied as moot.”); *Jones v. Milwaukee Cnty.*, 74-C-0374, 1979 WL 2035, at *5 (E.D. Wis. May 1, 1979) (“The defendants filed a motion to deny the plaintiffs’ motion for partial summary judgment. To oppose a motion, it is only necessary to file a brief or affidavits in opposition. A motion to deny the motion opposed is unnecessary. The defendants’ motion is superfluous and will therefore be dismissed.”); *cf. Carlwood Dev. Inc. v. United States*, 10-CV-1773, 2011 WL 69374, at *1 (D. Nev. Jan. 10, 2011) (characterizing as improper government’s purported “cross-motion” for summary judgment because it did not “address[] any matters even remotely indicative of a motion for summary judgment” but rather merely responded to the matters raised by the petitioners in their opening brief on their motion); *Langley v. AT&T Wireless Servs., Inc.*, 96-CV-3107, 1998 WL 792498, at *1, n.1 (N.D. Tex. Nov. 3, 1998) (“Plaintiff filed on October 23, 1998 a motion to deny defendant’s motion to strike and deny defendant’s motion for summary judgment. These pleadings are improper under the court’s local civil rules. The pertinent rule provides only for the filing of a motion and brief, a response, and a reply.”).

16. **State Cases:** *Dillon v. Typaldos*, 2006 WL 1381625, at *1, 6, 13 (N.J. Super. Ct. Ch. Div. May 19, 2006) (referring to a motion to dismiss a complaint filed in response to a motion to reinstate the complaint as a “cross-motion” and a subsequent motion to add defendants as a “counter motion”).

Federal Cases: *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 237 (2d Cir. 2007) (characterizing plaintiff’s motion to amend, filed in attempt to cure defects identified in defendants’ motion to dismiss under Fed. R. Civ. P. 12[b][6] as a “cross-motion”); *accord, Andre v. Walgreen Co.*, 12-CV-5413, 2013 U.S. Dist. LEXIS 88657, at *1-2 (D.N.J. June 25, 2013); *Lesperance v. Cnty. of St. Lawrence*, 10-CV-1273, 2011 U.S. Dist. LEXIS 92439,

II. PROCEDURAL RULES REGARDING CROSS-MOTIONS

A. COMMON PROCEDURAL RULES REGARDING CROSS-MOTIONS

Sometimes, cross-motions are allowed to be filed after the

expiration of the motion-filing deadline.¹⁷ Other times, however, cross-motions are not allowed to be filed after the expiration of the motion-filing deadline.¹⁸

Sometimes, the brief in support of a cross-motion must be

at *1-2 (N.D.N.Y. Aug. 18, 2011); *Deluca v. AccessIT Group, Inc.*, 695 F. Supp. 2d 54, 57, 64 (S.D.N.Y. 2010); *Coulter v. United States Dep't of Homeland Sec.*, 07-CV-4894, 2008 U.S. Dist. LEXIS 73014, at *1 (D.N.J. Sept. 23, 2008); *Steiert v. Mata Servs.*, 111 F. Supp. 2d 521, 523 (D.N.J. 2000).

17. **State Cases:** *Grande v. Peteroy*, 39 A.D.3d 590, 591-592 (N.Y. App. Div. 2007) (“[A]n untimely motion or cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds [because] the nearly identical nature of the grounds may provide the requisite good cause (see CPLR 3212 [a]) to review the untimely motion or cross motion on the merits.”); *Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281 (N.Y. App. Div. 2006) (“A cross motion for summary judgment made after the expiration of the [deadline for making dispositive motions] may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief ‘nearly identical’ to that sought by the cross motion.”).

Federal Cases: *Daly v. Royal Ins. Co. of Am.*, 00-CV-0040, 2002 WL 1768887, at *1 (D. Ariz. July 17, 2002) (permitting plaintiff to file cross-motion for summary judgment after expiration of motion-filing deadline); *Mobley v. Am. Home Assur. Co.*, 11-C-1293, 2012 WL 3028031, at *1 & n.1 (W.D. Okla. July 24, 2012) (“Defendant responded to Plaintiff’s Motion and also filed a counter Motion for Summary Judgment . . . Defendant’s failure to file a separate motion for summary judgment is in violation of the local rules. . . . However, because the deadline for filing dispositive motions has passed . . . , the Court will consider Defendant’s Motion despite this shortcoming.”); *Jones v. Coleman Co.*, 39 F.3d 749, 753 (7th Cir. 1994) (affirming the decision of a magistrate to judge to allow an untimely cross-motion where there was a “change in circumstances whereby the issues involving the only remaining defendant [were] addressed by the motion” that showed “good cause”); *Hahnel v. United States*, 782 F. Supp. 2d 20, 30-31 (W.D.N.Y. 2011) (“This Court has routinely permitted litigants to file a cross-motion in response to a dispositive motion, even though the deadline for filing dispositive motions had passed, provided that such cross-motions were filed by the deadline established for filing opposing papers, as set by the Court’s Motion Scheduling Order. . . . The Court cannot recall an instance, though, where a cross-motion was filed after all filing deadlines had expired, as in this case, and it notes its disapproval of the manner in which Plaintiff’s motion was filed. Nevertheless, the Court will, for its own convenience, and in its discretion, consider Plaintiff’s cross-motion . . .”).

Federal Court Rules and Standing Orders: Rules Ct. Fed. Claims 7.2(c)(1) (“A cross-motion may be filed within the time allowed for responses [to motions].”); E.D. Cal. Local Rule 78-230(e) (“Any counter-motion or other motion that a party may desire to make that is related to the general subject matter of the original motion shall be served and filed with the Clerk in the manner and on the date prescribed for the filing of opposition.”); N.D.N.Y. L.R. 7.1(c) (“A party may file and serve a cross-motion (meaning a competing request for relief or order similar to that requested by another party against the cross-moving party) at the time it files and serves its opposition papers to the original motion”).

18. **State Cases:** *Schacht v. Ameritrust Co. N.A.*, 1994 Ohio App.

LEXIS 1125, at *15-16 (Ohio Ct. App. 1994) (affirming lower court’s decision to strike cross-motion for summary judgment filed after deadline for all dispositive motions); *Cruickshank v. Fremont Inv. & Loan*, 307 Ga. App. 489, 489-90 (Ga. Ct. App. 2010) (affirming dismissal of untimely filed cross-motion for summary judgment).

Federal Cases: *Baker v. AirServ Corp.*, 08-CV-0913, 2009 WL 1098767, at *1 (D. Colo. Apr. 20, 2009) (“[P]laintiff’s only explanation for filing his motion for partial summary judgment after the dispositive motion deadline amounts to a misreading of Federal Rule of Civil Procedure 56(a). He offers no support for his position that Rule 56(a) permits him to file a cross-motion for summary judgment out of time, nor can I find any.”); *Kelley v. N.Y. Life Ins. & Annuity Corp.*, 07-CV-01702, 2008 WL 5423343, at *4 (D. Colo. Dec. 30, 2008) (“I first note that his Cross-Motion for Partial Summary Judgment was filed on November 11, 2008, after the dispositive motions deadline set by the scheduling order had passed on October 20, 2008. As such, his motion is untimely.”); *Schroer v. United States*, 07-CV-0690, 2008 U.S. Dist. LEXIS 64568, at *1-2 (D. Colo. Aug. 22, 2008) (striking cross-motion for summary judgment that was filed as a response after dispositive motion deadline passed); *United States ex rel. IBM v. Hartford Fire Ins. Co.*, 112 F. Supp. 2d 1023, 1028-29 (D. Haw. 2000) (declining to consider “cross-motion” for summary judgment filed “well after the court imposed deadline[,]” noting that, before the dispositive motion deadline expired, Defendant could have “request[ed] that the court modify its Scheduling Order, []or . . . [sought] relief from the Scheduling Order”); *Embrex, Inc. v. Serv. Eng’g Corp.*, 96-CV-0824, 1998 WL 35235446, at *1 (E.D.N.C. June 23, 1998) (granting motion “to strike plaintiff’s cross motion for summary judgment as untimely . . . under Fed. R. Civ. P. 16(f).”); *Serino v. Prudential Ins. Co. of Am.*, 706 F. Supp. 2d 584, 586-87 (M.D. Pa. 2009) (striking “cross-motion” for summary judgment that was filed after the expiration of the dispositive-motion deadline, even though it was filed within the deadline to file a response to the original motion for summary judgment); *Falk v. Wells Fargo Bank*, 09-CV-0678, 2011 WL 3702666, at *3 (N.D. Tex. Aug. 19, 2011) (“Wells Fargo moves to strike Falk’s Cross-Motion for Partial Summary Judgment. The deadline for filing dispositive motions was December 10, 2010. . . . On January 10, 2011, Falk submitted his Cross-Motion as part of his Response to Defendants Motion for Summary Judgment. Falk’s only explanation for failing to file his motion by, or request an extension of, the dispositive motions deadline is that it was the result of ‘inadvertence or because he had not previously thought of filing a Cross-Motion.’ . . . Finding no good cause to extend the dispositive motions deadline, the Court STRIKES Falk’s untimely pleading pursuant to Federal Rule 16(f)(1)(c).”; cf. *Byce v. Pruco Life Ins. Co.*, 09-CV-1912, 2011 WL 233390, at *1 (N.D. Ga. Jan. 21, 2011) (finding that cross-motion for summary judgment filed after expiration of dispositive-motion filing deadline was untimely and had to qualify for exception to be considered); *Wuliger v. Reassure Am. Life Ins. Co.*, 03-CV-7699, 2011 WL 767872, at *3 (N.D. Ohio Feb. 28, 2011) (finding that cross-motion for summary judgment filed after expiration of dispositive-motion filing deadline violated the court’s scheduling order but would be excused under the circumstances); *Seebach v. Seebach Am., Inc.*, 09-CV-0326, 2010 U.S. Dist. LEXIS 107568

combined with the brief in opposition to the original motion.¹⁹ Other times, however, the brief in support of a cross-motion may, or sometimes must, be filed separately from the brief in

opposition to the original motion.²⁰

Sometimes, replies on cross-motions are permitted without prior leave of the court.²¹

(S.D. W. Va. Oct. 7, 2010) (considering arguments raised to the extent they are in response to motion for summary judgment, but deeming “cross-motion” to be untimely, and therefore striking cross motion for summary judgment).

19. **Law Dictionaries and Encyclopedias:** 7A FED. PROC. LAWYERS ED. § 19:146 (2011) (“A cross-motion must be contained in the same document as the response to the original motion, and a response to the cross-motion must be contained in the same document as the reply . . .”).

Federal Cases: *Miller v. Elexco Land Servs., Inc.*, 09-CV-0038, 2011 WL 4499281, at *6 (N.D.N.Y. Sept. 27, 2011) (“Such a bifurcated motion practice is prohibited by [the court’s local rule on page limitations]. . . . The effect of this motion practice was . . . [to] enlarge[] the number of pages of memoranda of law that Defendant Elexco could submit regarding Plaintiffs’ two trespass claims . . .”); *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 375, 377 (U.S. Cl. Ct. 1988) (reciting court rule that “a party filing a cross-motion is required to file its argument in support of the cross-motion and in response to the other parties motion in the same brief”); *Big Lagoon Rancheria v. Cal.*, 09-CV-1471, 2010 U.S. Dist. LEXIS 47109, at *7 (N.D. Cal. Apr. 16, 2010) (“Big Lagoon’s dispositive motion is currently due June 17, 2010; the State’s opposition and any cross-motion, contained in a single brief, are due July 1, 2010; Big Lagoon’s reply and cross-opposition, contained in a single brief, are due July 15, 2010; and the State’s reply on its cross-motion is due July 22, 2010.”); *Love v. Correa*, 07-CV-0436, 2009 U.S. Dist. LEXIS 10544, at *41-42 (D. Haw. Feb. 11, 2009) (noting that “Defendants Fontes and Wu violated Local Rule 7.9 by filing separate oppositions and replies”).

Federal Court Rules and Standing Orders: D. Haw. L.R. 7.9 (“A party’s memorandum in support of the counter motion must be combined into one document with the party’s memorandum in opposition to the original motion”); D. Md. Civ. Rule 105(2)(c) (“After that motion has been filed, the other party shall file a cross-motion accompanied by a single memorandum (both opposing the first party’s motion and in support of its own cross-motion)”); N.D.N.Y. L.R. 7.1(c) (“If a party makes a cross-motion, it must join its cross motion brief with its opposition brief, and this combined brief may not exceed twenty-five (25) pages in length, exclusive of exhibits. A separate brief in opposition to the original motion is not permissible.”); U.S. Dist. Ct. Rules S.D.N.Y., Berman-Practices 2.C.2. (“Any cross-motion shall be included in the opposition brief.”); *cf.* D.N.J. L.R. 7.1(h) (“A cross-motion related to the subject matter of the original motion may be filed by the party opposing the motion together with that party’s opposition papers”); U.S. Court of Claims Rule 83.2(e) (stating that a party filing a cross-motion is required to file its argument in support of the cross-motion and in response to the other parties’ motion in the same brief).

20. **State Court Rules and Standing Orders:** N.M. Dist. Ct. Rule 1-007.1(E) (“Responses to motions shall be made separately from any counter-motions or cross-motions.”); N.M. Fourth Judicial Dist. Ct. LR4-304(E) (“The practice of filing cross-motions which operate as both a motion and as a response or reply to the original motion is prohibited.”); N.M. Sixth Judicial Dist. Ct. LR6-204(C) (“The practice of filing cross-motions to operate as both a motion and as a response to the original motion is prohibited.”).

Federal Cases: *World Publ’g Co. v. United States Dep’t of Justice*,

09-CV-0574, 2011 U.S. Dist. LEXIS 32594, at *25 (N.D. Okla. Mar. 28, 2011) (considering defendants’ motion to strike plaintiff’s opposition based on the argument that, “to the extent it purports to be a cross-motion for summary judgment[,] it violates Northern District of Oklahoma Local Civil Rule 7.2(e)[,]” which prohibits a response to a motion to include a cross-motion, and ultimately converting the response into a cross-motion); *Mobley v. Am. Home Assur. Co.*, 11-C-1293, 2012 WL 3028031, at *1 & n.1 (W.D. Okla. July 24, 2012) (“Defendant responded to Plaintiff’s Motion and also filed a counter Motion for Summary Judgment Defendant’s failure to file a separate motion for summary judgment is in violation of the local rules. . . . Combined motions are generally stricken.”); *Tooling, Mfg. & Techs. Ass’n v. Hartford Fire Ins. Co.*, 08-CV-11812, 2010 U.S. Dist. LEXIS 89273, at *8 n.5 (E.D. Mich. Aug. 30, 2010) (“[A] cross-motion must be filed independently of the response brief, though nothing would prohibit using the same brief for the response brief and the brief supporting the cross-motion.”).

Federal Court Rules and Standing Orders: D. Colo. L. Civ. R. 56.1(B) (“A cross motion for summary judgment shall not be included in a response brief.”); E.D. Mich. ECF Rule 5(e) (“[A] response or reply to a motion must not be combined with a counter-motion.”); D. Miss., L.U. Civ. R. 7(b)(3)(C) (“A response to a motion may not include a counter-motion in the same document. Any motion must be an item docketed separately from a response.”); New Mex. L.R. 1-007.1(E) (“Responses to motions shall be made separately from any counter-motions or cross-motions.”); E.D. Okla. L.R. 7.1(f) (“A response to a motion may not also include a motion or a cross-motion made by the responding party.”); N.D. Okla. L.R. 7.2(e) (“A response to a motion may not also include a motion or a cross-motion made by the responding party.”); W.D. Okla. L. Civ. R. 7.1(c) (“A response to a motion may not also include a motion or a cross-motion made by the responding party. If a party responding to a motion files a cross-motion or other closely-related motion concurrently with the filing of the response, the brief in support of the cross-motion or other closely-related motion *may* be combined with the responsive brief [or it may be filed separately].”) (emphasis added); U.S. Dist. Ct. Rules N.D. W. Va. 10.1 (“Always file motions and responses separately. For example, never file a cross-motion for summary judgment with a response to a motion for summary judgment. It is critical that the cross motion be filed separately so that it will appear on the Court’s Pending Motions Report and can be properly linked to any subsequent responses, replies, notices and orders.”); U.S. Dist. Ct. Rules S.D. W. Va. 10.1 (“Motions and responses must be filed as separate documents. For example, a cross-motion for summary judgment should never be combined with a response to a motion for summary judgment. It is critical that the cross motion be filed separately so that it can be properly linked to any subsequent responses, replies, notices and orders.”).

21. **State Cases:** *Captain Andy’s Sailing v. Dep’t of Land & Natural Res.*, 113 Haw. 184, 190 (Haw. 2006); *Watson v. YMCA of Greater Boston*, 14 LCR 528, 529 (Mass. Land Ct. 2006).

State Court Rules and Standing Orders: Mass. Land Court Rule 4 (“Responses to motions or cross-motions . . . must be served upon all other parties and filed with the court within thirty (30) days after service of the motion or cross-motion. . . . Reply briefs, affidavits and other materials in support of the reply (if any) must

Other times, however, replies on cross-motions are not permitted without prior leave of the court.²²

B. USEFULNESS OF FEDERAL RULES IN INTERPRETING STATE RULES

State court procedural rules are occasionally patterned after federal court procedural rules.²³ When the state court procedural rules are patterned after federal court procedural rules,

be served on the parties and filed with the court no later than ten (10) days prior to the date the court first set for hearing"); N.Y. C.P.L.R. § 2214(b) (providing that, where answering papers and a cross-motion are required to be served seven days in advance of the return day, "any reply or responding affidavits shall be served at least one day before such time"); Ohio Second District Local Appellate Rule 8(F)(2) ("A reply brief, if any, and/or a response to the cross-motion, if any, shall be filed within twenty (20) days after the filing of the brief in opposition to the motion. No other briefs or memorandum shall be filed except with leave of court, unless a cross-motion has been filed in which event the movant may file a reply within twenty (20) day[s] of the filing of opposing party's response."); *accord*, Eleventh District Local Appellate Rule 101(B)(1); Utah Rules of Civ. Proc., Rule 101(g) ("The reply to the response to the counter motion shall be filed and served at least 2 business days before the hearing.").

Federal Cases: *Young v. Thieblot Ryan, P.A.*, 11-CV-1562, 2012 WL 6698632, at *1 & n.3 (D. Md. Dec. 21, 2012); *Small v. Bud-Kworldwide, Inc.*, 895 F. Supp. 2d 438, 442 (E.D.N.Y. 2012); *Taccetta v. Fed. Bureau of Investigation*, 10-CV-6194, 2012 U.S. Dist. LEXIS 90683, at *1 (D.N.J. June 29, 2012); *Cnty. of Inyo v. Dep't of the Interior*, 06-CV-1502, 2010 U.S. Dist. LEXIS 135831, at *4 (E.D. Cal. Dec. 10, 2010); *Strong v. Horton Plaza, LP*, 09-CV-2901, 2010 U.S. Dist. LEXIS 86885, at *2-3 (S.D. Cal. Apr. 27, 2010); *Nat'l Union Fire Ins. Co. v. U.S. Bank, N.A.*, 07-CV-1958, 2008 U.S. Dist. LEXIS 47413, at *2 n.1 (S.D. Tex. June 11, 2008).

Federal Court Rules and Standing Orders: N.D. Cal. Gen. Order 61 Regarding Immigration Mandamus Cases ("[I]f plaintiff filed a counter-motion, plaintiff may serve and file a reply within 14 days of service of defendant's opposition."); N.D. Cal., B.L.R. 7007-1(e) ("Any reply to an opposition, or opposition to a counter-motion, shall be filed and served by the moving party at least 7 days before the hearing."); D. Haw. L.R. 7.9 ("The movant on a counter motion shall file and serve any reply"); W.D.N.Y. Civ. R. 7(b)(2)(A) ("If the party opposing the original motion files a cross-motion, . . . the party filing the cross-motion shall have fourteen days after service of the responding papers to file and serve reply papers in support of the cross-motion."); D. Md. Civ. Rule 105(2)(c) ("After that motion has been filed, the other party shall file a cross-motion . . . , the first party shall then file an opposition/reply, and the second party may then file a reply.").

22. **State Case:** *Rizz Mgt. Inc. v. Kemper Ins. Co.*, 791 N.Y.S.2d 873, at *3-5 (N.Y. App. Div. 2004).

State Court Rules and Standing Orders: N.J. Rules of Court. § 1:6-3(b) ("No reply papers may be served or filed by the cross-movant without leave of court."); NY Commercial Division Westchester County Alternative Dispute Resolution Rules Doc. 2 ("Sur-reply papers, including reply papers in support of a cross-motion, are not permitted, absent prior permission of the Court."); Kentucky Rules of Civ. Proc. Rule 76.21 ("No reply to a cross response shall be filed unless requested by the court.").

Federal Cases: *Cross v. Potter*, 09-CV-1293, 2013 WL 1149525, at *3 (N.D.N.Y. Mar. 19, 2013) (enforcing proscription against fil-

ing replies on cross-motions without prior leave of the court); *accord*, *Cross v. State Farm Ins. Co.*, 10-CV-1179, 2013 WL 665002, at *11 (N.D.N.Y. Feb. 22, 2013); *Werking v. Andrews*, 11-CV-0410, 2012 WL 2885424, at *2, n.5 (N.D.N.Y. July 13, 2012); *Planck v. Schenectady Cnty.*, 12-CV-0336, 2012 WL 1977972, at *2 (N.D.N.Y. June 1, 2012); *Miller v. Elexco Land Servs., Inc.*, 09-CV-0038, 2011 WL 4499281, at *6 (N.D.N.Y. Sept. 27, 2011); *Valentine v. UNUM Life Ins. Co. of Am.*, 12-CV-0647, 2012 U.S. Dist. LEXIS 83680, at *2-3 (N.D. Cal. June 15, 2012); *Speth v. Goode*, 95-CV-0264, 2013 U.S. Dist. LEXIS 101021, at *42 (D.N.J. July 19, 2013) (stating that "Plaintiff's reply in support of his cross-motion . . . was filed without permission of the Court in violation of L. Civ. R. 7.1(d)(3)").

III. COMMON PROBLEMS CAUSED BY MISUNDERSTANDINGS OF A CROSS-MOTION

Misunderstandings regarding the definition of a cross-motion often lead to problems during the filing and briefing of cross-motions, including (1) a violation of the action's motion-

ing replies on cross-motions without prior leave of the court); *accord*, *Cross v. State Farm Ins. Co.*, 10-CV-1179, 2013 WL 665002, at *11 (N.D.N.Y. Feb. 22, 2013); *Werking v. Andrews*, 11-CV-0410, 2012 WL 2885424, at *2, n.5 (N.D.N.Y. July 13, 2012); *Planck v. Schenectady Cnty.*, 12-CV-0336, 2012 WL 1977972, at *2 (N.D.N.Y. June 1, 2012); *Miller v. Elexco Land Servs., Inc.*, 09-CV-0038, 2011 WL 4499281, at *6 (N.D.N.Y. Sept. 27, 2011); *Valentine v. UNUM Life Ins. Co. of Am.*, 12-CV-0647, 2012 U.S. Dist. LEXIS 83680, at *2-3 (N.D. Cal. June 15, 2012); *Speth v. Goode*, 95-CV-0264, 2013 U.S. Dist. LEXIS 101021, at *42 (D.N.J. July 19, 2013) (stating that "Plaintiff's reply in support of his cross-motion . . . was filed without permission of the Court in violation of L. Civ. R. 7.1(d)(3)").

Federal Court Rules and Standing Orders: N.D. Cal. Civ. L.R. 16-5 ("Plaintiff may serve and file a reply within 14 days after service of defendant's opposition or counter-motion. Unless the Court orders otherwise, . . . [this] . . . conclu[des] . . . [the] briefing schedule"); D.N.J. Civ. R. 7.1(d)(3) ("No reply papers shall be filed, unless permitted by the Court, relating to the following motions: Cross [motions] under L. Civ. R. 7.1(h)"); N.D.N.Y. L.R. 7.1(c) ("The cross-moving party may not reply in further support of its cross-motion without the Court's prior permission."); D. Nev. L.R. 7056(d) ("Unless otherwise ordered, there is no reply to a counter-motion [for summary judgment] under subsection (e)(1)."); *cf.* W.D. Wash. L.C.R. 7(k) ("The court may order parties filing cross motions for summary judgment to combine their memoranda and forego reply briefs in exchange for an enlarged response brief.").

23. **State Cases:** *Ex parte Novaris Pharms. Corp.*, 975 So.2d 297, 300, n.2 (Ala. 2007) ("[T]he Alabama Rules of Civil Procedure . . . were patterned after the Federal Rules of Civil Procedure."); *Sears v. Doty*, 92 A.2d 604, 604 (Del. 1952) (noting that "Superior Court Rule 30(h) is copied from a local rule adopted by certain Federal District Courts."); *Fletcher v. Limeco Corp.*, 996 So.2d 773, 779 (Miss. 2008) ("[T]he Mississippi Rules of Civil Procedure, with few exceptions, were developed to comport with the Federal Rules of Civil Procedure."); *Univ. Underwriters Ins. Co. v. Ferguson*, 471 S.W.2d 28, 36, n.5 (Tex. 1971) (dissent) (noting that the trial court judge's procedure for dismissing the case was "akin to if not taken from the 'automatic' dismissal procedures which have been followed for many years under local rules of federal district courts"). **Federal Case:** *Blue v. Fremont Inv. & Loan*, 562 F. Supp. 2d 33, 41 n.6 (D.D.C. 2008) ("Federal Rule of Civil Procedure [13(a)] is materially identical to Superior Court Rule 13(a)").

24. **State Cases:** *Ex parte Novaris Pharms. Corp.*, 975 So.2d 297, 300, n.2 (Ala. 2007) ("Federal cases construing the Federal Rules of Civil Procedure are persuasive authority in construing the Alabama Rules of Civil Procedure, which were patterned after the Federal Rules of Civil Procedure."); *Fletcher v. Limeco Corp.*, 996 So.2d 773, 779 (Miss. 2008) (finding "highly persuasive" a federal district court's decisions interpreting Fed. R. Civ. P. 5(d) and an accompanying federal court local rule, given that "the Mississippi Rules of Civil Procedure, with few exceptions, were developed to

filing deadline, (2) a violation of the court's proscription against the filing of replies on cross-motions, (3) a violation of the court's proscription against the filing of sur-replies on dispositive motions, and (4) a violation of the court's page limitation on memoranda of law.

A. VIOLATION OF THE MOTION-FILED DEADLINE

Almost always, courts have (through scheduling orders and/or case-management plans) a deadline on the filing of motions. A litigant's misunderstanding of what a cross-motion is can lead the litigant to violate that motion-filing deadline.

Example: The deadline for filing dispositive motions is February 1. On January 31, Plaintiff moves for summary judgment on Claims 1 and 2 (seeking monetary relief). On February 18, Defendant files a response to Plaintiff's motion, combined with a "cross-motion" to dismiss Claim 3 (seeking injunctive relief) for failure to state a claim upon which relief can be granted. Defendant's motion on Claim 3 is not a "cross-motion" but a motion (because it seeks relief different from that requested by Plaintiff in its original motion). As a result, while Defendant's response is timely, Defendant's motion to dismiss is untimely.²⁵

B. VIOLATION OF THE RULE AGAINST FILING REPLIES ON CROSS-MOTIONS

Often courts have (through a local rule of practice, standing order, and/or case-management plan) a proscription against filing a reply on a cross-motion without prior leave of the court when the cross-motion is non-dispositive in nature, and occasionally even when the cross-motion is dispositive in nature.²⁶ A litigant's misunderstanding of what a cross-motion is can lead the litigant to violate a court's proscription against filing replies on cross-motions.

Example: The court has a local rule proscribing the filing of replies on cross-motions. Plaintiff files a motion for summary judgment on Claims 1 and 2. Defendant files a response and separate "motion" for summary judgment on Claims 1 and 2. Plaintiff files a response to Defendant's "motion" combined with a reply on its own motion. Defendant then attempts to file a reply on its own "motion" without prior leave. Defendant has violated the court's local rule proscribing the filing of replies on cross-motions.

C. VIOLATION OF THE RULE AGAINST FILING SUR-REPLIES ON DISPOSITIVE MOTIONS

Often courts have (through a local rule of practice, standing order, and/or case-management plan) a proscription against the filing of sur-replies on dispositive motions without prior leave of the court.²⁷ A litigant's misunderstanding of what a cross-motion is can lead the litigant to violate a court's proscription against filing sur-replies on dispositive motions.

Example: Plaintiff files a motion to set aside an administrative decision. Defendant files a response to the motion and a "cross-motion" for summary judgment. However, Defendant's "cross-motion" does not address any issues related to a motion for summary judgment but merely responds to the issues raised by Plaintiff in its original motion. Plaintiff files a reply on its original motion and an opposition to the "cross-motion." Defendant then files a reply on its "cross-motion." Plaintiff moves to strike the reply because the "cross-motion" is improper. Plaintiff's motion to strike is granted because Defendant's motion practice is an attempt to evade the proscription against filing sur-replies on dispositive motions.²⁸

comport with the Federal Rules of Civil Procedure"); *Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 93 Md. App. 772, 788 n.5 (1992) ("Maryland courts have frequently stated that when a local rule and a federal rule are similar, federal court decisions interpreting the federal rule are especially persuasive authority in interpreting the local rule.").

Federal Case: *Blue v. Fremont Inv. & Loan*, 562 F. Supp. 2d 33, 41 n.6 (D.D.C. 2008) ("[F]ederal court decisions interpreting the federal rule may be considered 'persuasive authority' in interpreting the local rule.").

25. See *Horton*, 2010 WL 3338920, at *2 & n.2 ("Defendant Keller's 'cross-motion' for summary judgment . . . is not a cross-motion for summary judgment but is instead a motion for summary judgment. As a result, Defendant Keller was required to file this dispositive motion by February 26, 2010. . . . However, Defendant Keller filed his motion April 19, 2010, fifty-two (52) days after the expiration of the disposition-motion filing deadline."); *Serino v. Prudential Ins. Co. of Am.*, 706 F. Supp. 2d 584, 586-87 (M.D. Pa. 2009) (striking "cross-motion" filed after the expiration of the dispositive-motion deadline but within the deadline to file a response to the original motion for summary judgment); *Baker v. AirServ Corp.*, 08-CV-0913, 2009 U.S. Dist. LEXIS 33443, at *1-3 (D. Colo. Apr. 20, 2009); *Kelley v. N. Y. Life Ins. & Annuity Corp.*, 07-CV-01702, 2008 U.S. Dist. LEXIS 104750, at *11 (D. Colo. Dec. 30, 2008); *Schroer v. United States*, 07-CV-0690, 2008 U.S. Dist. LEXIS

64568, at *2 (D. Colo. Aug. 22, 2008).

26. See, e.g., *D.N.H. L.R. 7.1(e)(2)* (prohibiting filing of reply on nondispositive motions), *accord*, *D.N.H. L.B.R. 7102(b)(2)*, *D. Minn. L.R. 7.1(b)(3)*, *N.D.N.Y. L.R. 7.1(b)(2)*; see also *N.D.N.Y. L.R. 7.1(c)* (proscribing filing of reply on cross-motions even when cross-motions are dispositive in nature), *accord*, *D.N.J. Civ. R. 7.1(d)(3)*; cf. *W.D. Wash. L.C.R. 7(k)*; *S.D. Ind. L.R. 56-1*, Advisory Committee Comments.

27. See, e.g., *C.D. Cal. L.R. 7-10*; *D. Del. L.R. 7.1.2(b)*; *S.D. Fla. L.R. 7.1(c)*; *D. Haw. L.B.R. 9013-1(c)(2)*; *D.N.J. L. Civ. R. 7.1(d)(6)*; *D.N.H. 7.1(e)(3)*; *D.N.M. LR-Civ 7.4(b)*; *N.D.N.Y. L.R. 7.1(b)(1)*; *S.D. Ohio L.R. 7.2(a)(2)*; *N.D. W. Va. L.R. Civ. P. 7.02(b)(3)*; *S.D. W. Va. L.R. Civ. P. 7.1(a)(7)*; *D. Utah L.R. 7(b)(3)*.

28. See *Carlwood Dev. Inc. v. United States*, 10-CV-1773, 2011 WL 69374, at *1 (D. Nev. Jan. 10, 2011) (denying petitioner's motion to strike government's improper "cross-motion"—which did not "address[] any matters even remotely indicative of a motion for summary judgment" but rather merely responded to the matters raised by the petitioners in their opening brief—because "rather than striking any portion of the [cross-motion] itself, the Court will merely construe [it] as only a response to the [petitioner's] opening brief, and not a cross-motion," and strike the government's unauthorized reply on its improper cross-motion as "nothing more than a disingenuous attempt to get the last word").

D. VIOLATION OF PAGE LIMITATIONS ON MEMORANDA OF LAW

Often courts have (through a local rule of practice, standing order, and/or case-management plan) rules setting forth differing page limitations for motions, responses, and replies, if not specifically for cross-motions and responses to cross-motions.²⁹ A litigant's misunderstanding of what a cross-motion is can lead the litigant to violate a court's page limitation on memoranda of law.

Example 1: The court has a local rule setting a limitation of 25 pages on memoranda of law and 10 pages on reply memoranda of law. The dispositive-motion filing deadline is February 1. On January 15, Defendant files a motion for summary judgment on all of Plaintiff's claims. On January 20, with due notice of Defendant's motion, and without filing a response to Defendant's motion, Plaintiff files a separate "motion" for summary judgment on all of its claims. As a result, not only does Plaintiff have an improper opportunity to file a reply on its separate "motion," its motion practice has caused the memoranda of law on the parties' competing requests for relief to number 120 pages (25 + 25 + 10 + 25 + 25 + 10), rather than 60 pages (25 + 25 + 10).³⁰

Example 2: The court has a local rule setting a limitation of 25 pages on memoranda of law. Plaintiff files a motion for summary judgment on Claim 1 under Theory X. Defendant files a 25-page response to Plaintiff's motion on Claim 1 under Theory X. Sepa-

ately, Defendant files a 25-page "motion" for summary judgment on Claim 1 under Theory Y. Both requests for relief were similar (i.e., summary judgment on Claim 1). As a result, Defendant's "motion" was really a "cross-motion," and he was entitled to only 25 pages in total.³¹

IV. POSSIBLE SOLUTIONS TO THOSE PROBLEMS

Several possible solutions exist to the procedural problems caused by misunderstandings of the definition of a cross-motion. Of course, from a court's perspective, these solutions include adopting and publishing rules regarding the definition, timing, and briefing of a "cross-motion."

In addition, it is useful for a court to know of several things practitioners can do to solve procedural problems. These solutions include the following: (1) filing a motion before the opposing party files its motion; (2) requesting leave to depart from the operative scheduling order or the court's local rules; (3) filing a motion to strike the improper cross-motion; and (4) filing a timely amended complaint (rather than a motion to amend) in response to a motion to dismiss for failure to state a claim.

A. FILING A MOTION BEFORE THE OPPOSING PARTY FILES ITS MOTION

Of course, one solution to the problems often caused by a party's violation of the rules regarding cross-motions is for the party to file its motion (which would otherwise be a "cross-motion") before the opposing party files its motion.

29. See, e.g., S.D. Ala. L.R. 7.1(b), (c); D. Ark. L.R. 10.1(m)(2); D.C. L.Cv.R. 7(e); M.D. Ga. Civ. Rule 7.4; D. Maine Rule 7(e); D. Md. L.R. 105(2)(c), (3); D. Nev. L.R. 7-4; D.N.J. Civ. R. 7.2(b); N.D.N.Y. L.R. 7.1(a)(1), (b)(1), (c); D.N.D. Civ. L.R. 7.1(A)(1); E.D. Okla. L.Cv.R. 7.1(k); N.D. Okla. L.Cv.R. 7(h); W.D.N.Y. Civ. Rule 7(a)(2)(C); E.D. Tex. L.R. CV. 7(1); W.D. Tex. L.R. CV. 7(f); D. Utah Civ. R. 7-1(b)(3); D. Vt. L.R. 7(a)(5).

30. See *Elexco Land Servs., Inc.*, 2011 WL 4499281, at *6 ("Such a bifurcated motion practice is prohibited by [the court's local rule on page limitations]. . . . The effect of this motion practice was three-fold: (1) it enlarged the number of pages of memoranda of law that Defendant Elexco could submit regarding Plaintiffs' two trespass claims . . . ; (2) it gave Defendant Elexco the last word regarding Plaintiffs' two trespass claims (by permitting Defendant Elexco to file a reply with regard to those claims, . . .) . . . ; and (3) it confused the Court (and no doubt Plaintiffs) by simultaneously (a) commingling Defendant Elexco's arguments regarding Plaintiffs' conversion claim with Defendant Elexco's arguments regarding Plaintiffs' two trespass claims, and (b) multiplying Defendant Elexco's arguments regarding Plaintiffs' two trespass claims.").

31. See *IP Innovation LLC v. Vizio, Inc.*, 08-CV-0393, 2010 WL 2696110, at *1 (N.D. Ill. July 1, 2010) ("Federal Rule of Civil Procedure 56 does not provide a party with the opportunity to file a separate motion for summary judgment for each argument a party desires to present."); *DeSena v. Beekley Corp.*, 09-CV-0352, 2010 WL 1049873, at *1 (D. Me. Mar. 17, 2010) ("Although, as the plaintiffs maintain, they may well have intended in filing six separate summary judgment motions to present segregable issues in an

efficient manner rather than to skirt the page limitation of Local Rule 7(e), their approach violates the spirit, if not the substance, of that rule."); *BPI Energy, Inc. v. IEC (Montgomery), LLC*, 07-CV-0186, 2009 WL 3518154, at *1 (S.D. Ill. Oct. 28, 2009) ("Local Rule 7.1(d) allows a twenty double-spaced typewritten page limit for all briefs. Although a literal reading of the local rule does not specifically prohibit a party from filing more than one summary judgment motion, the rule also does not lend itself to the interpretation that a party may file one supporting brief per issue raised at the summary judgment stage of the proceedings."); *Baker v. AirServ Corp.*, 08-CV-0913, 2009 U.S. Dist. LEXIS 33443, at *1-3 (D. Col. Apr. 20, 2009) (striking plaintiff's cross-motion for summary judgment, noting that the motion was untimely and exceeded the imposed page limitations when added to the pages in plaintiff's separately filed response to defendants' motion); *Walburn v. City of Naples, Fla.*, 04-CV-0194, 2005 WL 2322002, at *1, n.3 (M.D. Fla. Sept. 22, 2005) ("This Court agrees with Plaintiff's statement in his response to Defendant's dual motions for summary judgment that the unusual bifurcated approach to summary judgment is confusing, and it manages to sidestep Rule 3.01(c) of the Local Rules of this District, which would limit a single memorandum to a length of twenty pages.") [internal quotation marks omitted]; *Paper, Allied Indus., Chem. and Energy Workers*, 03-CV-0225, 2004 WL 1484995, at *5, n.9 (D. Me. June 4, 2004) ("I also observe that by filing two motions instead of one, the Union has also violated, in spirit if not in substance, the 20-page limitation imposed by Local Rule 7."), *recommendation rejected in part on other grounds*, 2004 WL 2536811 (D. Me. Nov. 10, 2004).

B. REQUESTING LEAVE TO DEPART FROM A SCHEDULING ORDER OR LOCAL RULES

A second solution is for a party to request leave to depart from any (1) scheduling order establishing a motion-filing deadline or (2) local rules of practice proscribing the filing of (a) replies on non-dispositive motions and cross-motions, (b) sur-replies on any motions, and (c) memoranda of law exceeding the applicable page limitation.³²

In support of such a request, it is helpful for the party to advise the court of the following, if applicable: (i) the good-faith need for such a departure; (ii) the lack of undue delay in making the request; (iii) the lack of prejudice to (and preferably the lack of opposition by) the opposing party; and (iv) the fact that it is the first such request.³³

C. FILING A MOTION TO STRIKE AN IMPROPER CROSS-MOTION

A third solution is for a party to move to strike the improper cross-motion or deny the cross-motion on procedural grounds.

It is important to note that, in federal court, a motion to strike a cross-motion is not properly made pursuant to Fed. R. Civ. P. 12(f) because that rule regards the striking of “pleadings,” and a cross-motion is not a “pleading” under Fed. R. Civ. P. 7(a).³⁴ Rather, a motion to strike a cross-motion may be properly made pursuant to the Court’s authority to impose sanctions against a party for failing to obey a scheduling or other pretrial order under Fed. R. Civ. P. 16(f)(1)(C).³⁵ In addition, a motion to strike a cross-motion may be properly made pursuant to the court’s inherent authority to enforce its local rules of practice.³⁶

32. See *Ass’n of Irrigated Residents v. C & R*, 05-CV-1593, 2007 WL 2815038, at *28 (E.D. Cal. Sept. 25, 2007) (“At the May 21, 2007 hearing, Defendants’ request to file a supplemental brief on the sole issue of whether Rule 2010 applied to them was granted. Defendants were notified by minute order on May 21, 2007 that upon filing the supplemental briefs the matter would be deemed submitted. Defendants were not given leave to file [their untimely] cross motion for summary judgment at the hearing on May 21, 2007.”); *United States ex rel. IBM v. Hartford Fire Ins. Co.*, 112 F. Supp. 2d 1023, 1028-29 (D. Haw. 2000) (declining to consider “cross-motion” for summary judgment filed “well after the court imposed deadline[.]” noting that, before the dispositive motion deadline expired, Defendant could have “request[ed] that the court modify its Scheduling Order, [l]or . . . [sought] relief from the Scheduling Order”).

33. See *Spooner v. Jackson*, 251 F. App’x 919, 924 (5th Cir. Oct. 24, 2007) (finding that defendant “had demonstrated good cause for filing his motion for summary judgment after the deadline for filing dispositive motions based on evidence that [defendant]’s counsel did not receive electronic notice of the scheduling order because of a computer virus”); *Wynn v. Cate*, 10-CV-0546, 2012 U.S. Dist. LEXIS 6228, at *1-2 (E.D. Cal. Jan. 19, 2012) (“Th[e] [scheduling order] deadline may only be modified upon a showing of good cause, which exists when the moving party demonstrates he cannot meet the deadline. . . . Plaintiff’s comparison of his resources with those of defense counsel does not speak to plaintiff’s diligence in preparing his own dispositive motion prior to the court-imposed deadline. Because plaintiff fails to demonstrate good cause for further extending the deadline for filing dispositive motions in this case, his request to modify the scheduling order is denied, and his cross-motion for summary judgment must therefore be denied as untimely.”).

34. See *Fisherman’s Harvest, Inc. v. United States*, 74 Fed. Cl. 681, 690 (Fed. Cl. 2006) (“Plaintiffs’ motion to strike does not comport with RCFC 12(f) [which is identical to Fed. R. Civ. P. 12(f)] because Weeks Marine’s Motion for Leave to Join as Parties and to Join Claims Against Bertucci and Luhr does not constitute a ‘pleading’ under the rule.”); *Sharpe v. MCI Telecomm. Corp.*, 19 F. Supp. 2d 483, 487 (E.D.N.C. 1998) (finding motion to strike cross-motion for summary judgment as improper and therefore construing the motion to strike as a response to the motion); but see *Ass’n of Irrigated Residents v. C & R*, 05-CV-1593, 2007 WL 2815038, at *27 (E.D. Cal. Sept. 25, 2007) (recognizing that plaintiff’s motion to strike defendants’ cross-motion for summary judgment was not technically proper under Fed. R. Civ. P. 12(f) but liberally construing

that motion to strike “as an invitation by the movant to consider whether [material proffered in support of the cross-motion] may properly be relied upon.”) [internal quotation marks omitted].

35. See *Spooner*, 251 F. App’x at 924 (“Spooner asserts that the district court erred by striking his cross-motion for summary judgment. He contends that it was unfair for the court to strike his cross-motion on the ground that it was untimely after the court allowed Jackson to file his motion for summary judgment after the deadline for filing dispositive motions established in the scheduling order. Spooner’s contentions are without merit. The court found that Jackson had demonstrated good cause for filing his motion for summary judgment after the deadline for filing dispositive motions based on evidence that Jackson’s counsel did not receive electronic notice of the scheduling order because of a computer virus. Spooner did not offer any excuse for the untimely filing his cross-motion for summary judgment.”); *Wells Fargo Bank*, 09-CV-0678, 2011 WL 3702666, at *3 (N.D. Tex. Aug. 19, 2011) (“Wells Fargo moves to strike Falk’s Cross-Motion for Partial Summary Judgment. The deadline for filing dispositive motions was December 10, 2010. . . . On January 10, 2011, Falk submitted his Cross-Motion as part of his Response to Defendants Motion for Summary Judgment. Falk’s only explanation for failing to file his motion by, or request an extension of, the dispositive motions deadline is that it was the result of ‘inadvertence or because he had not previously thought of filing a Cross-Motion.’ . . . Finding no good cause to extend the dispositive motions deadline, the Court STRIKES Falk’s untimely pleading pursuant to Federal Rule 16(f)(1)(c).”); *Wuliger v. Reassure Am. Life Ins. Co.*, 03-CV-7699, 2011 WL 767872, at *3 (N.D. Ohio Feb. 28, 2011) (explaining, in ruling on motion to strike untimely cross-motion, that “[t]he Court has broad discretion in imposing sanctions for violations of its scheduling orders”); *Lo v. United States Dep’t of Justice*, 03-CV-5055, 2005 WL 1388680, at *1, n.1 (E.D. Cal. June 10, 2005) (“The United States moves the court to strike plaintiff’s cross-motion or requests that plaintiff’s cross-motion otherwise be dismissed. Rule 16(f), Federal Rules of Civil Procedure, allows the court to impose such sanctions”); *Embrex, Inc. v. Serv. Eng’g Corp.*, 96-CV-0824, 1998 WL 35235446, at *1 (E.D.N.C. June 23, 1998) (granting motion “to strike plaintiff’s cross motion for summary judgment as untimely . . . under Fed. R. Civ. P. 16(f).”).

36. Cf. *Paliotta v. Nev.*, 11-CV-0121, 2012 WL 553131, at *2-3 (D. Nev. Jan. 5, 2012) (granting in part and denying in part defendants’ motion to strike plaintiff’s cross-motion for summary judgment, striking his sur-reply, filed as part of his reply on his cross-motion

The legal standard governing a motion to strike a cross-motion varies somewhat by jurisdiction; however, generally, that standard involves a determination of such issues as (1) prejudice to the party opposing the cross-motion, (2) bad faith by the cross-movant through merely attempting to get in the last word through a reply, and/or (3) undue delay by the cross-movant through waiting until the expiration of the motion-filing deadline to file its cross-motion.³⁷ If the court denies the motion to strike a cross-motion, the court generally possesses the discretion to construe the motion to strike the cross-motion as an opposition to the cross-motion based on procedural grounds.³⁸

**D. FILING A TIMELY AMENDED COMPLAINT
(RATHER THAN A CROSS-MOTION FOR LEAVE
TO AMEND) IN RESPONSE TO A MOTION TO
DISMISS FOR FAILURE TO STATE A CLAIM**

A fourth solution, in federal court, is to avoid the need for a cross-motion altogether in cases in which a motion to dismiss for failure to state a claim has been filed pursuant to Fed. R. Civ. P. 12(b)(6). This can be done by filing a timely amended complaint as a matter of right, rather than filing a cross-motion for leave to file an amended complaint.³⁹ Such an amended complaint is “timely” if it is filed within 21 days of service of such a motion.⁴⁰ Note, however, that if the motion challenging the pleading sufficiency of the complaint is one for “judgment on the pleadings” pursuant to Fed. R. Civ. P. 12(c), filed after the filing of an answer, then the amended complaint may be filed as a matter of right only within 21 days of the service of the answer.⁴¹



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for summary judgment, because it was in violation of the court's local rules of practice, and warning him that his “failure to abide by the Local Rules, including page limitations, in the future, will result in an order striking noncompliant documents”); *World Publ'g Co. v. United States Dep't of Justice*, 09-CV-0574, 2011 U.S. Dist. LEXIS 32594, at *25 (N.D. Okla. Mar. 28, 2011) (considering defendants' motion to strike plaintiff's opposition based on the argument that, “to the extent it purports to be a cross-motion for summary judgment[,] it violates Northern District of Oklahoma Local Civil Rule 7.2(e)[,]” which prohibits a response to a motion to include a cross-motion, and ultimately converting the response into a cross-motion).

37. See *Bell v. Bowman, Heintz, Boscia & Vician, P.C.*, 370 F. Supp. 2d 805, 806, n.1 (S.D. Ind. 2005) (denying motion to strike cross-motion because no prejudice was shown); cf. *Carlwood Dev. Inc. v. United States*, 10-CV-1773, 2011 WL 69374, at *1 (D. Nev. Jan. 10, 2011) (striking the government's unauthorized reply on its improper cross-motion as “nothing more than a disingenuous attempt to get the last word”); *Byce v. Pruco Life Ins. Co.*, 09-CV-1912, 2011 U.S. Dist. LEXIS 6816, at *3-6 (N.D. Ga. Jan. 21, 2011) (considering plaintiff's “excusable neglect” and prejudice to defendant in deciding whether to grant defendant's motion to strike plaintiff's untimely filed cross-motion for summary judgment); *Daly v. Royal Ins. Co. of Am.*, 00-CV-0040, 2002 U.S. Dist. LEXIS 16183, at *4 (D. Ariz. July 16, 2002) (considering prejudice to defendant, finding none, and accordingly denying defendant's motion to strike plaintiff's untimely filed cross-motion for summary judgment).

38. See *Fisherman's Harvest, Inc. v. United States*, 74 Fed. Cl. 681, 690 (Fed. Cl. 2006) (“Instead, courts may regard a motion to strike a motion simply as a response to that motion.”); *Falk v. Wells Fargo Bank*, 09-CV-0678, 2011 WL 3702666, at *3 (N.D. Tex. Aug. 19, 2011) (“[T]he Court finds that despite being styled as a cross-motion, Falk's arguments are more appropriately addressed as a response to Wells Fargo's Motion for Summary Judgment. Accordingly, the Court will address the arguments made in Falk's Cross-Motion along with the arguments made in Falk's Response.”); *Sharpe v. MCI Telecomm. Corp.*, 19 F. Supp. 2d 483, 487 (E.D.N.C. 1998) (“Because MCI has not filed a proper motion to strike under Rule 12(f), the Court must interpret MCI's motion as a response to Sharpe's motion which challenges the motion on procedural grounds.”).

39. See, e.g., *Williams v. BASF Catalysts LLC*, 11-CV-1754, 2012 WL 6204182, at *5 (D.N.J. Dec. 12, 2012); *Patrick v. Teays Valley Tr., LLC*, 12-CV-0039, 2012 WL 5993163, at *1 (N.D. W.Va. Nov. 30, 2012); *Leal v. McHugh*, 11-CV-0249, 2011 WL 6372820, at *1 (S.D. Tex. Dec. 20, 2011); *J.S. ex rel. Simpson v. Thorsen*, 766 F. Supp. 2d 695, 700 (E.D. Va. 2011).

40. Rule 15 of the Federal Rules of Civil Procedure provides, in pertinent part, that “[a] party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.” Fed. R. Civ. P. 15(a)(2).

41. See *infra* note 40.

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Interbranch Communication and Rule 3.2 of the 2007 ABA Model Code of Judicial Conduct

Raymond J. McKoski

Judges, legislators, and executives have one thing in common: they like to talk. Unfortunately, they do not talk enough to each other. As a result, the branches of government “move on in proud and silent isolation,” ignoring the nation’s need for interbranch understanding and cooperation.¹

The lack of effective interbranch communication does not mean that avenues of communication do not exist. The judiciary interacts with the political branches in many ways, including through judicial-impact statements, state-of-the-judiciary messages, judicial opinions, service on legislative and executive commissions, and testifying before—and consulting with—governmental committees and officials.²

Of course, every aspect of a judge’s conduct, including contacts with members of the other branches, is governed by a code of judicial conduct based on the 1972, 1990, or 2007 ABA Model Code of Judicial Conduct (hereinafter “1972 Code,” “1990 Code,” and “2007 Code”). Each of these codes restricts a judge’s ability to communicate voluntarily with executive and legislative officials.

Rule 3.2 of the 2007 Code provides that unless one of three exceptions applies, a judge shall not voluntarily appear at a public hearing or otherwise consult with an executive or legislative body or official. The exceptions permit judges to testify and consult in connection with (1) matters concerning the law, the legal system, or the administration of justice; (2) matters about which the judge acquired knowledge or expertise while performing judicial duties; and (3) the legal and economic interests of the judge or someone represented by the judge in a fiduciary capacity.³

This article examines the meaning and likely application of Rule 3.2. We begin with a brief overview of the Canons of the 1972 and 1990 Codes that served as the precursors of Rule 3.2.

THE ROAD TO RULE 3.2

Because of a judge’s unique experience in law-related matters, the 1972 Code authorized judges to testify publically before a legislative or executive body “on matters concerning the law, the legal system, and the administration of justice.”⁴ Canon 4B of the 1972 Code further authorized private consultations with a legislative or executive body or official “but only on matters concerning the administration of justice.”⁵ The authors of the 1972 Code believed that since judges have a direct interest in judicial-administration issues like personnel, budget, and facilities, they should be permitted to discuss those matters in venues other than public hearings.⁶ But private consultations on matters concerning the law or the legal system that did not involve the administration of justice were forbidden on the theory that a judge’s views on issues not directly related to the operation of the courts should be available to litigants and lawyers as well as legislators and executives.⁷

The 1990 Code abandoned this distinction and authorized a judge to both testify and privately consult “on matters concerning the law, the legal system or the administration of justice.”⁸ Canon 4C(1) of the 1990 Code also permitted a judge to testify before, or consult with, government officials about matters “involving the judge or the judge’s interests.”⁹ This “pro se” exception certainly made sense. It is hardly reasonable to expect a judge to stand idly by while a governmental entity plans to put an expressway through the judge’s backyard.

The 2007 Code continues to recognize that a judge’s unique professional experience should be shared with the other branches of government.¹⁰ Accordingly, Rule 3.2(A) reiterates the long-standing proposition that a judge may testify or consult regarding matters concerning the law, the legal system, or the administration of justice.¹¹ The 2007 Code, however, narrows the type of personal interest justifying a judge’s communication with government officials. Canon 4C(1) of the 1990

Footnotes

1. Shirley S. Abrahamson, *Remarks of the Hon. Shirley S. Abrahamson Before the American Bar Association Commission on Separation of Powers and Judicial Independence*, 12 ST. JOHN’S J. LEGAL COMMENT. 69, 80-81 (1996) (quoting Benjamin Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 125 (1921)).
2. See Julian Darwall & Martin Guggenheim, *Funding the Peoples’ Right*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 619, 652-53 (2012) (listing the methods by which the judiciary communicates with the other branches).
3. MODEL CODE OF JUDICIAL CONDUCT R. 3.2(A)(B)(C) (2007).
4. CODE OF JUDICIAL CONDUCT Canon 4B (1972).
5. *Id.*

6. E. WAYNE THODE, REPORTER’S NOTES TO THE CODE OF JUDICIAL CONDUCT 75 (1973).
7. *Id.* at 75-76.
8. MODEL CODE OF JUDICIAL CONDUCT Canon 4C(1) (1990); see LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 33 (1992). A few states still retain the 1972 Code provision that restricts consultations to matters pertaining to the administration of justice. See, e.g., ILL. CODE OF JUDICIAL CONDUCT Canon 4B (2013).
9. MODEL CODE OF JUDICIAL CONDUCT Canon 4C(1) (1990).
10. MODEL CODE OF JUDICIAL CONDUCT R. 3.2 cmt. 1 (2007).
11. *Id.* R. 3.2 (A).

Code had broadly authorized testimony or consultation whenever “the judge’s interests” were involved. To avoid the possibility that the judge’s interests could be construed to include social and political matters, Rule 3.2(C) narrows the pro se exemption to matters affecting “the judge’s *legal* or *economic* interests.”¹² Rule 3.2 expands the pro se exception in one regard by permitting a judge to testify and consult, not only regarding his own legal and economic interests, but also the legal and economic interests of a person or entity the judge represents in a fiduciary capacity.¹³

Most significantly, the 2007 Code adds a new exception to the general rule barring judges from voluntarily providing information to members of another governmental branch. Rule 3.2(B) permits testimonial and private contacts with executive and legislative officials regarding matters “about which the judge acquired knowledge or expertise in the course of the judge’s judicial duties.”¹⁴ This exception represents a “significant loosening” of the restrictions contained in the 1972 and 1990 Codes.¹⁵ Under Rule 3.2(B), the matter about which the judge acquired knowledge need not have anything to do with the law, the legal system, or the administration of justice and may relate to social problems and public-policy issues.¹⁶

JUSTIFICATIONS FOR LIMITING COMMUNICATIONS WITH EXECUTIVE AND LEGISLATIVE OFFICIALS

It could be convincingly argued that communicating with legislators and executives on matters directly affecting the viability of the judicial system, like facilities, staffing, and funding, is an essential part of the judicial function. Indeed, judges have an ethical obligation to seek sufficient “court staff . . . and resources to discharge all adjudicative and administrative responsibilities.”¹⁷ But the 2007 Code classifies all interbranch communications, regardless of the subject matter, as nonjudicial, “extrajudicial” activities.¹⁸ As a result, the restrictions imposed by Rule 3.2 on testimony before, and consultations with, legislative and executive officials must be examined against the justifications for limiting the extrajudicial activities of judges. Four state interests support restricting a judge’s extrajudicial activities.

INTERFERENCE WITH JUDICIAL DUTIES

First, personal and extrajudicial endeavors may cause undue absences from court or otherwise interfere with the performance of judicial duties.¹⁹ This concern most often arises in connection with a judge’s civic, charitable, and educational activities that require substantial time away from court.²⁰ It is less relevant to the interests served by Rule 3.2 because a judge’s contacts with governmental bodies and officials usually do not occur with sufficient frequency to compromise effective and timely case management.

[T]he restrictions . . . must be examined against the justifications for limiting the extrajudicial activities of judges.

ABUSING THE PRESTIGE OF JUDICIAL OFFICE

Second, a judge may misuse the prestige of office while engaging in nonjudicial activities.²¹ For example, when confronted by a judge soliciting money for a charity, a potential donor might feel coerced by judicial power and prestige into responding favorably.²² But the likelihood of judicial prestige having a bullying effect diminishes greatly when a judge is speaking with members of a coequal branch of government rather than with members of the lay public. Indeed, legislators and executives show little hesitance in ignoring, rebuking, and criticizing judges. Whether it is calling for a judge’s impeachment,²³ claiming that judges “bend the laws to let drug dealers go free,”²⁴ calling out a judge for crafting a decision to “put more money in her pocket and the pocket of her cronies,”²⁵ threatening to defy court orders,²⁶ or refusing to let a judge speak,²⁷ there is little chance of judicial status intimidating political-branch officials into blindly acceding to a judge’s request.

PROTECTING THE APPEARANCE OF IMPARTIALITY

A third and especially important basis for limiting a judge’s personal and extrajudicial activities is to protect the appearance

12. *Id.* R. 3.2(C) (emphasis added).

13. *Id.* The 2007 Code strictly limits the circumstances under which a judge may serve as a fiduciary. See *id.* R. 3.8.

14. *Id.* R. 3.2(B).

15. CHARLES E. GEYH & W. WILLIAM HODES, REPORTERS’ NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 59 (2009).

16. See *id.*

17. MODEL CODE OF JUDICIAL CONDUCT R. 2.5 cmt. 3 (2007).

18. See MODEL CODE OF JUDICIAL CONDUCT R. 3.2 (2007). Rule 3.2 falls under Canon 3, which is titled, “A Judge Shall Conduct the Judge’s Personal and Extrajudicial Activities to Minimize the Risk of Conflict with the Obligations of Judicial Office.”

19. See *id.* R. 3.1(A) (prohibiting participation in extrajudicial “activities that will interfere with the proper performance of the judge’s judicial duties”).

20. See, e.g., *In re DiBasi*, Determination (N.Y. State Comm’n on Judicial Conduct Nov. 19, 2001) (disciplining a judge for attending a college class each weekday from 9:15 a.m. until 1:00 p.m.).

21. See MODEL CODE OF JUDICIAL CONDUCT R. 3.2 cmt. 2 (2007)

(reminding judges to avoid using the prestige of office while testifying or consulting).

22. Raymond J. McKoski, *Charitable Fund-Raising by Judges: The Give and Take of the 2007 ABA Model Code of Judicial Conduct*, 2008 MICH. ST. L. REV. 769, 779-81.

23. See, e.g., JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED: A JUDICIAL INDICTMENT OF WAR ON DRUGS 117 (2001) (quoting Senator Robert Dole’s call for the impeachment of a federal district court judge who granted a motion to suppress evidence in a drug prosecution).

24. *Id.*

25. Charles Stile, *Christie Used Smear to Put Heat on Judges*, HERALD NEWS (West Patterson, N.J.), Oct. 20, 2011, at C1.

26. See Ginger Gibson, *If Court Orders School Aid, Christie May Not Comply*, STAR-LEDGER (Newark, N.J.), Apr. 22, 2011, at 1.

27. See Brad Cooper, *Kansas House Leader Turns Down Chief Justice’s Request to Address Legislature*, KANSAS CITY STAR, Dec. 31, 2012, available at 2012 WLNR 28186943.

[A]t what point does permissible assistance from the judiciary turn into a prohibited entanglement?

of judicial impartiality. Thus, judicial codes prohibit membership in a prosecutors-only bar association because it might reasonably call into question the judge's impartiality in criminal cases.²⁸ Similarly, testifying at a public hearing might adversely reflect on a judge's neutrality, depending to some extent on the subject matter of the presentation but even more

so on the tenor of the presentation. To illustrate the point, assume that two judges testify before a state legislature in support of a bill to legalize marijuana.

The first judge presents her remarks in an aggressive, partisan manner blaming Republicans for drug laws designed to disproportionately impact certain racial and ethnic groups, resulting in "prisoner-of-war" type incarceration. The judge promises to "take the next step" if the legislators fail to perform their "God given duty." She also promises to acquit anyone of a marijuana offense unless the defendant is "proven guilty beyond any shadow of a shadow of a doubt."

Also testifying in support of the bill, the second judge relates her courtroom observations of the racial and ethnic makeup of persons charged with marijuana offenses, the treatment alternatives available to the court, the advantages of treatment over incarceration, reoffender rates in her county, the internal conflicts judges face in imposing mandatory sentences, and how court resources could be devoted to more serious problems if marijuana were legalized.²⁹ The judge concludes by acknowledging the separate roles of legislators and judges and reaffirms her commitment to uphold the law, without regard to her personal views.³⁰

Both judges have testified on a controversial issue. The difference is one of approach. The first judge's personalization of the issue and combative tenor casts doubt on her impartiality. Therefore, her testimony constitutes an impermissible extrajudicial activity. The second judge, by maintaining the dignity and objectivity of the judicial office, basing her testimony on courtroom observations, and affirming her commitment to follow the law, allows her to advance the same position as the first judge without casting doubt on her impartiality. Thus, the second judge's testimony is a permitted extrajudicial activity.

SEPARATION OF POWERS

Fourth, regulating the nonjudicial activities of judges helps maintain the institutional independence of the judiciary. Ensuring judicial independence means "precluding debilitating entanglements between the Judiciary and the two political Branches, and prevent[ing] the Judiciary from encroaching into areas reserved for the other Branches" ³¹ But while encroaching on the legislative or executive domain is prohibited, providing assistance to co-branches is not. The separation-of-powers doctrine does not preclude the judiciary from providing information, advice, and other nonintrusive forms of assistance to governmental bodies and officials.³² It is simply impossible for the legislative and judicial branches not to be intertwined to some extent since legislatures control court appropriations, determine court jurisdiction, set judicial salaries and benefits, and enact statutes governing every aspect of substantive and procedural law.³³

In the final analysis, the separation-of-powers question becomes: at what point does permissible assistance from the judiciary turn into a prohibited entanglement? Rule 3.2 provides a bright-line test. As long as the judge's communication falls within one of the categories established by subsection (A), (B), or (C) of Rule 3.2, no interference with legislative or executive independence will result. This presumption recognizes the importance of interbranch communication and acknowledges that supplying information and recommendations is a far cry from usurping the legislative or executive function.

With this background in mind, we can turn to the meaning and application of Rule 3.2

RULE 3.2: THE GENERAL PROHIBITION

Unless one of three exceptions applies, "[a] judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or legislative body or official" ³⁴ Rule 3.2 does not attempt to interfere with a judge's duty to appear and testify when officially summoned to do so.³⁵ The Rule restricts consulting with government officials, but not every discussion is a consultation. The term "consultation" implies a fact-gathering purpose related to a pending or impending matter before the executive or legislative branch.³⁶ Informal conversations between, for example, a judge and a state legislator at a Fourth of July picnic concerning issues of the day should not be considered a "con-

28. See Fla. Comm. on Standards of Conduct Governing Judges, Op. 95-21 (1995) (disallowing membership in a plaintiffs' bar association).

29. Cf. *Rising Violent Crime in the Aftermath of Hurricane Katrina: Hearing Before the S. Comm. on the Judiciary*, 110 Cong. 37-39 (2007) (statement of Judge David L. Bell) (outlining the age and race of juveniles appearing before the court, treatment alternatives, success rates of treatment modalities, and caseloads).

30. Cf. MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmt. 13 (2007).

31. See *Mistretta v. United States*, 488 U.S. 361, 385 (1989).

32. *Id.* at 372 ("We also have recognized, however, that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of

its coordinate Branches.").

33. Russell R. Wheeler & Robert A. Katzmann, *Project Seeks to Improve Communications Between Courts and Legislatures*, 75 JUDICATURE 45, 45 (1991).

34. MODEL CODE OF JUDICIAL CONDUCT R. 3.2 (2007); see THODE *supra* note 6, at 59.

35. GEYH & HODES, *supra* note 15, at 59.

36. Cf. *California Wilderness Coalition v. U.S. Dept. of Energy*, 631 F3d 1072, 1087 (9th Cir. 2011) ("An ordinary meaning of the word consult is to 'seek information or advice from (someone with expertise in a particular area)' or to 'have discussions or confer with (someone), typically before undertaking a course of action.'" (quoting *The New Oxford Dictionary* 369 (2001))).

sultation” under Rule 3.2.³⁷ Neither should the Rule be implicated when legislators spend a day with judges to observe court procedures³⁸ or when a chief administrative judge contacts legislative officials to develop a working relationship with the legislature.³⁹

EXCEPTION ONE: TESTIFYING OR CONSULTING ABOUT MATTERS CONCERNING THE LAW, THE LEGAL SYSTEM, OR THE ADMINISTRATION OF JUSTICE

Judges may testify and consult about matters “concerning the law, the legal system, or the administration of justice.”⁴⁰ Although some disagreement exists as to the scope of this phrase,⁴¹ on its face the exception covers a lot of ground. As defined in the 2007 Code, the term “law” includes “court rules as well as statutes, constitutional provisions, and decisional law.”⁴² “Legal system” and “administration of justice,” undefined in the 2007 Code, are comprehensive terms. A legal system “refers to the nature and content of the law generally, and the structures and methods whereby it is legislated upon, adjudicated upon and administered.”⁴³ Equally broad, the administration of justice “establishes and maintains, and improves the methods and procedures by which the rights, duties, and obligations established by the legal system are litigated and adjudicated.”⁴⁴ Professor E. Wayne Thode recognized the breadth and flexibility of the phrase “the law, the legal system and the administration of justice” when it was first introduced in the 1972 Code by noting that it included “a broad range of organizations and projects . . . corresponding to the range of concerns that present themselves in the law under modern conditions.”⁴⁵

Judges frequently appear before legislators on an issue at the heart of the legal system and the administration of justice—funding for the courts. Judges testify before legislative bodies annually to maintain or increase a court’s appropriation.⁴⁶ In addition to providing testimony, judges consult with legislators about budgetary matters. In 2004, the chief judges of the Eastern, Central,

Northern, and Southern Districts of the California federal district court presented a joint letter to California Senators Dianne Feinstein and Barbara Boxer and each member of the state’s congressional delegation urging adequate appropriations to dodge a “perilous situation.”⁴⁷ In the same year, Alaska federal district court judges sent a letter to the chair of the Senate Appropriations Committee warning that “the courts stand on the brink of a fiscal abyss” and that if funding did not increase, “it will plunge the courts over the precipice.”⁴⁸ In 2013, the chief judges of 87 federal district courts wrote to the ranking members of Congress expressing concern that “flat funding” and “sequester cuts” “have created an unprecedented financial crisis that is adversely affecting all facets of court operations.”⁴⁹ In the name of the administration of justice and the legal system, judges freely lobby legislators and executives concerning salaries and benefits,⁵⁰ courthouse facilities and safety,⁵¹ additional judgeships,⁵² methods of judicial selection,⁵³ judicial

Judges may testify and consult about matters “concerning the law, the legal system, or the administration of justice.”

37. Courts and judicial ethics advisory committees have not applied Rule 3.2 or its predecessor provisions in the 1972 and 1990 Codes to informal gatherings that include judges and legislative officials. See ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 347-52 (2011) (reviewing cases and judicial ethics advisory opinions construing restrictions on a judge’s ability to testify or consult with governmental officials).

38. See ABA TASK FORCE ON PRESERVATION OF THE JUSTICE SYSTEM, CRISIS IN THE COURTS: DEFINING THE PROBLEM 15 (2011) (highlighting an Oregon program in which state legislators spend a day observing court).

39. See Joint Legislative Hearing on the 2012-2013 Judiciary Budget 1 (N.Y. 2012) (remarks of Chief Administrative Judge A. Gail Prudenti) (“Over the last two months I’ve tried to contact as many legislators as possible . . . to better understand their views of the judiciary, its mission, and its challenges. I very much look forward to continuing that conversation here today—to working closely with you and getting to know each of you and learning your particular concerns.”).

40. MODEL CODE OF JUDICIAL CONDUCT R. 3.2 (2007).

41. See U.S. Judicial Conference Comm. on Codes of Conduct, Op. 93 (2009) (interpreting the phrase “matters concerning the law” narrowly).

42. MODEL CODE OF JUDICIAL CONDUCT Terminology (2007).

43. William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 681-82 (2000).

44. McKoski, *supra* note 22, at 797.

45. THODE, *supra* note 6, at 77.

46. See, e.g., *Funding Crisis Strikes Throughout Federal Courts, Judge Tells Senate Panel*, THE THIRD BRANCH NEWS (July 23, 2013), available at <http://news.uscourts.gov/funding-crisis-strikes-throughout-federal-courts-judge-tells-senate-panel>.

47. *Is Congress Listening?*, THE THIRD BRANCH (Aug. 2004), available at http://www.uscourts.gov/News/TheThirdBranch/10-10-28/Is_Congress_Listening.aspx.

48. *Id.*

49. Letter from Loretta A. Preska to Joseph R. Biden, Jr., Aug. 13, 2013, available at <http://www.ndtexblog.com/wp-content/uploads/2013/08/chief-judges-letter-to-joseph-biden.pdf>.

50. See Keith M. Phaneuf, *State Judges Press for Their First Pay Increase in Six Years*, RECORD-JOURNAL (Meriden, Conn.), Nov. 22, 2012, at 5.

51. See, e.g., Guy Clifton, *Bill Adds Security in Courts*, RENO GAZETTE-JOURNAL, Feb. 14, 2009, at A1 (reporting that Washoe District Court Judge Chuck Weller testified in support of a bill to increase protection for judges, courthouse personnel, and visitors).

52. See, e.g., *Responding to the Growing Need for Federal Judgeships: The Federal Judiciary Act of 2009: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 111th Cong. 10-11 (2009) (testimony of federal district court judge Lawrence J. O’Neill).

53. See, e.g., Anjeanette Damon, *Raggio Continues to Push Bill for Appointed Judges*, RENO GAZETTE-JOURNAL, Feb. 24, 2009, at A3 (summarizing the testimony of the Nevada Supreme Court Chief Justice before a state senate committee on the issue of merit selection).

Rule 3.2(B) is tailor-made for judges presiding over drug courts . . . and other specialty tribunals.

conduct and disability,⁵⁴ and access to justice.⁵⁵

Judges also regularly testify and consult on matters of law and legislation.⁵⁶ In 2013, a federal judge testified in support of a bill before the Oregon legislature authorizing county courts to supervise inmates released from the department of corrections.⁵⁷ Bankruptcy judge Frank J. Bailey testified before a subcommittee of the House Judiciary Committee in

favor of the Chapter 11 Bankruptcy Reform Act of 2011.⁵⁸ Federal court of appeals judges James L. Oakes and Roger J. Minor, together with federal district court judge Pierre N. Leval, testified before Congress regarding a proposed amendment to the fair-use provisions of the Copyright Act.⁵⁹ Bills concerning sentencing,⁶⁰ juvenile delinquency,⁶¹ foreign intelligence,⁶² specialty courts,⁶³ immigration,⁶⁴ violence against women,⁶⁵ and televising court proceedings⁶⁶ have drawn judicial comment.

EXCEPTION TWO: TESTIMONY AND CONSULTATIONS BASED ON KNOWLEDGE ACQUIRED IN THE PERFORMANCE OF JUDICIAL DUTIES

Court proceedings encompass a wide variety of subjects,

including medicine, gangs, addiction, fetal development, child rearing, marriage, discrimination, natural resources, pollution, religion, labor, taxation, elections, and virtually every other area of human concern. In the course of their duties, judges frequently gain knowledge in non-law-related subjects that would be useful to legislators and executives in fashioning solutions to societal problems. Acknowledging this fact, Rule 3.2(B) of the 2007 Code boldly broadens the scope of information that a judge may voluntarily impart to the legislative and executive branches by authorizing judges to testify and consult concerning any matter “about which the judge acquired knowledge or expertise in the course of the judge’s judicial duties.”⁶⁷

Three aspects of Rule 3.2(B) are noteworthy. First, the information conveyed need not be law-related or concern the judge’s personal interests. There is no restriction on the subject of the judge’s communication, and as a result, social issues and matters of public policy appear to be fair game.⁶⁸ Second, Rule 3.2 requires only knowledge, not expertise. Third, the information conveyed by the judge must have been obtained during the exercise of adjudicative, administrative, or supervisory judicial duties. Knowledge developed during nonjudicial activities cannot be voluntarily conveyed under Rule 3.2(B).

Rule 3.2(B) is tailor-made for judges presiding over drug courts, mental health courts, veterans’ courts, and other specialty tribunals. By serving as leaders of the problem-solving courts’ “therapeutic teams,” judges gain knowledge about

54. See, e.g., *An Examination of the Judicial Conduct and Disability System: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113 Cong. 6-8 (2013), available at http://judiciary.house.gov/_files/hearings/113th/04252013_3/Scirica%2004252013.pdf (testimony of Judge Anthony J. Scirica, United States Court of Appeals, Third Circuit).

55. See, e.g., *Closing the Justice Gap: Providing Civil Legal Assistance to Low Income Americans: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 15-17 (2008) (testimony of Texas state trial judge Lora Livingston).

56. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 955 (2000) (“Members of the [administrative office] staff and federal judges now regularly appear before Congress to testify on pending legislation.”).

57. Hannah Hoffman, *Judge Testifies in Favor of Re-Entry Courts*, OREGON STATESMAN JOURNAL, Mar. 20, 2013 (on file with author).

58. *Chapter 11 Bankruptcy Venue Reform Act of 2011 (H.R. 2533): Hearing Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary*, 112th Cong. 30-52 (2011) (testimony of Frank J. Bailey, Chief Judge of the United States Bankruptcy Court, District of Massachusetts).

59. See H.R. REP. NO. 102-836, at 2 (1992).

60. See, e.g., *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Comm’n Six Years after U.S. v. Booker: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong., 10-100 (2011) (testimony of Judge Patti B. Saris, Chair, United States Sentencing Commission); see also Gwen Filosa, *Judges Criticize Sentencing Laws: They Tell Lawmakers Rules Clog Prisons*, NEW ORLEANS TIMES-PICAYUNE, Nov. 21, 2002, at 1 (reporting that seven state court judges testified before members of the Louisiana legislature

concerning court backlogs, mandatory sentencing, and drug courts).

61. See, e.g., *Ending School-to-Prison Pipeline: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong., 71-79 (2012) [hereinafter *School-to-Prison*] (testimony of Judge Steven C. Teske).

62. See, e.g., *Strengthening Privacy Rights and National Security: Oversight of FISA Surveillance Programs: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013), available at 2013 WLNR 18825425 (testimony of James G. Carr, Senior United States District Judge, Northern District, Ohio).

63. See, e.g., *Drug and Veterans Treatment Courts: Hearing Before the Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 112th Cong., 16-18 (2011) (testimony of Judge Jeanne E. LaFazia).

64. See Aileen B. Flores, *El Paso County Judge Veronica Escobar Testifies in DC, Urges Reform*, EL PASO TIMES, Mar. 21, 2013, available at http://www.elpasotimes.com/newupdated/ci_22832013/el-paso-county-judge-veronica-escobar-testifies-washington?IADID=Search-www.elpasotimes.com-www.elpasotimes.com (reporting the testimony of Judge Escobar regarding immigration reform).

65. See, e.g., *Leading the Fight: The Violence Against Women Office: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 107th Cong. 33-39 (2002) (testimony of Judge Vincent J. Poppiti).

66. See, e.g., *Televising the Supreme Court: Hearing Before the Subcomm. on Administrative Oversight of the Courts of the S. Comm. on the Judiciary*, 112th Cong. 84-91 (2011) (testimony of Judge Anthony J. Scirica).

67. MODEL CODE OF JUDICIAL CONDUCT R. 3.2(B) (2007); see GEYH & HODES, *supra* note 15, at 59.

68. See GEYH & HODES, *supra* note 15, at 59.

community problems and solutions to those problems.⁶⁹ And there is every reason for judges to share this knowledge with legislators and executives to assist them in improving the lives of their constituents.

The testimony of Chief Judge Steve Teske of the Clayton County, Georgia, Juvenile Court illustrates the valuable information that a specialty-court judge can impart.⁷⁰ In his appearance before Congress in 2012, Judge Teske testified to matters directly relating to the law, the legal system, and the administration of justice when he expressed his frustration with rising recidivism rates and the need to devote a disproportionate share of court resources to minor juvenile infractions.⁷¹ But Chief Judge Teske went further, advising the legislators of the adverse effects of zero-tolerance school policies that came to his attention as a juvenile court judge. He stated that zero-tolerance policies requiring that students be arrested, expelled, or suspended for minor infractions (1) negatively impact graduation rates, school safety, and the entire community; (2) increase juvenile crime; and (3) increase reoffender rates.⁷² He further testified that zero-tolerance is contrary to adolescent cognition, that “school connectedness” protects against delinquency, and that “[w]e are a nation in crisis when it comes to educating our children.”⁷³ Referring to school officials who promote zero-tolerance, Judge Teske opined: “It confounds the mind that professionals trained and certified to teach our children are duped into believing that suspending a student who doesn’t want to be in school is an effective tool.”⁷⁴

Some of Judge Teske’s testimony clearly concerned the law, the legal system, and the administration of justice and therefore was proper under Rule 3.2(A) and the analogous provisions of the 1972 and 1990 Codes. Less clear, however, is whether the judge’s comments regarding school officials, school policies, adolescent cognition, graduation rates, and school and community safety related to the law, the legal system, or the administration of justice. That question, while determinative of whether a judge’s testimony would be proper under previous ABA Model Codes, is of no import under Rule 3.2(B), which provides an avenue for the transfer of valuable, but not necessarily law-related, information from the judiciary to the other branches of government.⁷⁵

EXCEPTION THREE: ACTING PRO SE OR IN A FIDUCIARY CAPACITY

Canon 4C(1) of the 1990 Code permitted communication with an executive or legislative body or official on any matter involving “the judge or the judge’s interests.”⁷⁶ The Code did not define “judge’s interests” or otherwise cabin the apparent all-inclusive scope of the phrase. Permitting judges to determine for themselves which interests were sufficient to invoke Canon 4C(1) caused some apprehension that the exception might swallow the rule.⁷⁷ The disciplinary proceeding against Arkansas Appellate Court Judge Wendell Griffen highlighted that concern.

Judge Griffen spoke to the Black Caucus of the Arkansas legislature about funding for the University of Arkansas. He urged the legislators not to reward the University financially because of its “practices and policies that exclude, inhibit, and mistreat black students, faculty, staff, and citizens.”⁷⁸ The judge also suggested that the legislature “send them a budgetary vote of no confidence concerning sorry leadership about racial inclusion over the past 130 years at the University of Arkansas. Show them the money!”⁷⁹ The Arkansas Discipline and Disability Commission admonished Judge Griffen for testifying on a matter not concerning the law, the legal system, or the administration of justice.⁸⁰ Judge Griffen appealed, claiming that his remarks fell within Canon 4C(1) of the Arkansas Code of Judicial Conduct, which permitted testimony on matters involving the “judge or the judge’s interests.”⁸¹

The Arkansas Supreme Court struggled with the scope of the term “judge’s interests.” It considered whether the phrase included social and political concerns, or as Judge Griffen argued, any matter of interest to a particular judge.⁸² After a futile attempt to decipher what the ABA meant by a “judge’s interests,” the court held the phrase unconstitutionally vague and vacated the disciplinary sanction imposed on Judge Griffen.⁸³

In response to the *Griffen* decision, the drafters of the 2007 Code narrowed the type of personal interest triggering the prose exception.⁸⁴ Accordingly, Rule 3.2(C) limits a judge’s ability to testify and consult to matters involving “the judge’s legal or

The Arkansas Supreme Court struggled with the scope of the term “judge’s interests.”

69. Jane M. Spinak, *A Conversation About Problem Solving Courts: Take 2*, 10 U. MD. L.J. RACE, GENDER & CLASS 113, 124-25 (2010).

70. Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 3 n.7 (2006) (“Juvenile courts were the first in the genre of specialty courts.”).

71. *School-to-Prison*, *supra* note 61 (testimony of Judge Steven C. Teske).

72. *Id.* at 71, 72, 74, 77.

73. *Id.* at 76-77.

74. *Id.* at 76.

75. Canon 4B of the Georgia Code of Judicial Conduct does not include a provision permitting judges to testify or consult regarding matters about which the judge gained knowledge in the course of performing the judicial function. Nor does it contain a provision permitting judges to communicate with legislators and

executives about the judge’s own interests. GA. CODE OF JUDICIAL CONDUCT Canon 4B (2013). Canon 4 of the Georgia Code only authorizes appearances at public hearings on matters concerning the law, the legal system, or the administration of justice. *Id.*

76. MODEL CODE OF JUDICIAL CONDUCT CANON 4(C)(1) (1990).

77. See GEYH & HODES, *supra* note 15, at 59.

78. *Griffen v. Ark. Judicial Discipline and Disability Comm’n*, 130 S.W.3d 524, 526 (Ark. 2003).

79. *Id.* at 526-27.

80. *Id.* at 529-30.

81. *Id.* at 530.

82. *Id.* at 531-35.

83. *Id.* at 538.

84. See ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 351 (2011) (“The [2007] Code tried to address the problem raised by *Griffen* . . .”).

**Neither the Rule
nor its comments
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economic interests.”⁸⁵ The Code does not define the term “legal interests.” The Code defines “economic interest” in the context of judicial disqualification⁸⁶ but not in the context of Rule 3.2(C).⁸⁷ Comment 3 to Rule 3.2 gives one illustration of an economic interest—a zoning proposal that adversely affects the

value of the judge's real property.⁸⁸ Neither the Rule nor its comments provide an example of a judge's legal interests.

Does Rule 3.2(C) permit the type of remarks concerning race relations offered by Judge Griffen? Most likely, the drafters did not intend the Rule to condone commentary on a social or political matter unless it directly impacted the judge's financial position or an interest protected by a state or federal law. At least one ethics expert opined that Judge Griffen's remarks would not find protection under Rule 3.2(C).⁸⁹ But even assuming that conclusion is correct, it would not take much to turn the prohibited social interest in race relations into an economic or legal interest. For instance, if the judge's child attended the University with tuition assistance from Judge Griffen, the judge might very well possess an “economic interest” in the payments to the school or a “legal interest” in his child's treatment by the institution. Certainly, “[i]t is not a novel proposition to say that parents have a recognized legal interest in the education . . . of their child.”⁹⁰ Similarly, if the judge enrolled in a course at the University, a strictly social interest in the treatment of African-Americans by the administration might be transformed into a legal or economic interest. Moreover, if Judge Griffen had presided over a case involving a discrimination claim against the University of Arkansas, his testimony before the state legislators likely would have been permissible under Rule 3.2(B).

Virtually all states revising their judicial codes since the issuance of the 2007 Code have adopted the ABA's recommendation and narrowed the judge's personal interests to those of an economic or legal nature.⁹¹ Indiana has broadened the

exception slightly by providing that a judge may testify or consult regarding not only his own economic and legal interests but also those of family members residing with the judge.⁹² Most notably, the Code of Conduct for United States Judges adopted in 2009 rejects the ABA recommendation to narrow the pro se exception and retains the language of Canon 4 of the 1990 Code permitting judges to consult and testify on any matter involving “the judge or the judge's interests.”⁹³ A few states fail to provide any pro se exception.⁹⁴ And most jurisdictions not yet revising their code of judicial conduct in light of the 2007 Code include the broad language of the 1990 Code permitting appearances and consultations on any matter involving the “judge's interests.”⁹⁵

To avoid the need to distinguish between social issues on the one hand and economic issues on the other, Alaska permits judges to testify and consult on both economic and social interests.⁹⁶ Although the Alaska Code leaves “social interests” undefined, the term is often used to encompass a virtually limitless array of interests, including “safety, order, and morals; economic interests; and nonmaterial and political interests.”⁹⁷

A PRACTICAL APPLICATION OF RULE 3.2

Assume that a judge assigned to a misdemeanor court wishes to make a statement during the public-comment portion of a city council meeting.⁹⁸ After introducing himself as a resident of the community, the judge plans to voice the opinion that the city should amend its liquor ordinance to reduce the number of hours that establishments may serve alcohol from 23 hours per day to 16 hours per day. The judge will inform the mayor and city council that he (1) is concerned for the safety of late-night bar patrons and others who may be harmed by late-night bar patrons; (2) believes that the current ordinance unnecessarily diverts court resources to deal with numerous alcohol-related incidents occurring between 2:00 a.m. and 5:00 a.m.; and (3) believes that the current ordinance fosters a negative community image.

Clearly, Rule 3.2 governs the judge's remarks since the judge plans to voluntarily speak at a public hearing conducted by the city's legislative body and the city's top executive official. There-

85. MODEL CODE OF JUDICIAL CONDUCT R. 3.2(C) (2007).

86. *Id.* Terminology (defining “economic interest”).

87. *Id.*

88. MODEL CODE OF JUDICIAL CONDUCT R. 3.2 cmt. 3 (2007).

89. See Howard W. Brill, *The Arkansas Code of Judicial Conduct of 2009*, 2009 ARK. L. NOTES 1, 11.

90. *Winkelman ex rel. Winkelman v. Parma City School Dist.*, 550 U.S. 516, 529 (2007).

91. See, e.g., ARK. CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013); COLO. CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013); IOWA CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013); KAN. CODE OF JUDICIAL CONDUCT R. 3.2(B) (2013); MARY. CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013); MINN. CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013); MI. CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013); OHIO CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013); OKLA. CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013); *but see* ARIZ. CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013) (permitting a judge to testify or consult concerning the “judge's interests.”).

92. IND. CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013).

93. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 4(A)(2) (2009).

94. See, e.g., ALA. CODE OF JUDICIAL CONDUCT Canon 4B (2013); ILL. CODE OF JUDICIAL CONDUCT Canon 4B (2013); TEX. CODE OF JUDICIAL CONDUCT Canon 4 (2013).

95. See, e.g., FLA. CODE OF JUDICIAL CONDUCT Canon 4C (2013); MISS. CODE OF JUDICIAL CONDUCT Canon 4C (2013); N.Y. CODE OF JUDICIAL CONDUCT Canon 4C (2013); S.C. CODE OF JUDICIAL CONDUCT Canon 4C(1) (2013); VA. CODE OF JUDICIAL CONDUCT Canon 4C (2013); WIS. SUP. CT. R. 60.05(3) (2013).

96. ALASKA CODE OF JUDICIAL CONDUCT Canon 4C(1) cmt. (2013).

97. *State v. Hutchinson Ice Cream Co.*, 147 N.W. 195, 199 (Iowa 1914); see Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 17-38 (1943) (defining “social interests” to include the security of domestic, religious, and political institutions; general morals; conservation of social resources; protection and training of dependents; aesthetics; and general progress, including political progress).

98. This illustration is based on Illinois Judicial Ethics Committee Opinion 07-05 (2007).

fore, the judge's comments are prohibited unless an exception contained in subsection (A), (B), or (C) of Rule 3.2 applies.

Most of the judge's proposed statement appears to be authorized by subsection (A), which permits testimony regarding "the law" since a city ordinance is a law.⁹⁹ Indeed, "[t]he plain language of the [2007] code does not prevent a judge from acting on his or her own initiative with regard to legislative issues."¹⁰⁰ Rule 3.2(A) also permits judicial input on matters concerning the administration of justice. And since the administration of justice includes case management and the use of judicial facilities, personnel, and funds,¹⁰¹ the judge's comments about the impact of late-night alcohol consumption on court resources appears permissible.¹⁰² The judge's concern about the safety of bar patrons and others might not qualify as matters of law or court administration but should fall within Rule 3.2(B)'s window for concerns about public safety developed by the judge while on the bench.

A more difficult aspect of the proposed statement is the judge's view that the ability to purchase alcohol 23 hours a day fosters a negative community image. An interest in a city's image is most probably a personal interest. But is it a legal or economic interest as required by Rule 3.2(C)?

An argument can be made that the city's image affects the judge's economic interests. A positive or negative reputation dictates for many communities whether they will attract new residents and businesses, which in turn impacts property values, tax revenues, and home resale values. For example, the city of Winston-Salem considers its image important because:

The image our community has beyond its borders as a place to live, work and do business influences the decisions of individuals and companies considering to move to our area. So our image and reputation are very important. A community with a positive reputation will have a competitive advantage in attracting visitors, residents and business investment.¹⁰³

Regardless of whether community image suffices as a legal or economic interest, it is difficult to conclude that the judge's comment implicates any policy consideration underlying the need to restrict a judge's communications with legislators and executives. In the context of the judge's entire statement, the reference to community image does not misuse judicial prestige, undermine judicial impartiality, or interfere with the independence of another branch of government.

CONCLUSION

Judges provide information, unavailable from other sources, to the political branches. When providing this valuable service, however, judges must avoid (1) detracting from judicial impar-

tiality in fact or in appearance; (2) misusing judicial prestige; and (3) interfering with the independence of a co-branch of government. To help keep testimony and consultations within ethical constraints, a judge should:

- Clearly state whether the testimony or consultation is offered in a personal capacity or in an official capacity as a representative of the judicial branch;
- Present information in an objective, fact-based manner;
- Mention judicial status only when it directly relates to the manner in which the judge obtained the information being conveyed;
- Not mention judicial status when the judge is communicating about a personal interest;
- Confirm that personal views do not play a role in the judge's decision-making process;
- Confirm that the judge will continue to apply the law without regard to personal opinions or preferences;
- Acknowledge the separate functions of the legislative, executive, and judicial branches;
- Avoid commenting on any pending or impending court proceeding;¹⁰⁴
- Avoid statements that might affect the outcome or impair the fairness of a pending or impending court proceeding.¹⁰⁵

These cautionary measures will help ensure the free flow of important information from the judicial branch to the executive and legislative branches while maintaining judicial independence, integrity, and impartiality.



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99. See *Pittman v. Wilson County*, 839 F.2d 225, 228 n.7 (4th Cir. 1998) ("Like a statute, an ordinance is a law binding on all concerned.").

100. ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 340 (2011).

101. See *Jorgensen v. Blagojevich*, 811 N.E.2d 652, 667 (Ill. 2004) ("The court's administrative authority over the judicial branch carries with it the corresponding authority to require production of the facilities, personnel and resources necessary to enable the judicial branch to perform its constitutional responsibilities.").

102. See Ill. Judicial Ethics Comm., Op. 07-05 (2007) ("Reduction of

public harm from alcohol consumption is part of the administration of justice to the extent it decreases alcohol related offenses, civil litigation, and other court matters.").

103. City of Winston-Salem, North Carolina, LEGACY DEVELOPMENT GUIDE 128 (2001), available at http://www.cityofws.org/portals/0/pdf/planning/publications/legacy/chapters/community_character.pdf.

104. See MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A) (2007).

105. *Id.* R. 2.10(A).

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Effective Adjudication *of* Domestic Abuse Cases

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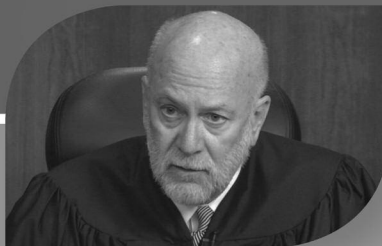
This new and innovative online resource for handling civil and criminal domestic violence cases explores the unique dynamics of domestic violence, including assessing lethality and dangerousness, custody and protective orders, special evidentiary issues, and effective sentencing.

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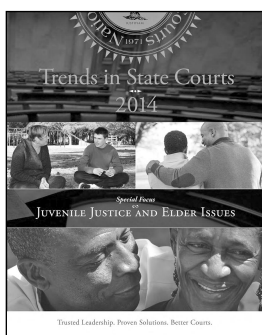
The Resource Page



NEW BOOKS

TRENDS IN STATE COURTS: 2014 (CAROL R. FLANGO, DEBORAH W. SMTH, NORA E. SYDOW, CHARLES F. CAMPBELL & NEAL B. KAUDER, EDS.). National Center for State Courts, 2014. 88 pp. (free via downloadable PDF).

<http://www.ncsc.org/trends>



The 2014 edition of *Trends in State Courts* is out, containing its usual collection of concise but authoritative articles. This year's issue focuses on

issues involving juvenile justice and the elderly. Six articles cover juvenile-justice issues, beginning with one that discusses the Models for Change Juvenile Justice Reform Initiative of the John D. and Catherine T. MacArthur Foundation. Other articles include one on the need for early appointment of counsel in juvenile court, one on judicial leadership in addressing adolescent mental-health needs, and one on reducing racial and ethnic disparities in the juvenile-justice system.

The section on elders begins with a national review of reform efforts related to elder abuse and adult guardianships. Other articles include ones on how to enhance access to justice for seniors and an interview with the state-court administrators in Pennsylvania and Texas on the work that has been done in those states to better respond to elder-related issues.

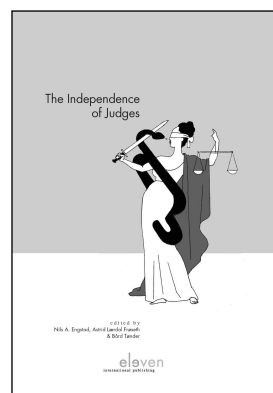
In addition to these themed articles, this year's *Trends* also contains several articles on general topics: a review of recent developments in Alaska, New York, and Utah on improving procedural fairness; discussion of New Jersey's use of technology to improve both the percentage of summoned jurors who show up

and to make it easier for jurors to serve; strategies identified to use technology to better address the challenge of self-represented litigation; and the erosion of judicial-retirement benefits during the recent economic recession.

THE INDEPENDENCE OF JUDGES (NILS A. ENGSTAD, ASTRID LAERDAL FROSETH & BARD TONDER, EDS.). Eleven International Publishing, 2014. 344 pp. (\$112.50).

The Norwegian Association of Judges published a book on judicial independence to celebrate its 100th anniversary in 2012. With adaptations for an international audience, the book, originally issued in Norwegian, has been issued in English, containing 22 essays on various aspects of judicial independence. Authors include judges, lawyers, law professors, social scientists, and government officials. For those interested in cross-national perspectives on judicial independence, the book would be of interest.

Essays cover topics such as the origins of judicial independence, considerations of the tension between judicial independence and administrative efficiency, international standards on the protection of judicial autonomy, special considerations for judicial independence within the European Union, the establishment



of an independent judiciary in Bosnia and Herzegovina, judicial independence and public trust in courts in the Russian Federation, the independence of judges in international tribunals, considerations that arise in a multicultural society, the responsibility of judges serving under an oppressive government, and the relationship between judicial independence and the independence of the legal profession.

The book closes with an interesting essay on the relationship of judges with

the media. Law professor Ragna Aarli notes that public confidence in Norwegian courts has risen steadily from 2001 (62% with fairly high or very high confidence) to 2006 (79%) to 2012 (85%). Aarli contends that this increase "coincides with the introduction and circulation of the Media Handbook for judges," an effort of the Norwegian Association of Judges to have judges more directly interact with the media and the public.



WEBSITES OF INTEREST

Quarterly Summaries
of Procedural-Fairness Research
ProceduralFairness.org



The ProceduralFairness.org website has begun posting quarterly summaries of new research. The website was created in 2012 to provide background information about how to improve procedural fairness in court and policing, including links to important articles and other information.

The quarterly research summaries are prepared by Justine Greve, M.A., of the Kansas Court of Appeals, and Shelley Spacek Miller, J.D., of the National Center for State Courts. They search the Internet and other sources to locate the most notable procedural-fairness scholarship released over the past quarter related to procedural-fairness issues in courts and in law enforcement. The report also covers recent news and events of interest.

The website also has a blog with regular commentaries on procedural-fairness issues.