Volume 58, Issue 2

# Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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# Court Review

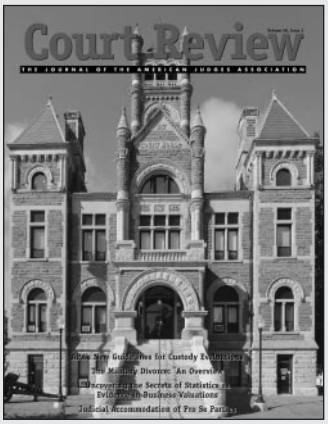
THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Volume 58, Issue 2 2022

## EDITOR'S NOTE

I am honored to be a guest editor for this issue of *Court Review*. Judge David Prince approached me in early 2021 about helping him "curate" the articles for this issue. His focus was on family law cases and how to identify authors and topics that will be of interest for the readership of *Court Review*. We had several discussions and settled on the four lead articles with topics that are front and center for family court judges: The APA Guidelines for Child Custody Evaluations; "Uncovering the Secrets of Statistics as Evidence in Business Valuations"; "The Military Divorce: An Overview"; and "Judicial Accommodation of Pro Se Parties."

The method and science that goes into the preparation of child custody evaluations is the topic of the article by Dr. Helen Brantley, Dr. Eric Drogan, and Dr. Jemour Maddux. Their article is especially timely because it focuses on the newly published Guidelines for Child Custody Evaluation of the American Psychological Association. The Guidelines were approved in February 2022 and update the 2010 Guidelines. The new Guidelines address recent research and developments in multiculturalism, domestic violence and when children resist parenting time. Judges who preside over contested custody cases will find the article very helpful in determining if a report they receive has followed the time-tested protocols of the APA Guidelines and if it makes recommendations supported by sufficient data.




Christopher Melcher's article on the use of statistics in business valuations tackles the often confusing and potentially misleading use of numbers and statistics in such reports. A nationally respected trial lawyer and expert in business valuations, Christopher takes the reader through the sleight-of-hand manipulation that can occur when analyzing the economic history and value of a business. He discusses the bias that may exist in a statistical study; how a small sample size can be meaningless; how the court is the gatekeeper under the *Daubert* rule of what is or is not reliable expert testimony; and how outcomes can be manipulated depending on how the numbers are presented. His article helps fact finders separate the wheat from the chaff when it comes to determining how much weight to give to an expert business valuation report.

Because cases that involve jargon can be confusing at best and totally mystifying at worst, Mark Sullivan, Joseph DeWoskin, and Judge Dan Wiley shed light on the military divorce. The article is formatted as an easy-to-follow conversation between the two lawyers and an experienced family court judge. They cover all aspects of military pay and benefits and the recently modified handling of military retirement pay. They provide a helpful glossary of the multitude of acronyms that are part and parcel of the military divorce; a checklist for the court of the issues presented in a military divorce; and a template for the orders needed to divide the service member's retirement pay. After reading this article the judge will know the difference between BAH and an SBP; will understand why the question of whether a spouse is a 20/20/20 spouse is important; and will be able to confidently read and understand an LES and a DD 214.

***Continued on page 56***

*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 94 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

Advertising: *Court Review* accepts advertising for products and services of interest to judges. For information, email aja@ncsc.org at call (800) 616-6165.

On the cover: The Perry County Courthouse in New Lexington, Ohio was designed by Ohio architect, Joseph Warren Yost. The cornerstone was laid on May 18, 1887 and was dedicated on December 20, 1888. The Courthouse was added to the National Register of Historic Places in 1981 and has been an integral part of Perry County history for over 100 years. It was the site of the landmark case DeRolph v. State of Ohio regarding public school funding in 1991. The county courts have operated out of the courthouse since it's construction. Perry County continues to invest in the preservation of the Courthouse, founding the Perry County Preservation Committee in 2016. Photo taken by Mark Cooper and generously provided by Judge Luann Cooperider. Judge Cooperider is the first female judge of Perry County and forever grateful to the people of Perry County.

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# President's Column

## Working for Equal Justice for All

**Yvette Mansfield Alexander**

Greetings my most esteemed colleagues and *Court Review* readers. The American Judges Association calendar has been extremely busy since my investiture in October, and I could not be more thrilled to be representing such an outstanding group of judges. If you haven't had a chance to do so already, please take a look at our website (www.amjudges.org). Each month we are highlighting our members. If you would like to nominate someone, or nominate yourself, for the "Members Spotlight" please do so by sending their biography to aja@ncsc.org. Our members are doing awesome things and we want to share their awesomeness!

On March 7, 2022, I traveled to Selma, Alabama for the reenactment of the march on bloody Sunday. As I tried to wrap my mind around my experience in Selma on the 57th anniversary of bloody Sunday—I could only imagine what those "foot soldiers" had gone through when they were met on the top of the Edmond Pettus bridge with drawn guns, whips, water hoses, and anything else the police could use to try and stop them from crossing that bridge. Through much adversity these men and women plowed and marched on to Montgomery. I merely traced their steps and I was exhausted. As I listened to speech after speech, including one from the Vice President of the United States of America Kamala Harris, about this infamous bridge crossing, I couldn't help but wonder how they survived. I walked across that bridge, then sat in an SUV and was driven to Montgomery. They marched to the top of the bridge and were met with all kinds of brutality, yet they still marched on to Montgomery. It took us forty-five minutes to drive to Montgomery and they marched there after being beaten. What tenacity, what strength, what courage they all possessed. The march across that bridge was a life-changing event for me. If they could go on after all they endured surely we can do our part to make this world a better place. It definitely is not when you are born or when you die that makes the difference but instead, it is that dash in the middle that counts. It is what you do as you journey through this road called life that matters.

Although our fight for justice and equality is not yet complete, we must continue to strive for a more perfect union; to make the promise of justice a reality. We all owe those courageous men and women our deepest gratitude for the ultimate sacrifices they made to lay the groundwork for freedom and equality for all, especially at a time where the United States was marred with fatal and rampant racism that breathed so deeply within everyday society. Our robust diversity and continued progress toward inclusivity is the very thing that makes the United States of America thrive. It serves as a reminder that we as judges must continue to lead the way and do our part to hear courteously; answer wisely; consider soberly; and decide impartially. For after all, the judiciary is the heartbeat of the perception of justice and our job is to enhance justice not to diminish it. As one of the world's richest countries, there are still families who go to bed at night hungry, there are still families who have no place to call home, and there are still families who are judged by the color of their skin and not the content of their character. We have come a long way, but we also know that we have a long way to go. As former President Barack Obama once said, "This union my never be perfect, but generation after generation has shown that it can always be perfected."

As I am writing this message, the historic confirmation of Justice Katanji Brown Jackson has happened. My emotions are raging. I am excited. I am very proud. I am elated. Finally, after 233 years and 115 appointed justices, only five of whom are women and just three are people of color, we will have someone who looks like me as a member of the highest court in the land. The first African American woman has been confirmed to become a United States of America Supreme Court Justice. As we dispense justice daily, we call upon our life's experiences to guide us. Diversity is a key component to the administration of justice; therefore all courts should be diverse. We are not all the same and we do not all judge the same. Nevertheless, justice should be the ultimate goal we all strive to achieve. Justice Katanji Brown Jackson is the first but she definitely will not be the last. Our country will be the benefactor of lasting decisions from a justice who is highly competent, possesses diplomatic poise, and has persevered. The American Judges Association is proud to join in a collaboration with four other national judges' organizations to spear head a brunch in her honor.

More great news, I am "honey-moon happy" to report that AJA's first in-person conference was a huge success. The hotel was sold out and registration was at an all-time high. We were all overjoyed just to see one another again. Congratulations to our 2021 Awardees who were finally able to receive their awards in person at our midyear conference luncheon in Napa, California on April 27, 2022. Kudos to Justice Robert Torres and the entire education committee for putting together an excellent education program. A huge thank you to Past President Elliot Zide for spearheading a magnificent fundraiser for the American Judges Foundation. We all left Napa revived, reinvigorated and ready to move our courts forward. When we all work together we can accomplish greatness.

As we look ahead, we look forward to our Annual Educational Conference in Philadelphia, Pennsylvania from August 27th through August 31, 2022. Our theme is "Judicial Independence." The education program promises to be exemplary. One of my favorites is the United States Supreme Court update by Dean Erwin Chemerinsky. It never fails to be interesting, informative, and estimable. The conference seminars will explore the threats to judicial independence, judicial ethics, red flag laws, and of course judicial wellness. The host committee has planned many outstanding activities to highlight their stellar city. You should surely plan to attend.

Thank you for the confidence you have bestowed upon me to lead this association! Continue to strive to do your best—all for life, liberty, and the pursuit of happiness. I am humbled to have the opportunity and the responsibility to be a part of this enduring and indelible legacy.

# The American Psychological Association's *Guidelines for Child Custody Evaluations in Family Law Proceedings:*

## Implications for the Courts

**Helen T. Brantley, Eric Y. Drogin & Jemour A. Maddux**

Whether they directly preside over such matters or not, all judges are aware that child custody cases are among the most contentious, nerve-wracking, and costly proceedings in our entire legal system. The most aggrieved and well-heeled of litigants are likely to up the ante by enlisting psychologists as expert witnesses—even when the Court has already found it necessary to do so on its own. American Psychological Association (APA) Guidelines exist to encourage best practices for these witnesses, and to help them to avoid commonly encountered pitfalls. This article addresses how the Court can best access, interpret, and reinforce the latest revision of these Guidelines for the benefit of parties, counsel, and judges alike.

In 1994, the APA published its first *Guidelines for Child Custody Evaluations in Divorce Proceedings* in the wake of concern over psychologists' growing influence in custody disputes and a lack of guidance in conducting child custody evaluations.[1] During the decade and a half following the arrival of these initial Guidelines, child custody evaluations became even more prevalent, inspiring a significant growth in social science research and reflecting a rapidly evolving legal landscape. The APA responded to these changes by updating its first Guidelines and renaming them the *Guidelines for Child Custody Evaluations in Family Law Proceedings*.[2] The pace of scientific and legal change has not abated, and the APA has passed a new set of *Guidelines* with the same name as the preceding version, but with a strikingly fresh perspective on such matters as child abuse, child neglect, intimate partner violence, problem substance use, and a host of problematic parenting practices.[3]

The Guidelines represent much more than the collective opinion of the Working Group that wrote them, comprised of six psychologists with varying levels of child custody experience and different areas of expertise. At the outset of this latest revision, more than one hundred public comments from laypersons and fellow professionals were received and reviewed. Once an initial draft of the Guidelines was completed to the Working Group's satisfaction, that draft was reviewed by APA's Office of General Counsel and by other staff persons, and then sent out for another round of public comments. The Working Group made further revisions based on those comments, and a subsequent draft was submitted for additional legal review. The Guidelines were sent to the APA's Board of Directors, to the APA's Council Leadership Team, and ultimately to the APA's elected Council of Representatives for a final vote of approval in February 2022.

### THE DIFFERENCE BETWEEN GUIDELINES AND STANDARDS

The APA views Guidelines and Standards as having notably different purposes and effects. Guidelines are aspirational statements of best practices and desirable conduct. Standards are mandatory and are typically accompanied by enforcement processes that may lead to disciplinary action and even expulsion. The only set of Standards utilized by the APA is its *Ethical Principles of Psychologists and Code of Conduct*.[4] References to these Standards are embedded in virtually every Guideline, but the APA reminds everyone—laypersons and fellow professionals alike—that Guidelines describe what APA members strive to do, and not what they are required to do.

### HOW ARE THESE GUIDELINES DIFFERENT?

The Guidelines provide new and updated recommendations for conducting comprehensive child custody evaluations. Users will be exposed to a wealth of recent research and professional literature with consistent attention to multiculturalism. The Guidelines offer greater specificity concerning assessment techniques, more procedural recommendations, and a streamlined progression of advice that tracks successive phases of the evaluation process in chronological order. The current Guidelines stop short of providing a potentially restrictive template for conducting child custody evaluations.

**Footnotes**

1. American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings,* 49 Am. Psychologist 677, 677-680 (1994).
2. American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings,* 65 Am. Psychologist 863, 863-867 (2010).
3. American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings,* Am. Psychologist (2022).
4. American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct* (2017), https://www.apa.org/ ethics/code/index [https://perma.cc/3HXA-7GBZ].

Psychologists are receiving more requests than ever before to conduct evaluations of ethnically/racially diverse families. This is not surprising when we consider, for example, that non-Hispanic White children under age 15 now comprise less than half of the U.S. child population in this age range.[5] The Guidelines reflect the value of withdrawing from cases or seeking peer consultation when faced with potentially insurmountable barriers to valid and effective cross-cultural assessment. The current Guidelines deliver specific recommendations for ensuring culturally competent practice. Key to the effective use of such advice is recognizing that even when psychologists and examinees are of the same ethnicity, their respective cultural identities may actually be defined by additional frameworks (e.g., disability, resources, and experiences with racism).

The Guidelines offer expanded guidance concerning specialized areas of child custody evaluation, such as relocation, child maltreatment, and parent-child contact problems. Areas receiving heightened focus include psychological testing, child interviewing, and screening for problem substance use and family violence (such as intimate partner violence and child maltreatment). The Guidelines continue to emphasize that the welfare of the child is paramount.

Specific procedural recommendations are provided to encourage routine screenings for problem substance use and family violence, which may lead to separate and more specialized evaluation(s) of child maltreatment, domestic violence, and/or substance use if advisable. Detailed support is provided for determining how to assess children in the context of child custody evaluations. This may include some combination of observing children on their own, observing parent-child interaction, one-on-one child interviewing, and child psychological testing.

The Guidelines also include updated advice for psychological testing in general, whether administered to children, adults, or both. Data generated through psychological testing can help develop and test hypotheses concerning matters that inform the best interests of the child. Conducting such procedures is typically reserved by law to licensed psychologists, for whom recommendations are made concerning best practices for choosing, administering, interpreting, and describing the results of various measures. The Guidelines also help non-psychologists to appreciate the potential benefits of procuring psychological testing and recognizing the specialized knowledge required to utilize these instruments correctly and effectively in child custody evaluations.

## FIVE SECTIONS OF THE GUIDELINES

The Guidelines are divided into five sections: Scope of the Child Custody Evaluation, Competence, Preparing for the Child Custody Evaluation, Conducting a Child Custody Evaluation, and Interpreting and Communicating the Results of the Child Custody Evaluation. These sections reflect the expected sequence in which a comprehensive child custody evaluation typically occurs.

## SCOPE OF THE CHILD CUSTODY EVALUATION

**"The Guidelines continue to emphasize that the welfare of the child is paramount."**

The scope of each evaluation is determined with reference to the best interests of the child and the child's welfare. As a result, the needs of the child and the capacities of the parents each require investigation. It is necessary to ascertain the fit between the child's needs and each caregiver's ability to provide healthy parenting.

The Guidelines recommend practices for comprehensive child custody evaluations, but not for the "brief focused evaluations" that address narrowly tailored issues in custody concerns.[6] Child protective evaluations are covered by separate APA Guidelines that are themselves currently under revision.[7] The Guidelines are not intended for consultants or for non-evaluating investigators in these cases.

## COMPETENCE

Psychologists who perform comprehensive child custody evaluations need to be skilled in and suitably informed concerning forensic psychology, family systems, child and adult development, child and adult pathology, problem substance use, family violence, and assessment procedures for both adults and children. They need to become appropriately grounded in the law of the various jurisdictions in which they practice. Innovations in psychological research and periodic changes in the law require psychologists not only to acquire a sufficient knowledge base, but also to maintain and continue to develop their skills in this rapidly evolving practice environment. Understanding of multicultural influences on parenting and child rearing becomes increasingly important in a diverse society.

In addition, there are areas of child custody evaluations that require specialized competencies. For example, the Guidelines include brief discussions of relocation of one parent, quality of attachment, parent-child contact problems, intimate partner violence contrasted with situational couple violence, child maltreatment, personality dysfunction, and a host of additional mental health-related concerns.

Currently, the most contentious aspect of child custody evaluation involves sharply differing opinions on the nature, prevalence, and effects of alienating behaviors. There is no question that these phenomena exist, but far less clear are what causes them and the specific ways in which they may affect a given family and its members. Why a child rejects and refuses contact with one parent may be based in separation anxiety, poor parenting, mental health problems, or trauma related to domestic violence. What we do know is that a child who chooses one parent to the exclusion of the other is likely to suffer long-term emotional damage which may disrupt the longer-term develop-

5. William H. Frey, *Less than Half of US Children are White, Census Shows* (2019), https://www.brookings.edu/research/less-than-half-of-us-children-under-15-are-white-census-shows/ [https://perma.cc/822J-VMJB].
6. Linda Cavallero & Susan E. Hanks, *Guidelines for Brief-Focused Assessment: AFCC Task Force on Brief Focused Assessments,* 50 FAM. CT. REV., 558, 558-569. (2012).
7. American Psychological Association, *Guidelines for Psychological Evaluations in Child Protection Matters,* 68 AM. PSYCHOLOGIST 20, 20-31 (2013).

**"The Court Order is the blueprint for the psychologist's evaluation..."**

ment.[8] Effectively ferreting out the roots and causes of this particular problem on a case-by-case basis requires diligent monitoring of the research and professional literature in this evolving area of research and study.

Psychologists may pursue different subspecialties, which may make one evaluator preferable over another for a given case. For example, if a family has a history of violence, a psychologist well-versed in domestic violence issues may be preferable over others who are equally qualified in every other way. Similarly, a psychologist with a strong background in child disabilities may be a preferred choice for a child with chronic physical disease, special learning issues, or other disabilities. Multicultural knowledge, training, and experience may suggest a specific psychologist for a given case. In some jurisdictions, of course, some of these choices may not be available, which underscores the critical importance of psychologists remaining as professionally well-rounded as feasible.

**PREPARING FOR THE CHILD CUSTODY EVALUATION**

The Court Order is the blueprint for the psychologist's evaluation and subsequent report, specifying what the psychologist is expected to assess in the best interest of the child. The more thorough the Order is in stating what questions the Court wants answered, the more relevant and helpful the evaluation may be. For example, are stepparents, stepsiblings, grandparents to be included in the evaluation, and if so, how heavily should their information be weighed? If one parent is moving away, what factors does the Court want considered in the psychologist's evaluation? Does the Court want specific recommendations on treatment, parenting time, and/or custody? The Guidelines caution psychologists about accepting employment based on Orders that do not contain explicit questions that the Court wishes to have addressed.

It is helpful when Orders empower the psychologist to obtain legal, medical, child protective, assessment, treatment, and other specified records. The Order may also specify a timeline for completion of the evaluation and designate who is to receive the report on its completion. Such Orders structure the work of the evaluator, reduce the time involved in administrative details, reduce participant resistance, and avoid the omission of essential information.

Properly conducted child custody evaluations are the product of careful preparation and flexible planning. Psychologists are best advised to gather records, select testing materials, update consent forms, and consider case-specific assessment goals well in advance of the first examination—knowing, of course, that last-minute developments may require a fresh approach to meeting assessment goals.

**CONDUCTING THE CHILD CUSTODY EVALUATION**

In conducting evaluations, psychologists seek to act as fair and impartial evaluators in whatever matters they undertake. Because parties are highly invested in evaluation results, participants may be overstressed, volatile, and unpredictable. The Guidelines recommend that psychologists avoid the presence—or any seeming indication—of cognitive, confirmatory, explicit, or implicit bias. The use of derogatory language in the course of examinations, reports, or courtroom testimony will run afoul of this principle. When psychologists encounter matters that involve contradictions to their own values, they should seek consultation and perhaps withdraw from the case entirely if they feel incapable of remaining impartial.

Continuing to take their cue from the *Ethical Principles of Psychologists and Code of Conduct,* which are currently under revision, the Guidelines urge psychologists to remain aware of any real or perceived conflicts of interest, as these may introduce real or apparent bias into the evaluator's findings.[9] For example, the child's therapist is not an appropriate choice to use as an evaluator. It is too much to ask of treatment providers to deliver objective, arm's-length assessments of forensic matters, just as it is unfair to saddle the parties with welcome opinions that, due to their source, may carry correspondingly less weight with the Court. This is not to suggest, of course, that the child's therapist cannot be a valuable fact witness, educating the Court about the child's emotional status and requirements for further treatment. Following the completion of their forensic responsibilities, child custody evaluators should not be expected to take on another role once the Court has rendered a decision. For example, an evaluator should not become a parenting coordinator, or a therapist to the family or its members, unless such a dual role is unavoidable.

The Guidelines place considerable emphasis on the methods used to evaluate children. Developmentally appropriate assessment protocols are critically important. Interviews may derive useful information from children as young as two or three years of age. Observations of infants and toddlers provide knowledge about a child's temperament, reactivity, separation anxiety, and adaptability. These data may be very helpful in determining the goodness of fit reflected in personality and parenting style. Goodness of fit is generally accepted to denote how the parents' strengths and weaknesses enhance or detract from the development of a particular child's needs and gifts. Collateral interviews with daycare workers and other childcare personnel can help evaluators learn about levels of parental involvement and the child's resiliency when placed in new environments.

Interviewing adolescents requires different skills from interviewing young children. In jurisdictions where an older child's custodial preferences are heavily weighted, attempts to discover the adolescent's perspective on this issue may be essential. Because of the fluctuating nature of parent-child relationships during adolescence, the content of interviews may be variable, calling for multiple interviews with the teenager rather than a single interview. It is especially important for the evaluator to talk to

8. Amy J. L. Baker & Naomi Ben-Ami, *To Turn a Child Against a Parent is to Turn a Child Against Himself: The Direct and Indirect Effects of Exposure to Parental Alienation Strategies on Self-Esteem and Well-Being,* 52 J. DIVORCE & REMARRIAGE 472, 472-489 (2011).

9. American Psychological Association, *supra* note 4.

people who know teenagers apart from their parents. Collateral interviews can be conducted with such sources as teachers, physicians, coaches, and youth group leaders. Psychological testing can be very helpful in identifying and defining issues particular to a given child, such as cognitive or other mental health concerns.

Of considerable importance in evaluating children is observing family interactions. These observations can be conducted in a variety of settings including the psychologist's office, the family home, or the playground. While there are few observational schemes that have been developed specifically for forensic use, psychologists should choose those with the most established reliability and validity. Much can be learned by observing the way the parent responds to the child, sets appropriate boundaries for the child's behaviors, demonstrates engagement with the child, handles sibling interactions, and disciplines the child in an appropriate fashion. Similarly, the child's behavior with each parent may be documented in terms of seeking attention from the parent, remaining near to the parent, displaying pleasure in family interaction, engaging with siblings in a constructive manner, and conveying comfort with the family setting.

Adult interviews assist in the assessment of parenting style, addressing both strengths and weaknesses. This enables psychologists to gauge parents' and the children's goodness of fit so children can develop in a physically and mentally healthy manner. The Guidelines discuss the variety of topics to be included in adult interviews, such as social history, educational history, vocational history, and previous as well as current relationships. Co-parenting skills can be a specific focus of these interviews, as the quality of co-parenting is a known factor in children's healthy adjustment. The Guidelines indicate that this facet of the evaluation focuses less on mental health status than on parenting capacity and performance.

Adult psychological testing is frequently a part of the child custody evaluation. The Guidelines address such issues as the need for standardized administration and standardized scoring. Since, in general, most psychological measures are not developed for child custody evaluations and do not have standards using comparable populations, it is important for psychologists that assessment measures are selected for their contribution to an understanding of an adult's ability to parent as opposed to an isolated clinical profile. The Guidelines note that it is customary for both parents to receive the same procedures unless there are unusual circumstances that ethically and clinically support using different tests. Psychologists take into account any adaptations that are made—such as translation into a different language—and how these changes might affect the reliability and validity of a given assessment procedure.

A notable change in the Guidelines is the strong recommendation that in each case psychologists conduct screening for substance use and domestic violence, regardless of an examinee's known history. Due to the increased stress that child custody evaluations may occasion, psychologists are advised to continue screening for both these concerns throughout the ongoing assessment process. The stress and weight of the evaluation may cause an increase in substance use, which may influence relationship conflict. Numerous substance use measures are available. The authors caution that not all self-report measures are reliable.

Collected data must be sufficient to address the Court's referral questions and to support the evaluator's conclusions. Taking short cuts in the evaluation process may create a lack of confidence on the part of the Courts and the participants regarding findings about a child's needs, an adult's parenting capacity, and the goodness of fit between the two. Thorough examinations are necessary for sufficiently reliable conclusions. If parties are reluctant to participate, psychologists may consider seeking an additional court order to facilitate the completion of evaluations in a timely manner. When requested data are missing, this should be mentioned as a potential limitation to the overall validity of the report and conclusions and recommendations it contains.

**"Adult psychological testing is frequently a part of the child custody evaluation."**

All child custody evaluation records must be placed in an orderly storage system. This facilitates retrieval, enables prompt provision of follow-up services, and honors the requirements of regulatory bodies. Paper, video, and electronic data, including interview material, clinical records, educational records, and test data are considered components of these records. With the increased use of digitalization, it is all the more important for psychologists to remain cognizant of changing trends in record storage.

## INTERPRETING AND COMMUNICATING THE RESULTS OF THE CHILD CUSTODY EVALUATION

The Guidelines recommend that data analysis and interpretation be performed in a rigorously scientific fashion. Psychologists recognize that personal situations and cultural contexts may influence the nature and relevance of the data obtained. Relevant stressors may include such events as bereavement, natural disasters, public health emergencies, and other threats to the family.

Cultural issues influence parenting techniques and patterns of interaction among family members. Evaluators must be aware and manage their own cultural and other biases when analyzing evaluation data. An up-to-date grasp of scientific research and technical assessment developments are especially important when analyzing complex referral questions that address such issues as relocation and parent-child contact problems.

The Guidelines make it clear that all recommendations should support the best interest and welfare of the child. Psychologists may not be comfortable in a particular case with making recommendations related to legal custody, physical custody, or parenting time, perhaps because of a lack of sufficient data. The Court may seek suggestions and advice concerning mental health treatment, parenting resources, and other custody-related concerns, and psychologists are free to offer answers if a sufficient basis has been established. The Guidelines caution against making recommendations that have not been requested.

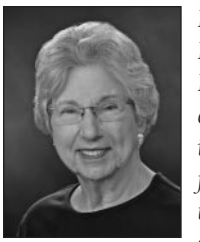
When writing reports and testifying about child custody evaluations, psychologists are urged to present their findings in a manner that is concise, accurate, and impartial. Since reports are often entered into evidence, it is important that such data sources as interviews, test results, collateral reports, and reviewed records are suitably documented. The Guidelines suggest that reports be well-organized, even-handed, and transparently based upon reliable, thoroughly reviewed sources. Psychologists may see themselves as caught between complying with the Court's expressed

desires for brevity and concision, while honoring the requirements of regulatory agencies that all relevant data be presented. One way of meeting both goals may be to describe the data sources, the rationale of the findings, and the recommendations separately, followed by a sufficiently complete description of the sources consulted and the data collected in a separate section. The best and most effective reports are professionally composed, honor privacy needs to the extent feasible, avoid unnecessary jargon, and convey respect for all parties.

## CONCLUSION

With respect to child custody proceedings, there is perhaps no other form of civil or criminal litigation in which judges find themselves more dependent upon the assistance of expert witnesses. Some of these witnesses are exceptionally skilled in conveying their recommendations, cataloging the data that inform those recommendations, and explaining the ways in which psychological practice, research, and ethics converge to make those recommendations more than just a product of instinct, sympathy, and experience. Others of these witnesses wait with thinly veiled impatience for the Court to reveal just what part of "scientific expert" it fails to understand.

In either instance, the Court will want to be armed with sufficient information concerning just what it is that psychologists' national guild organization recommends in terms of best practices for child custody evaluations. The Guidelines will soon be publicly accessible, and well worth the Court's review. Encouraging psychological expert witnesses to heed the advice of their own profession—and enabling them to do so—will benefit all parties in the long run.



*Helen T. Brantley, Ph.D. chaired the American Psychological Association's Task Force for the Development of Guidelines for the Practice of Parenting Coordination and, most recently, the American Psychological Association's Working Group for the Revision of the Guidelines for Child Custody Evaluations in Family Law Proceedings. She served as the Director of the Forensic Psychiatry Service at the University of North Carolina. Dr. Brantley currently serves as Chair of the North Carolina Psychology Board.*

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## EDITOR'S NOTE

***Continued from page 50***

Rounding out the quartet of articles, Michael Roundy of Boston, Massachusetts provides guidance to judges in his article on judicial accommodation of *pro se* parties. A challenge to the efficiency and fairness of resolving domestic relations cases is the ever-increasing number of self-represented parties. Given that there is no right to appointed counsel in most domestic relations scenarios, how the Court in a domestic relations case handles the pro se party can impact the process and outcome of a case. Michael provides an excellent survey of case law, court rules, codes of conduct, and ethics opinions that readers will find very helpful in handling these often challenging situations. He provides a number of real-life examples for judges to consider when determining how far they can go in advising and guiding the pro se litigant.

I enjoyed working with these respected and knowledgeable professionals. All of us at *Court Review* hope that these articles will be helpful to the judicial officers who are charged with helping families move through the court system.

— David M. Johnson

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# The Military Divorce:

## An Overview

Joseph A. DeWoskin, Mark E. Sullivan & District Court Judge Dan Wiley

*Your Court Review Editors asked Mark Sullivan, nationally known expert on the military divorce, to contribute an article to this journal. Mark recruited colleagues Joe DeWoskin of Kansas City, KS, a retired Army officer, and Kansas District Court Judge Dan Wiley, who presides over domestic relations cases, to assist him. What follows is their round table discussion of the key issues in a military divorce.*

### MILITARY BENEFITS

**Judge Dan Wiley:** Recognizing and dividing military benefits is essential for the court in a divorce case where one or both of the parties is in military service or retired. It's also a key skill when the case is resolved through negotiation and settlement, which occurs in about 95% of civil cases nationwide. So how can the judge get a handle on what these issues, entitlements, and benefits are?

**Mark:** The first thing to recognize is that there are certain items which can be allocated to the court. These include the military pension division and Survivor Benefit Plan coverage for the former spouse.

On the other hand, there are benefits which are "off-limits" for the court since they are granted by federal statute. These include military medical coverage, which means treatment at any MTF or military treatment facility, and use of TRICARE for non-military health care needs. It also includes possession of a military ID card, shopping at the commissary, and use of the base exchange, which is like a department store. All of these items are entitlements. They cannot be bargained for, they cannot be withheld, and they cannot be allocated by the court, since they are granted to an individual based on his or her meeting certain eligibility criteria under federal law, not based on a court order.

When dealing with a party in the military, it's important to have some basic information about his or her[1] service, which would include such items as rank, branch of service and domicile. A good starting point might be a checklist. Every judge needs one in a military divorce case. Here's a chart which covers the basic information needed by the court and some of the property division issues for the court to determine.

**CHECKLIST FOR THE JUDGE**
**PROPERTY DIVISION IN THE MILITARY DIVORCE CASE**

| Item | Comments | Information/ Notes |
|---|---|---|
| Branch of service | (e.g., Army, Coast Guard) | |
| Component | (e.g., active duty, National Guard, Reserves) | |
| Rank/Pay grade | (e.g., major/O-4) | |
| DIEMS (date of initial entry into military service) | (e.g., January 20, 2002) | |
| Breaks in service | Ask about whether there was any time that SM was not in the military (and when) If the SM is a Reservist or member of the National Guard, ask if there are any "bad years"[2] | |
| Date of marriage | | |
| Date of separation | (if applicable) | |
| Date of divorce | (if applicable) | |
| Domicile of servicemember | One of the jurisdictional bases for pension division is domicile. 10 U.S.C. § 1408 (c)(4)(B). | |
| Military pension division | | |
| Survivor Benefit Plan (SBP) | | |
| Military medical coverage | | |
| Accrued leave | (if applicable) | |
| Thrift Savings Plan (TSP) | (if applicable) | |

### FAMILY SUPPORT

**Judge:** The most immediate concern for many of the parties who are in my courtroom is support, so let's start there. I've decided a number of divorces involving military members. One of the major issues I see is determining the income of the military member and how to calculate support. Joe, I know the military has a unique pay system. How is that reflected on the military member's paystub?

**Joe:** The pay statement for an active duty servicemember, reservist, or member of the National Guard is called a Leave and

***AUTHOR'S NOTE:*** The following article is a dialogue among the authors regarding the unique aspects of military divorce, pension division, family support, and related issues when one of the litigants is in the military.

**Footnotes**

1. For ease of reference, the servicemember will be referred to as a male throughout this article and the former spouse will be referred to as a female.
2. A "good year" means having at least 50 retirement points. Less than that means a "bad year," that is, one which does not apply toward the 20 years needed for retirement. *See* 10 U.S.C. §§ 12731(a)(2), 12732(a)(2).

Earnings Statement, or LES. For a retiree it's called a RAS or Retiree Account Statement.

**Judge:** What about the terms and abbreviations found in the LES?

**Mark:** The three major money items on the LES are base pay, the Basic Allowance for Housing (BAH), and the Basic Allowance for Subsistence (BAS). Sometimes you'll also find entries for special duty pay, family separation pay, hazardous fire pay, and other forms of pay.[3]

**Judge:** I have often found attorneys and litigants confused when it comes to pay and allowances. For example, how do the tax laws operate when it comes to base pay, BAH, and BAS?

**Mark:** The starting point is that base pay is the same as civilian wages; this element is taxable income, except when the base pay is earned in a combat zone. BAS and BAH are not taxable.[4] This means that, when calculating issues of child support and maintenance, I usually ask the court for a variance from the support guidelines to account for the tax-free status of the BAS and BAH.

**Joe:** Sometimes, a judge doesn't fully understand how to read an LES or RAS, so I need to try to educate the court through either a statement of counsel or by having my client explain the terms. You can find a good demonstrative exhibit by searching for "how to read an LES" or "how to read a RAS" on any Internet search engine.

**Mark:** Another good place to find that information is the Defense Finance and Accounting Service (DFAS) website.[5] The LES of the Army, Navy, Air Force, and Marine Corps are very similar. Joe, what do you think are the most important parts of the LES?

**Joe:** Knowing the servicemember's grade or rank, the years of service, and the ETS, or Expiration Term of Service, is the starting point, and this is also useful when determining the military pension division amounts.

**Mark:** In addition, I want to review the servicemember's entitlements, that is, pay and allowances, as well as what the deductions are and the information contained in the section of the LES covering accrued and used leave or vacation time. Judge, what are your thoughts on the most important part of the LES?

**Judge:** I find the information on the TSP to be pretty important. I want to know whether there is a defined contribution plan which will need to be divided, and I also need to know the net monthly income for our servicemember, "Sergeant John Doe," so that I'll know how much money there is to go around in a support case.

**Mark:** With the RAS for a military retiree, a judge should start with "Understanding Your RAS," which can be found on the DFAS website.[6] The most important term is John Doe's gross pay, that is, the total retired pay to which he is entitled. Next comes the "VA waiver," which is the amount of his VA disability pay that's deducted from gross pay. The third item to examine is "SBP costs," which is the premium for the Survivor Benefit Plan, or SBP, an annuity which can be elected to pay continued income to a spouse or former spouse if the retiree dies first.

**Judge:** The net amount after debits for those items lets the court know John Doe's taxable monthly income. It also shows his disposable retired pay.

**Joe:** It also shows John's disposable retired pay. That is the retiree's gross pay less any "VA waiver" amount and the premium for the Survivor Benefit Plan covering the spouse who receives a portion of the pension.[7] This information is important because it will allow the court to see how much of the military retirement is divisible as property.

**Judge:** Mark, does the RAS also reflect changes in gross pay, VA Disability payments, and SBP costs?

**Mark:** That is correct. There is a section on the RAS that reflects "old pay" and "new pay." This information is usually on the December RAS, showing the increase in gross pay and SBP costs that the retiree will receive due to the cost-of-living allowance increase.

**Joe:** Once the court determines the income of the servicemember or retiree, it can decide on child support and spousal support. The amount of monthly support is subject to garnishment by the pay center, and the court order should state a specific monthly amount to be withheld from the pay of John Doe and disbursed to the appropriate recipient, either the Child Support Enforcement Agency or, if it's spousal support, to "Jane Doe," the spouse or former spouse. The Tax Cuts and Jobs Act stated that all new awards of spousal support since January 1, 2018, are tax-free to Jane Doe and are not deductible for John.

## MILITARY PENSION DIVISION

**Judge:** It seems to me that the most important and valuable benefit over which the court could exercise jurisdiction would be military retired pay.[8]

**Joe:** That is correct. For a military member, the retired pay is often the most significant asset in the marriage. In addition to monthly pension payments, there is often a Thrift Savings Plan (TSP) account to be divided, which is the equivalent of a 401(k) plan. With the new Blended Retirement System, which is mandatory for all those who enter the uniformed services[9] after December 31,

3. *Pay*, MIL. COMP., https://militarypay.defense.gov/pay/ (last visited June 6, 2022).
4. *Tax Exempt Allowances*, MIL. COMP., https://militarypay.defense.gov/Pay/Tax-Information/Exempt/ (last visited June 6, 2022).
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7. 10 U.S.C. § 1408(a)(4)(A).
8. *See, e.g.*, Cunningham v. Cunningham, 173 N.C. App. 641, 619 S.E.2d 593 (2005) (ex-husband was a Marine Corps lieutenant colonel, and the former wife's estimate of the value of the pension was about $560,000).
9. "Uniformed services" means the Army, Navy, Air Force, Marine Corps, Space Force, plus the Reserves for these branches of service, and the National Guard. The retired pay center for these is DFAS. "Uniformed services" also means the Coast Guard and the officer corps of the Public Health Service and the National Oceanic and Atmospheric Administration. The retired pay center for these elements is the Coast Guard Pay and Personnel Center.

2017, there is a TSP for every servicemember, whereas it is optional for those is "the legacy retirement system."[10]

## JURISDICTION

**Judge:** Mark, when dealing with military pension division, what do you consider the first thing that needs to be addressed?

**Mark:** That's jurisdiction. This is because the retired pay center will not accept an order dividing military retirement unless the court has jurisdiction over the military member by reason of (1) residence in the territorial jurisdiction of the court (other than by military assignment); (2) domicile in the territorial jurisdiction of the court; or (3) consent to the jurisdiction of the court.[11]

**Judge:** I think that "domicile" is the easiest of these to parse. It means the state of legal residence of the servicemember. That would often be the state from which he entered military service.

**Joe:** That's right. There's no "federal definition" of domicile in the USFSPA. It's left up to state law and cases.

**Mark:** Sometimes, John Doe will claim a bogus domicile in a state such as Texas or Florida, neither of which have state income taxes. It's important for the court to scrutinize such claims to determine if John has ever lived in that state and what connections he might have to the claimed state of legal residence. I've written a Silent Partner infoletter on "Divorce and Domicile," which is available at the website of the North Carolina State Bar's military committee, www.nclamp.gov > Publication. It details all of the facts which a judge needs to explore to make an evidence-based decision on domicile.

**Joe:** There's also a form which might be helpful. It's DD Form 2058, and it's used when Sergeant John Doe fills out his withholding paperwork at the finance office. It lists what John is claiming as his state of legal residence for tax purposes.

**Judge:** What about the first element, the member's residence but not due to military orders? Can you give us an example of that, Joe?

**Joe:** Yes. Suppose that John Doe is assigned to Eglin Air Force Base at the western edge of the Florida Panhandle. He is not required to live on base, so he chooses to reside just over the state line in Gulf Shores, Alabama, to be near his parents. In that situation, Alabama could exercise jurisdiction over his pension since he's not living there due to orders. It's his choice.

**Joe:** I think it is important to note that this underlying issue primarily applies to those servicemembers who are still on active duty. If we are talking about a Reservist, National Guardsmen, or retiree, then the court should have jurisdiction over the pension if that individual resides within the territorial jurisdiction of the court.

**Mark:** The third test, "consent to the jurisdiction of the court," does not mean that John accepts the court's decision on dividing his military pension or even that he agrees to any pension division at all. It means that he has acted consistent with the recognition of the power of the court to order the pension division. This is sometimes called "an appearance." If state law says that John's actions—such as filing an answer or response to the lawsuit, asking for a continuance, or propounding discovery—amount to a general appearance, then he has consented to the jurisdiction of the court.

**Judge:** The court's order dividing military retired pay must contain a specific statement of how the court is exercising jurisdiction over the member's pension. Just saying that the court has jurisdiction is not enough.

## PENSION-SHARE GARNISHMENT

**Judge:** What other requirements are there to establish monthly pension-share payments for Jane Doe, the former spouse? I've heard some lawyers argue that there's a "10/10 Rule" and that it limits the court's ability to divide military retired pay.

**Mark:** I have the same experience. There is a common misconception about what the 10/10 Rule means. Many people believe that in order to receive any portion of the military retirement, the parties need to be married for ten years and have military service that overlaps the marriage for ten years, too. That couldn't be any further from the truth, right, Joe?

**Joe:** That is correct. The 10/10 Rule simply states that the retired pay center will not do a pension-share garnishment as property division unless the parties were married for at least 10 years during which the member performed at least 10 years of service creditable toward eligibility for retired pay. If the 10/10 overlap exists, then the appropriate pay center will pay the former spouse her share of the military retirement directly.[12] Judge, in your experience, why is the 10/10 Rule so important?

**Judge:** Pension garnishments mean reduced future litigation because the retired pay center pays the money directly to the former spouse, has all appropriate taxes withheld at the federal and state level, and the parties will have less post-divorce contact with one another. There are also yearly adjustments for COLAs, or cost-of-living adjustments, which means that the parties don't have to keep track of that information.

**Mark:** But, Joe, is there a difference between how you determine the 10/10 rule between active-duty members and those in the Guard or Reserves?

**Joe:** Yes. For an active-duty member, the determination is 10 actual years of active duty. However, for a member of the Reserves or National Guard, the determining factor is "ten good years." A qualifying year for a Guard/Reserve member means one with at least 50 retirement points. If the member has one or more years with less than 50 points, then there is the possibility that although there may be ten years of marriage, the military service may not have ten good years of overlap. This would preclude direct payment from DFAS.

## FROZEN BENEFIT RULE

**Joe:** Judge, are you familiar with the Frozen Benefit Rule?

**Judge:** Yes. On December 23, 2016, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017). This completely changed how military retirement was divided. For every other pension that's divided, we use the actual retired pay of the individual, not some artificial number at the date of divorce. This new statute, however,

10. The "legacy retirement system" refers to the retirement system for those who are not covered by the BRS, or Blended Retirement System. In general, these are members who entered service before January 1, 2018, and did not "opt into" the BRS during calendar year 2017.
11. 10 U.S.C. § 1408(c)(4).
12. 10 U.S.C. § 1408(d)(2).

requires that the pension which is to be divided must be an amount equal to what John Doe would have received had he retired on the date of the divorce.[13] Joe, what divorce cases will involve the Frozen Benefit Rule and its impact on the military retirement?

**Joe:** The law applies to all cases in which the divorce is granted after December 23, 2016, and—at the time of divorce—the pension is not in pay status. The parties cannot agree to "opt-out" of the Frozen Benefit Rule. It applies to everyone who meets these qualifications. State court judges do not have the authority to order DFAS to do anything that is outside of the federal statute. When the snapshot is taken, the former spouse will receive a portion of the amount the servicemember would have received had he retired on that date (with the cost-of-living allowance increases).

**Mark:** The statute limits what the court may divide at divorce to the hypothetical amount of retired pay of the member at that date, increased by the cost-of-living amounts granted to military retirees from the time of the divorce to the date the member retires.[14] Basically, the court is now required to take a snapshot at the time of the divorce and divide the hypothetical military retirement at that point in time. Judge, what happens if you decide you want to order the retirement at a later date than the date of divorce?

**Judge:** The court cannot enter a valid order for division of the "final retired pay" of John Doe, that is, the actual pension amount that he would receive at the end of his career. The order entered by the court must contain two data points which allow the retired pay center to calculate the "snapshot amount" of retired pay which will be divided. Those two points are the "retired pay base" of the individual, usually known as his "High-3" amount, and the years of creditable service for the member. Both are set as of the date of divorce.

**Mark:** The "High-3" pay for John Doe is the average of the highest three years of compensation, based on active-duty pay tables. This requires the court to have a calculation—usually made by one of the parties or attorneys—which shows the average of the highest 36 months before the divorce date. That's usually the most recent 36 months.

**Joe:** With a Guard/Reserve member, the second data point would be his Reserve retirement points, not his years of service.

**Judge:** And both of those data points are as of the divorce date. That means that the court has to receive the information as evidence and state it in the order dividing military retired pay, or else the order will be rejected.

**Joe:** And it is important to emphasize that the *divorce date* is what we're talking about. Many attorneys think that it's the data as of the date of filing the lawsuit or the date of separation. While those dates may be important items to include in a pension order, the essential data points which *must* be inserted are those two items as of the date of divorce. Without those, the order will be rejected, and the entire case lands in the judge's lap for a *clarifying order* that has the correct, required information in it. That's a waste of judicial resources when it could have been done correctly in the first place.

## IN-KIND DIVISION

**Judge:** What are the ways the court can divide the military pension, Joe? I know that a judge can receive evidence about the present value of a pension and then do a set-off order, trading the pension against other marital assets. But there's seldom enough other marital property to balance out the spreadsheet which I use. How about the "in-kind division"?

**Joe:** There are four different ways to divide military retirement. These are the fixed amount, the percentage, the formula clause, and the hypothetical award.

**Mark:** I've written a Silent Partner infoletter on "Getting Military Pension Orders Honored By the Retired Pay Center," which addresses each of these.[15] When the order involves a fixed dollar amount, it might read, "The court awards Jane Doe, the plaintiff, $1,500.00 of the disposable retired pay of the defendant, John Doe." Of the four acceptable clauses for the retired pay center, only this one excludes a cost-of-living adjustment. The flat amount never changes, and thus it benefits the servicemember or retiree.[16]

**Joe:** When the court grants a percentage award, which is usually for retirees since all the numbers are known, the order might read, "The former spouse is awarded 47% of the servicemember's military retired pay."

**Mark:** A formula award is an award expressed as a ratio.[17] For example, the order could state, "Wife shall receive 50% of the Husband's disposable retired pay times a fraction, the numerator being the months of marital pension service, and the denominator being the total months of service by Husband." The order must then provide the numerator, which is usually the months of marriage during which time the member performed creditable military service.[18] It is necessary to include as the numerator the months of service or retirement points acquired during the marriage.

**Joe:** If you fail to include the data for the numerator, the order will be rejected. The retired pay center, on the other hand, will provide the denominator (total months of service or retirement points) if that is left blank in the order. It is important to note that the numerator needs to be accurate; the retired pay center relies on the figures in the order and will not back-check the marital military service to ensure its accuracy. Judge, which clause do you see the most issues with on orders that come before you?

**Judge:** I would say that the hypothetical clause is the most difficult to draft.

**Mark:** Why is that?

13. 10 U.S.C. § 1408(a)(4)(B).
14. *Id.*
15. Publications of Silent Partners, LEGAL ASSISTANCE FOR MIL. PERS., https://www.nclamp.gov/publications/silent-partners/ (last visited June 6, 2022).
16. U.S. DEP'T OF DEF., 7000.14-R, DEP'T OF DEF. FIN. MGMT.REGUL.vol. 7B, ch. 29, 290601.D (June 2021) [hereinafter DoDFMR].
17. DoDFMR, vol. 7B, ch. 29, § 290211 (June 2021).
18. Mark Sullivan, *Getting Military Pension Orders Honored by the Retired Pay Center*, LEGAL ASSISTANCE FOR MIL. PERS.: SILENT PARTNERS, https://www.nclamp.gov/publications/silent-partners/getting-military-pension-orders-honored-by-the-retired-pay-center/. (last visited June 6, 2022).

**Judge:** The hypothetical clause involves an award based on rank or status, which is different from when the servicemember retires. The order, for example, may say: "Former Spouse is granted 50% of what an Army Staff Sergeant (E-6) would receive if he were to retire with over 18 years of military service and High-3 pay of $____ per month as of ___(date)."[19] Since there is no table or spreadsheet that reflects this type of pay, DFAS would calculate the hypothetical pay amount and compute a ratio to the actual retired pay in order to calculate the amount to which the former spouse should receive.[20]

**Mark:** Joe, what would you do if you had a National Guardsman or Reservist and you were preparing an order to tender to the judge for pension division?

**Joe:** When dividing that type of pension, and the servicemember is still drilling and has not submitted retirement paperwork, a "formula clause" is what is normally used. The "formula clause" is used because the final retired pay isn't known, and the total service creditable for retirement is also unknown.

**Judge:** And don't forget that in a Guard/Reserve case involving a formula clause, you are required to specify the division according to retirement points.[21]

**Mark:** That's a good reminder, Judge. The usual language used refers to points earned during the marriage divided by the total points during the member's career. It is also important to remember that you can also use a percentage clause or a fixed dollar amount clause for a still-drilling member of the Guard or Reserves.

## ELEMENTS OF THE MILITARY PENSION DIVISION ORDER

**Joe:** Mark, we have discussed DFAS being strict about the language in a military pension division order (MPDO). What are the elements that need to be included in an MPDO?

**Mark:** We have already discussed the importance of stating how Court has jurisdiction over the servicemember. The order should also include the name and addresses of the parties, including their Social Security numbers (SSN). If state law or local rules prohibit the inclusion of the full SSN, you can state that they are included under separate cover. Additionally, the application document, DD Form 2293,[22] requires the SSN.

**Judge:** The order should also include the date of marriage and years of marriage and military service (the 10/10 Rule), the military member's grade or rank, a statement that the servicemember's rights under the Servicemembers Civil Relief Act (SCRA)[23] has been observed and honored, and a statement as to what the pay center will pay the former spouse.

**Mark:** The usual language for pension division clauses is found in the Silent Partner infoletter, "Getting Military Pension Orders Honored by the Retired Pay Center."[24] Joe, can you think of anything else that needs to be included?

**Joe:** I would definitely recommend taking a look at the DFAS web

**FORMER SPOUSES' PROTECTION ACT CHECK SHEET**

| MEMBER'S NAME: | SOCIAL SECURITY NUMBER: |
|---|---|

- ❑ SERVICE OF APPLICATION (personal, certified or registered mail, return receipt requested)
- ❑ FINAL DECREE OF DIVORCE, DISSOLUTION OR ANNULMENT OR LEGAL SEPARATION ISSUED BY A COURT – OR – A COURT ORDERED, RATIFIED OR APPROVED PROPERTY SETTLEMENT INCIDENT TO SUCH A DECREE
- ❑ AUTHENTICATED OR CERTIFIED
- ❑ MEMBER PROPERLY IDENTIFIED (E.G., NAME, ADDRESS, SSN)
- ❑ NAME, ADDRESS, AND SSN OF FORMER SPOUSE
- ❑ ORDER PROVIDES FOR ONE OF THE FOLLOWING:
  - A) PAYMENT OF FIXED MONTHLY AMOUNT OF $_____
  - B) FIXED PERCENTAGE OF _____%
  - C) FORMULA CALCULATION (must use retirement points in Guard/Reserve case):
  - D) HYPOTHETICAL CALCULATION:
- ❑ MEMBER'S RIGHTS UNDER THE SERVICEMEMBERS CIVIL RELIEF ACT COMPLIED WITH
- ❑ JURISDICTION MET –
  - ❑ RESIDENCE
  - ❑ DOMICILE
  - ❑ CONSENT
- ❑ ORDER HAS NOT BEEN AMENDED, SUPERSEDED, OR SET ASIDE
- ❑ ORDER IS FINAL DECREE, NO APPEAL MAY BE TAKEN, NO APPEAL WAS TAKEN WITHIN TIME PERMITTED
- ❑ FORMER SPOUSE MARRIED TO MEMBER AT LEAST 10 YEARS DURING AT LEAST 10 YEARS OF CREDITABLE SERVICE

| PAY ENTRY DATE: | RETIREMENT DATE: |
|---|---|
| MARRIAGE DATE: | DIVORCE DATE: |

- ❑ IF THE FINAL DECREE OF DIVORCE, DISSOLUTION, ANNULMENT OR LEGAL SEPARATION ISSUED BY A COURT, OR COURT-ORDERED, RATIFIED OR APPROVED PROPERTY SETTLEMENT INCIDENT TO SUCH A DECREE IS AFTER DEC. 23, 2016, AND MEMBER AT THAT DATE IS NOT RECEIVING RETIRED PAY, THIS DATA IS SHOWN FOR DATE OF DIVORCE, ETC.:
  - FOR MEMBERS ON ACTIVE DUTY -

| YRS. OF CREDITABLE SERVICE: | HIGH-3 PAY: |
|---|---|

- FOR RESERVE COMPONENT MEMBERS (I.E. NATIONAL GUARD, RESERVES) -

| RETIREMENT POINTS: | HIGH-3 PAY: |
|---|---|

19. *See* DoDFMR vol. 1, ch. 3, § 030101.A.2. (Oct. 2020) (for servicemembers entering military service on or after September 8, 1980, retired pay is calculated using the average of the member's highest 36 months of basic pay at retirement, also known as "High-3")..
20. *Guidance for Lawyers: Military Pension Division*, LEGAL ASSISTANCE FOR MIL. PERS.: SILENT PARTNERS, https://www.nclamp.gov/media/425645/s-mp-guidance.pdf (last visited June 6, 2022) (detailed information on hypothetical clauses)..
21. DoDFMR, vol. 7B, ch. 29 § 290211.B (June 2021).
22. DoDFMR, vol. 7B, ch. 29 § 290401 (June 2021).
23. The SCRA is found at 50 U.S.C. §§ 3901-4043.
24. *Supra* at note 13.

page and the sample order language shown there for a pension order.[25] The court could also use a checklist which DFAS uses to ensure that all the essential elements are included in the pension division order. Shown nearby is the document which the agency uses.

## SURVIVOR BENEFIT PLAN

**Judge:** Let's change the subject. What about the Survivor Benefit Plan? SBP is an important component of a divorce settlement or property division trial as to a death benefit for Jane Doe, the servicemember's spouse. It ensures a continuous flow of income to Jane if her husband, John Doe, dies first.[26]

**Mark:** And it's equally important for the other side, Joe. If I'm in court advocating for John Doe, then I want to bring two points to the judge's attention:

- First of all, it's not free. SBP involves payment of a premium out of John's retired pay, and it's not fair for him to be charged with this deduction since he needs to be dead for the benefit to appear, with money flowing to his ex-wife.[27]
- Second, there can only be one adult beneficiary for SBP, so the court's awarding of coverage to the former spouse means that John cannot have SBP for a future spouse.

**Judge:** Of course, I'd take both of those positions into account, but sometimes I find that the attorneys come to the equitable distribution pretrial conference unaware of the survivor annuity or unprepared to make or defend against those arguments. It's always a good idea for the judge to determine what's being tried, and the Survivor Benefit Plan is a large part of the usual military divorce case. Assuming that the court includes SBP as an issue for trial, does the court have to award SBP to the former spouse?

**Mark:** If I were arguing the servicemember's case, I'd say that it does not have to do that. Especially where there is a short-term marriage,[28] or there's evidence that the former spouse may remarry before age 55, I think that the court should decline to allot SBP coverage to the former spouse.

**Judge:** Why did you mention remarriage before 55, Mark? Is there a remarriage penalty associated with the SBP?

**Mark:** Yes, there is. If the former spouse remarries before turning age 55, she is not eligible for SBP payments should her ex die before her. This suspension, however, would be removed if that subsequent marriage ended in divorce, annulment, or the death of the new spouse.

**Judge:** Speaking of remarriage, what if the servicemember, John Doe, remarries? Can a portion of the SBP be "saved" for a new spouse in the future?

**Mark:** No, it can't. The SBP cannot be subdivided into two or more adult beneficiaries. It's a unitary benefit. The court needs to remember, "It's either EX or NEXT—not both."

**Judge:** If I were to award SBP coverage to the spouse or former spouse, what is the language that should be used, Joe?

**Joe:** This is a situation where "magic words" need to be in the court's order. The phrase which ought to be used is this—"*The defendant, John Doe, will immediately elect former-spouse SBP coverage for the plaintiff, Jane Doe, with his full retired pay as the base amount.*" If it's necessary to insert some more specific instructions in the order, then consider including a requirement that John complete and execute DD Form 2656-1, sending it promptly to Jane's attorney so that she can also sign it and forward it to the retired pay center with a certified copy of the divorce decree and the order providing for SBP coverage.[29]

**Judge:** And what if I want to have the former spouse pay the bill for this, Mark? Can I just tell the retired pay center to "bill her for the charges," or something like that?

**Mark:** You could, but it wouldn't work. Due to the language in the federal statute, 10 U.S.C. § 1408(a)(4)(A)(iv), the premium must be deducted from the retiree's gross pay. It cannot be shifted to the former spouse.

**Judge:** Is there a "Plan B" which could be used for shifting the cost to the former spouse?

**Mark:** Yes, there is. You could order that "*The plaintiff, Jane Doe, will promptly reimburse the defendant each month for the portion of the SBP premium which is deducted from his share of the military pension.*" Since such exchanges rarely work out between divorce parties, another option for the court would be to modify the percentage of the pension which Jane gets so as to have her shoulder the entire burden of the SBP premium. The calculations could be done by one of the attorneys, and the language would be, "*The plaintiff will pay the entire cost of the premium for former-spouse SBP coverage, and her share of the pension will be adjusted to reflect this responsibility.*"[30]

**Judge:** Are there some easy-to-remember rules as to ordering and implementing the Survivor Benefit Plan in a divorce case?

**Mark:** Yes. We call it the "3-R Rule." Joe—what's the first R?

25. DEF. FIN. & ACCT. SERV., SAMPLE ORDER LANGUAGE; MILITARY RETIRED PAY DIVISION ORDER (2020), https://www.dfas.mil/Portals/98/Documents/Garnishments/SAMPLE%20ORDER%20LANGUAGE%202.pdf?ver=2020-01-17-093724-717.
26. *See* 10 U.S.C. § 1451 (the Survivor Benefit Plan, found at Chapter 73 of Title 10 U.S. Code, pays the beneficiary 55% of the selected base amount for life. The base can be any dollar amount from full retired pay down to $300 per month).
27. The SBP premium to cover a spouse or former spouse is 6.5% of the SBP base when the servicemember retires from active duty. It costs up to 10% for the same coverage if the retirement is from the Reserves or National Guard.
28. *See, e.g.*, *In re* Miller, 957 N.W.2d 41 (Iowa Ct. App. 2021) (in case involving an eight-year marriage, Court of Appeals upheld trial court's denial of former-spouse Survivor Benefit Plan coverage due to length of marriage).
29. The former spouse can also act to ensure that she is covered by executing and submitting DD Form 2656-10, the "deemed election" form, so that her request for coverage will be honored even if John fails or refuses to make the required election on time. The "deemed election" is covered at 10 U.S.C. § 1450(f)(3).
30. In a retirement from active duty, the usual reduction is about 4-4.5% from the *nominal share* that Jane would receive to the *adjusted share* she will actually get, so that she will be paying "full freight" for the SBP cost. The order should make it clear that the reduction will stop when there is no longer a premium to be paid. This occurs if the former spouse remarries before age 55, which suspends her eligibility for SBP, and also if there are 30 years of premium payments and the retiree is at least 70 years old.

**Joe:** It's R for Requirement. There needs to be language in the court order which requires the servicemember to elect former-spouse SBP coverage. Mark, what's the second R?

**Mark:** The second R stands for Request. There must be an election made for SBP coverage on the appropriate form. Just having a court order for coverage isn't enough. And the third R, Joe?

**Joe:** It's R for Register. You have to register the SBP election with the retired pay center within the time limits imposed by the statute. For the election made by the servicemember, it's one year from the date of the divorce. For the former spouse, a deemed election must be received by the center within one year of the order mandating the election of former-spouse SBP coverage.

**Judge:** As I mentioned earlier, sometimes the attorneys don't mention SBP. If it isn't presented at trial through testimony or evidence, I can't rule on the allocation of SBP coverage, and it's probably lost.[31] In fact, some judges feel that the parties or their attorneys aren't even aware of its existence.[32]

**Joe:** So, what's a judge to do?

**Judge:** I know that some judges will raise the issue in a pretrial conference. Failure to do this sometimes means that the issue and the asset are overlooked, which may mean that there would be an appeal or a motion to reopen the proceedings for new litigation of the "newly discovered asset." That takes up time which is needed for other matters.

**Mark:** What other factors which move the court to introduce the topic of SBP?

**Judge:** One would be the very real specter of malpractice. No lawyer wants to face a claim of legal negligence, and most of the lawyers who practice in my court really want to do the best for their clients. Very few people are helped when an important asset is overlooked in a property division trial. The discovery of the "missed asset" can lead to motions to amend, set aside or reconsider, grievances at the state bar, and lawsuits for malpractice. Raising the issue in pretrial proceedings can alert everyone to the existence of this hidden element, and it may, in some cases, spur the parties toward settlement.

**Joe:** I agree. Many attorneys are not well versed in the area of military divorce and pension division. Addressing the issues and putting everything on the table is a smart way of being sure that the court's eventual decision is informed and fair.

## OTHER BENEFITS

**Judge:** What other benefits and entitlements should the court be concerned about?

**Mark:** One of them would be the valuation of accrued leave. If "John Doe," our servicemember, is on active duty, then he probably has accrued some leave time. This potential asset can be marital or community property, and it's often overlooked.

**Joe:** Each SM accrues 30 days of paid leave each year, regardless of rank. This leave is worth what its equivalent would be at the monthly pay rate of the SM, and one can calculate this easily by using the pay tables available on the DFAS website.[33] For example, if John's base pay is $6,000 per month and he has 45 days of accrued leave at the date of valuation under state law (i.e., date of separation, date of filing, date of divorce), his accrued leave would be worth about $9,000 (45/30 × $6,000).

**Mark:** There's another point worth noting. Military leave may, at the time of one's separation from the uniformed services, be cashed in or else used as terminal leave by the individual concerned.

**Joe:** The attorney for John may try to confuse the issue by pointing out that the non-military spouse cannot be awarded military leave, but this argument misses the point. The issue is not who can use military leave but rather whether, under applicable state law, an asset such as "vacation time" is marital or community property. All the evidence that is needed would be the SM's Leave and Earnings Statement for the applicable date under state law for classifying and valuing the marital property. A majority of states have upheld the valuation and allocation of vacation and sick leave. The Colorado Supreme Court, ruling that such item may be valued and allocated, set out a review of case law in this area in *In re* Marriage of Cardona.[34]

## MEDICAL COVERAGE

**Judge:** Whether it's in the context of family support or division of military benefit, our judges usually want to know about military medical care. What is it, how can the spouse and children qualify, and can the court do anything to help in obtaining it?

**Mark:** The first step is to check your resources. The Code of Federal Regulations is an excellent source for information. You'll find "Benefits for former spouses" at 32 CFR § 161.19, and the tables there show what spouses and former spouses may obtain, depending on the number of marital years, the years of military service, and the overlap between the two.

**Joe:** The "gold standard" for military medical care is labeled *20-20-20 coverage*. This means that Jane Doe has been married at least 20 years, John has served at least 20 years, and there is an overlap of the two for at least 20 years. Jane Doe, as an unremarried former spouse,[35] can use TRICARE, a civilian health coverage program, for medical and drug expenses, and she can receive space-available care at any MTF or military treatment facility. There are, of course, copayments and an initial deductible, just like every other medical insurance policy.[36]

**Mark:** If the former spouse doesn't have a long-term marriage, she may purchase a conversion health policy under the DoD's Continued Health Care Benefit Program (CHCBP). 10 USC 1086(a). The CHCBP is not part of TRICARE; it is a health insurance plan nego-

31. For cases in which silence spelled the death of former-spouse SBP, *see, e.g.*, Myers v. Ridgley, 2017 Ark. App. 411, 2017 Ark. App. LEXIS 474; Kuba v. Kuba, 2013 Mo. App. LEXIS 745; Hicks v. Hicks, 348 S.W.3d 281 (Tex. App. 2011); Williams v. Williams, 37 So. 3d 1171 (Miss. Ct. App. 2010); Creech v. Creech, 2010 Ky. App. Unpub. LEXIS 194; Dziamko v. Chuhaj, 193 Md. App. 98, 996 A.2d 893 (2010); Potts v. Potts, 142 Md. App. 448, 790 A.2d 703 (Ct. Spec. App. 2002); and Cox v. Cox, 228 A.D. 2d 773, 644 N.Y.S. 2d 77 (N.Y. App. Div, 3rd Dep't. 1996).
32. For cases in which there is apparently no recognition of the existence of the Survivor Benefit Plan, *see, e.g.,* Kelly v. Kelly, 2013 Conn. Super. LEXIS 1348; Hicks v. Hicks, 2012 VA. Cir. LEXIS 80; and Wormer v. Poling, 2012 N.J. Super. Unpub. LEXIS 2276.
33. *Pay Tables,* DEF. FIN. & ACCT. SERV., https://www.dfas.mil/MilitaryMembers/payentitlements/Pay-Tables/ (last visited June 6, 2022).
34. *In re* Marriage of Cardona, 316 P.3d 626 (Colo. 2014).
35. This means that she can never remarry.
36. The requirements for full eligibility for Tricare are set out at 10 USC § 1072(2)(f ).

## GLOSSARY OF TERMS, ABBREVIATIONS AND ACRONYMS

**10/10:** Shorthand for overlap of ten years of military pension service and ten years of marriage. This is the requirement for direct payment of military retired pay as property to a former spouse by garnishment.
**20/20/20:** Shorthand for 20 years of marriage, 20 years of military pension service, and an overlap of at least 20 years. This is the requirement for an unremarried former spouse's entitlement to post-divorce medical coverage and some other privileges.
**Basic Allowance for Housing (BAH):** A tax-free housing allowance that is provided to a servicemember (SM) who is authorized to live off-base.
**Basic Allowance for Subsistence (BAS):** An allowance that is meant to offset costs for an SM's meals.
**Basic Pay:** The pay of a servicemember according to rank and longevity, before additional amounts are added for quarters, subsistence, flying status, overseas duty, etc.
**COLA:** Cost of Living Adjustment.
**DEERS:** Defense Enrollment Eligibility Reporting System.
**DFAS:** Defense Finance and Accounting Service.
**Disposable Retired Pay:** That portion of gross military retired pay considered by the military pay center to be subject to court orders for division as property or subject to garnishment through legal process in enforcement of a court order. See 10 U.S.C. § 1408(a)(4).
**DD Form 214:** An SM's discharge certificate.
**LES:** Leave and Earnings Statement. The pay statement of an SM showing total entitlements (pay and allowances), taxes, and other mandatory deductions, voluntary allotments, days of annual leave taken and available, state of residence for tax purposes, etc.
**SBP:** Survivor Benefit Plan, 10 U.S.C. § 1447 et seq.
**SCRA:** Servicemembers Civil Relief Act, Chapter 50 of Title 50, U.S. Code.
**Separation:** Discharge/release from active duty.
**Servicemember (SM):** An officer or enlisted member of the uniformed services.
**SGLI:** Servicemembers Group Life Insurance, 38 U.S.C. § 765 et seq.
**TDY:** Temporary duty.
**TRICARE:** Military health care coverage program.
**Uniformed Services:** The U.S. Army, Navy, Marine Corps, Air Force, Coast Guard, Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration.
**USFSPA:** The Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408.

tiated between the Defense Department and a private insurer. The spouse must apply for coverage within 60 days of losing TRICARE eligibility and must pay the premiums on time.

**Joe:** On purchase of the CHCBP policy, Jane is entitled, on request, to medical care for 36 months after the final decree of divorce, dissolution, or annulment.[37]

**Mark:** There is also another option for the former spouse who cannot satisfy the 20/20/20 rule. She may nevertheless be eligible for indefinite medical coverage through the CHCBP.[38] The criteria the DoD presently uses is that the former spouse must

- not have remarried before age 55;
- not be covered under Tricare' and
- either receive a portion of military retired pay or receive a survivor annuity (i.e., the SBP),[39] or
- have a court order for military pension division or a written agreement requiring SBP coverage for her.

### THRIFT SAVINGS PLAN

**Judge:** What about a retirement account, Joe? The Thrift Savings Plan, which is similar to a 401(k) plan, is sometimes a marital asset.

**Joe:** Yes. The court should consider this potentially valuable marital asset to the extent it was acquired during the marriage. Servicemembers can set up and contribute to their TSPs, and—for those who are in the Blended Retirement System[40]—there are matching contributions by the government.

**Judge:** How do I determine what its value is and how much of that is marital?

**Mark:** To ascertain the TSP value, the court will need a copy of the TSP statement closest to the valuation date.[41] If the account was set up before the marriage, a copy of the statement closest to the marriage date would also be needed.

**Joe:** If the account was established during the marriage, then all the court needs to do is:

- Determine the balance as of the classification date;
- Find out if there have been any loans from the account; and

37. 10 U.S.C. § 1078a(g)(1)(C). For further information regarding CHCBP coverage and benefits, one can use a search engine to look for "CHCBP," contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 740072, Louisville, KY 40201-7472 (800-444-5445).
38. This is pursuant to 10 U.S.C. § 1078a and 32 C.F.R § 199.20.
39. It is strongly recommended that both of these be involved, not just "either/or."
40. SMs who joined the uniformed services after December 31, 2017 are covered by the Blended Retirement System (BRS), as are those who opted into the system during calendar year 2017. For an explanation of the Blended Retirement System, *see* Amelia B. Kays,*The Blended Retirement System and Divorce*, LEGAL ASSISTANCE FOR MIL. PERS.:SILENT PARTNERS, https://www.nclamp.gov/publications/silent-partners/the-blended-retirement-system-and-divorce/ (last visited June 6, 2022).
41. This is the date under state law for classification and valuation of marital or community property assets. In some states it is the date the parties separated. In others it is the date of divorce or the date of filing the divorce case.

- Find out if there have been any distributions from the account.

What is left is the marital value as the classification date. The adjustment would need to be made, of course, for passive gains and losses between that date and the date of the hearing.

**Mark:** If the SM sets up the TSP account before marriage, then it will be necessary for the court to receive evidence on the "incoming balance," that is, the value at the time of the marriage. Then the court will need to determine the growth of that balance up to the classification date. This means either expert testimony or else evidence showing the monthly or quarterly growth of the account. Once the court determines how much the date-of-marriage balance was and how much that figure has grown, then it can subtract that appreciated figure from the value on the classification date, which will leave the remainder as the marital portion of the account.

**Joe:** The court divides a TSP account by means of a Retirement Benefits Court Order (RBCO). The rules and language can be found in a pamphlet called "Court Orders and Powers of Attorney" prepared by the TSP Legal Processing Unit. It is easily located by typing into any internet search engine, "court orders and powers of attorney TSP."

**Mark:** There are two critical issues for the court to decide. The first is whether the former spouse, "Jane Doe," is to receive a set dollar amount or a percentage of the balance in the account. The government will comply with either approach to division in the court's order. The second issue for the court is to decide in a contested case whether Jane is to receive "earnings" on the amount that is allocated to her.

**Joe:** The term "earnings" means passive gains and losses. If the court states in its ruling that Jane will receive earnings on the amount awarded to her, then the TSP Legal Processing Unit will adjust the amount stated in the order for any increase or decrease in the value of the account from that date to the date of transfer to her.

**Mark:** Jane's amount will be placed in a separate TSP account to be managed by Jane. She can, if she wishes, remove the funds and transfer the balance to an IRA in her name. If she takes an outright distribution, however, she will be receiving taxable money.

**Judge:** Can the funds in the TSP account of John Doe be garnished if he gets behind in child support?

**Mark:** Yes, they can. The order must state certain information to allow the account to be identified.[42] The garnishment must be in a fixed dollar amount, not a percentage or fraction. When the proper court order is served, the account will be frozen until the government can comply with the garnishment terms.[43]

**Judge:** Well, gentlemen, I think that wraps up the military divorce overview. We've covered pension division, family support, the Survivor Benefit Plan, and a host of other subjects. Thank you for helping to make clear to our judicial colleagues the issues and rules regarding the military divorce case.

*Judge Dan Wiley graduated from the University of Kansas School of Law in 1992, with honors. He served as a Leavenworth Kansas Municipal Court Judge from 1997-2008, and as a State District Court Judge since 2009, where he primarily hears domestic relations cases. Judge Wiley is a United States Air Force veteran.*

*Joseph A. DeWoskin practices law in Kansas City, Kansas; he is a retired Army lieutenant colonel; he is licensed in Missouri and Kansas; and teaches CLE around the country on military issues in divorce.*

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42. The information on TSP accounts, child support and garnishment can be found in the booklet, "Court Orders and Powers of Attorney" (September 2014), which may be located in "Publications and Forms" at https://tsp.gov. In the process of dividing the TSP account at divorce, Jane Doe or her attorney can get the TSP account balance and TSP transaction history by submitting a written request, and the court can write up the division order using the model RBCO in the booklet.
43. This information is also in the TSP booklet.


Judicial education plays an important role in enhancing the professionalism of the judiciary and promoting the rule of law. This following list includes information about the International Organization for Judicial Training and judicial education providers in the United States.

**INTERNATIONAL ORGANIZATION FOR JUDICIAL TRAINING**
The International Organization for Judicial Training (IOJT) was established in 2002 in order to promote the rule of law by supporting the work of judicial education institutions around the world. The organization convenes biannual conferences hosted by judicial training centers of different countries. These conferences provide an opportunity for judges and judicial educators to discuss strategies for establishing and developing training centers, designing effective curricula, developing faculty capacity, and improving teaching methodology. The IOJT website includes links to materials from past conferences as well as its journal: Judicial Education and Training. http://www.iojt.org

**FEDERAL JUDICIAL CENTER: EDUCATION AND RESEARCH FOR THE U.S. FEDERAL COURTS**
An overview of the Federal Judicial Center, including its organization, history, and mission. For translated versions of this document, see Translated Briefing Materials under the Resources menu.
https://www.fjc.gov/sites/default/files/2015/About-FJC-English-2014-10-07.pdf

**NATIONAL ASSOCIATION OF STATE JUDICIAL EDUCATORS**
The National Association of State Judicial Educators (NASJE) is a non-profit organization that strives to improve the justice system through judicial branch education. http://nasje.org

**NATIONAL JUDICIAL COLLEGE**
The National Judicial College provides judicial education and professional development for judges within the United States as well as for judges from other countries. https://www.judges.org

**NATIONAL CENTER FOR STATE COURTS**
The mission of National Center for State Courts (NCSC) is to improve the administration of justice through leadership and service to state courts, and courts around the world. https://www.ncsc.org

**THE JUDICIAL EDUCATION REFERENCE, INFORMATION AND TECHNICAL TRANSFER PROJECT**
The Judicial Education Reference, Information and Technical Transfer (JERITT) Project is the national clearinghouse for information on continuing judicial branch education for judges and other judicial officers, administrators and managers, and judicial branch educators. This site includes links to judicial education centers serving the United States state court systems. https://www.fjc.gov/sites/default/files/2015/About-FJC-English-2014-10-07.pdf

**COUNCIL FOR COURT EXCELLENCE**
Working primarily in Washington, D.C., courts, the Council is attempting to create an accessible, fast-moving justice system. The Council for Court Excellence works to achieve this through education of the citizenry on the justice system and by advocating reforms. http://www.courtexcellence.org

**NATIONAL CENTER FOR JUSTICE AND THE RULE OF LAW**
Working through the University of Mississippi School of Law, the National Center for Justice and the Rule of Law attempts to ensure fairness in the U.S. criminal justice system. It uses projects, conferences, and education, and it produces publications that study the criminal justice system. It seeks to highlight issues of justice and rule of law and discuss methods to address related problems. https://olemiss.edu/depts/ncjrl/Administration/about_mission.html

**THE FEDERAL JUDICIARY CHANNEL ON YOUTUBE**
This link will bring you to streaming video productions developed by the Federal Judicial Center, the Administrative Office of the United States Courts, and the United States Sentencing Commission. The videos cover a range of topics including analysis of U.S. Supreme Court decisions, discussion of sentencing law, and information about the U.S. judiciary. https://www.youtube.com/user/uscourts?feature=watch

# Uncovering the Secrets of Statistics as Evidence in Business Valuations

**Christopher C. Melcher**

Trials over the value of a business involve data, in large amounts, which must be presented in an understandable and impactful way. Statistics, when used properly, allow us to detect patterns or test theories we could not comprehend from a sea of numbers. But these shortcuts can be misused to create the appearance of accuracy, either through the expert's failure to understand statistics or desire to deceive. This article explains, in simple terms, how to avoid these traps and spot a good statistic from a bad one.

The risk of false statistics in the courtroom cannot be understated. The murder prosecution of English solicitor Sally Clark (1964-2007) was a miscarriage of justice founded on a statistic. She was convicted and sentenced to life in prison in 1999 for murdering her two infant sons who died two years apart.[1] Her defense argued sudden infant death syndrome (SIDS) was the cause.[2] The prosecutor's expert, a pediatrician, testified that the chance of a SIDS death was 1 in 8,500. And to to find the odds of two children dying in the same household of SIDS, he squared that number (8,543 × 8,543), claiming it was a 1 in 73 million chance that both of Ms. Clark's children could have died of SIDS.[3] The jury convicted Ms. Clark on that evidence. In October 2001, the Royal Statistical Society reported its concern about the "misuse of statistics in the courts" and said "no statistical basis" existed for the 1 in 73 million figure.[4] The deaths were not independent events but ones which occurred in the same household. No empirical evidence existed to support the expert's testimony.[5] The Society warned: "Although many scientists have some familiarity with statistical methods, statistics remains a specialized area. The Society urges the Courts to ensure that statistical evidence is presented only by appropriately qualified statistical experts, as would be the case for any other form of expert evidence."[6] The conviction was overturned after Ms. Clark served three years in prison when evidence came to light that her second child had died from a bacterial infection, which the prosecution failed to disclose.[7] Ms. Clark was debased by the failures of the legal system in which she had worked as a solicitor and did not recover from the experience.[8] The lesson from Clark's case is that the field of statistics is a specialized area that unqualified experts should not tinker with, and courts must understand when statistical evidence is not worthy of admission.

## EVALUATING STATISTICS

A statistic can be distorted, just as any other evidence that relies on the credibility of the witness who presents it. It's been said that "there are three kinds of lies: lies, damned lies, and statistics."[9] The problem with statistics is that their precision gives the illusion of significance. We rarely question what sounds like science because we lack the time or skill to evaluate it. This allows experts to present faulty statistics, which might easily become a finding that overstates or oversimplifies the facts.

To avoid the persuasive powers of statistics, basic rules were developed in 1954 by journalist Darrell Huff in his bestselling book, *How to Lie with Statistics*. "Not all the statistical information that you may come upon can be tested with the sureness of chemical analysis…. But you can prod the stuff with five simple questions, and by finding the answers avoid learning a remarkable lot that isn't so."[10] The simple test proposed by Huff for evaluating statistics provides the framework for deep analysis.

### *Who Says So?*

Look closely for bias of the author or funder of the study.[11] One of the weakest forms of evidence is "authority" (citing to the person or organization that developed the statistic); yet, we can be impressed by *who they are* rather than asking *how they know* what they claim.[12] Identity tells us nothing to support the relevance or accuracy of the statistic, but may reveal a motive to create flattering results. The point here is to consider that the expert who constructed the statistic has a bias for the result to support the conclusion.

### Footnotes

1. *Sally Clark*, WIKIPEDIA, https://en.wikipedia.org/wiki/Sally_Clark (last visited Mar. 7, 2022).
2. *Id.*
3. *Id.*
4. News Release, Royal Statistical Society, Royal Statistical Society Concerned by Issues Raised in Sally Clark Case (Oct. 23, 2001), https://web.archive.org/web/20110824151124/http://www.rss.org.uk/uploadedfiles/documentlibrary/744.pdf (last visited Mar. 7, 2022).
5. *Id.*
6. *Id.*
7. R. v Sally Clark [2003] EWCA (Crim) 1020 (Eng.), http://www.bailii.org/ew/cases/EWCA/Crim/2003/1020.html.
8. *Sally Clark*, *supra* note 1.
9. Popularized by Mark Twain and commonly attributed to British prime minister Benjamin Disraeli. See *Lies, Damned Lies, and Statistics*, WIKIPEDIA, https://en.wikipedia.org/wiki/Lies,_damned_lies,_and_statistics (last visited Mar. 9, 2022).
10. DARRELL HUFF, HOW TO LIE WITH STATISTICS 122 (1954).
11. *Id.* at 123.
12. Ben Goldacre, *Battling Bad Science*, TED GLOBAL (July 2011), https://www.ted.com/talks/ben_goldacre_battling_bad_science (last visited Mar. 9, 2022). *See also* BEN GOLDACRE, BAD SCIENCE (2008).

***How Do They Know?***

"Watch out for evidence of a biased sample, one that has been selected improperly" or is too small to mean anything.[13] When evaluating a study, ask how many people participated in the study (sample size), whether those who participated are representative of the litigant to which the study is being applied (relevance), and likelihood that the observed result could have occurred by chance as opposed to a specific cause (statistical significance).

***What's Missing?***

"You won't always be told how many cases [are in a study]. The absence of such a figure, particularly when the source is an interested one, is enough to throw suspicion on the whole thing."[14] When data are held back we cannot evaluate the statistic, and no rational conclusion can be based on it. Surveys with statistical significance are expensive to construct. With some surveys, the publisher will want to sell the information to experts and keep others from profiting off their surveys, so these publishers may claim their data is proprietary and refuse to release the key information on which the studies are based. That makes sense for the publisher, but how can an expert reasonably rely on a study when its data are hidden?

***Did Somebody Change the Subject?***

"When assaying a statistic, watch out for a switch somewhere between the raw figure and the conclusion. One thing is all too often reported as another."[15] This is the classic fallacy of confusing correlation with causation. Just because two events happen together does not mean that one had anything to do with the other.[16]

***Does It Make Sense?***

"Many a statistic is false on its face. It gets by only because the magic of numbers brings about a suspension of common sense."[17] It is easy to be lured into believing a statistic because of the persuasive power of numbers. Stepping back and applying common sense to the conclusion the expert wants us to accept is often all that is needed.

## HOW STATISTICS APPEAR IN COURT

Sometimes a statistic can be taken as evidence without having an expert on the stand. Statistics that are reasonably subject to dispute may be judicially noticed.[18] This saves time and money when the accuracy and reliability of the statistic cannot reasonably be questioned. By example, life expectancy tables are statistics that courts may judicially notice.[19] The use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended for California jury trials.[20] Mostly, a proposed statistic will be hotly disputed, making it unavailable for judicial notice. An expert, hopefully one qualified in using statistics, will need to persuade the trier of fact that the statistic is credible enough to form a basis for the expert's opinion.

***Court's Gatekeeping Role***

An expert witness can rely on statistics in forming an opinion—if the information is of the type an expert may reasonably rely upon in forming the opinion, whether or not the information is itself admissible.[21] The battleground is whether the statistical information is reliable enough for experts to use, or is conjecture that no reasonable expert would have considered.[22] The trial court is a "gatekeeper to exclude speculative expert testimony."[23] As explained by one court: "(W)hen an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an expert opinion is worth no more than the reasons upon which it rests."[24]

The rule in *Daubert*[25] is that trial judges must be gatekeepers and exclude unreliable expert testimony, whether that testimony is based in science or otherwise.[26] Expert opinion that relies on statistics must pass through that gate to be admissible. The *Daubert* factors, as applied to statistical propositions, are (1) whether the expert's calculation or survey has been, and can be, objectively tested for reliability; (2) whether the calculation or survey has been subject to peer review and publication; (3) the known or potential rate of error of the calculation or survey when applied; (4) the existence and maintenance of standards and controls; and (5) whether the calculation or survey has been generally accepted in the statistics community.[27] Post-*Daubert*, courts have identified other factors relevant to a statistical inquiry: (a) whether the testimony grew naturally from research independent of the litigation, or if it was developed with testimony in mind;[28] (b) whether the expert has extrapolated an accepted premise into an unfounded conclusion;[29] (c) whether the expert accounted for plausible alternative explanations;[30] and (d) whether the expert used the same intellectual

13. HUFF, *supra* note 10, at124.
14. *Id*. at 126-27.
15. *Id*. at 132-33.
16. *Statistical Language—Correlation and Causation,* AUSTRALIAN BUREAU OF STATISTICS, https://www.abs.gov.au/websitedbs/D3310114.nsf/home/statistical+language+-+correlation+and+causation (last visited Mar. 9, 2022).
17. HUFF, *supra* note 10 at 137-38.
18. *See, e.g.*, Cal. Evid. Code § 452(g);Fed. R. Evid. 201(b)(2).
19. Dickinson v. S. Pac. Co., 172 Cal. 727, 158 P. 183 (1916); Allen v. Toledo, 109 Cal. App. 3d 415, 424 (Ct. App. 1980).
20. Cal. Civil Jury Instructions (CACI) No. 3932; Life Expectancy Table – Male; Life Expectancy Table – Female.
21. See, e.g., Cal. Evid. Code § 801(b); Fed. R. Evid. 702-703.
22. See, Korsak v. Atlas Hotels, Inc., 2 Cal. App. 4th 1516, 1526 (1992) (privately conducted survey not reasonable for expert to rely on).
23. Sargon Enterprises, Inc. v. Univ. of S. Cal. 55 Cal. 4th 747, 769-81 (2012) (speculative opinion on damages).
24. Jennings v. Palomar Pomerado Health Sys., Inc. 114 Cal. App. 4th 1108, 1117 (2003)( internal quotes omitted).
25. Daubert v. Merrell Dow Pharms, Inc., 509 U.S. 579 (1993).
26. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 156-57 (1999).
27. See, Fed. R. Evid. 702, committee notes on rules to 2000 amendment; *Kumho Tire,* 526 at 149-50 (application of *Daubert* to nonscientific expert testimony).
28. Daubert v. Merrell Dow Pharms, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995).
29. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997).
30. Claar v. Burlington N.R.R., 29 F.3d 499 (9th Cir. 1994); cf., Ambrosini v. Labarraque, 101 F.3d 129 (D.C. Cir. 1996) (only obvious or reasonable alternatives must be ruled out).

rigor in forming the opinion in court that the expert uses in practice.[31]

When the expert has relied on unreasonable information as a significant basis for the opinion, then the opinion should be excluded.[32] It is important for counsel to "lock in" the expert in deposition or *voir dire* that the expert has relied on statistical information as a significant basis for the opinion. Otherwise, the expert can say (when exclusion is sought) that the statistic was unimportant.

***Reliance Does Not Equal Admission***

The rule against reliance on *unreasonable information* is often confused with the rule that allows experts to consider *inadmissible information* to form an opinion. The two concepts are not the same. If an expert reasonably relies on information in forming an opinion, it is a proper basis for the opinion even if the information is inadmissible under the rules of evidence.[33] For example, a published study would probably be inadmissible under the rule against hearsay,[34] but the information in that study may be reliable and accurate enough for the expert to rely upon it. The question is whether a reasonable expert would rely on the information (not whether the information is independently admissible). If so, the opinion may be admitted, even though the information underlying the opinion could not itself be admitted.[35] This is true because that data the expert considered are not offered into evidence—it is the *opinion* of the expert that constitutes evidence.

Conversely, just because an expert relies on information to form an opinion does not mean that the underlying information goes into evidence. The information relied upon by the expert is not made admissible simply by the expert considering it; there must be an independent evidentiary basis for its admission if the proponent wants it in evidence.[36] To keep out hearsay information, the expert generally may not disclose inadmissible information that the expert relied upon, while on direct examination.[37] The expert, instead, can testify generally on direct as to the types of information considered, without revealing inadmissible hearsay. For example, the expert may testify on direct: "I relied on a study performed by the Society of Statisticians in forming my opinion regarding the probability of this event occurring." That provides a *basis* for the opinion without revealing the *content* of the study. The expert may not add, "and the study showed a 1 in 5 million chance of this event occurring" as that would be inadmissible hearsay on direct exam.

An exception allows for the expert to be asked for the information underlying the opinion on cross-examination.[38] This allows the cross-examiner to delve into the specific information the expert used, to show that information was not reasonable to rely upon.

With the rules of evidence out of the way and Huff's tips in mind, we can now turn to the biggest areas where statistics are used—or abused—in business valuation cases: averaging past results, reliance on compensation surveys, and capitalization rates.

## GAMES WITH AVERAGES

Taking an average of financial data (such as revenue, income, or expense) is common in business valuations. The goal is to normalize year-to-year performance to illustrate the typical performance of the company. We predict the future based on past results and cannot do that based on one good or bad year. So, we take an average. But not all averages are the same. In a business valuation, statistics may appear to be a simple averaging of numbers by the expert but can lead to widely varying outcomes depending on how the average is taken.

***Types of Averages***

Did the expert use the mean, median, mode, range, or weighted average? These are different ways of averaging, with vastly different results. The point is to use a method that results in a reasonable illustration of the data, but the expert may be tempted to pick one that favors the desired conclusion.

First, the terminology. The *mean* is a simple average that we are all familiar with. The *median* is the value that appears in the middle of a group of numbers. The *mode* is the most frequent value in a group. The *range* is the difference between high and low values in the group. And then we have the *weighted average*, where more emphasis is placed on certain numbers in a group when taking an average.

Let's take a group of numbers and apply each approach to see the outcomes. For the company we are valuing, the annual revenues over the past seven years were:

**TABLE 1: ANNUAL REVENUES**

| Year | Revenues |
|---|---|
| 1 | $100,000 |
| 2 | $200,000 |
| 3 | $200,000 |
| 4 | $300,000 |
| 5 | $600,000 |
| 6 | $700,000 |
| 7 | $800,000 |

The mean (simple average) is **$414,000**, which is the sum of the group divided by 7. The median (midpoint) is **$300,000** as it occurred in year 4, in the middle of the pack. The mode (frequent number) is **$200,000** because that number appears most often. The range (hi-low difference) is **$700,000**, which is the largest number minus the smallest number.

A weighted average depends on appraiser judgment, where the expert places more importance on certain numbers. It is common for experts to use a weighted average because not all years

31. *Kumho Tire, supra* note 26, at 152.
32. See, Cal. Evid. Code § 803 (mandating exclusion).
33. See, Fed. R. Evid. 703.
34. See, Fed. R. Evid. 802.
35. Cf., Cal. Evid. Code § 802 (expert may not rely on matters precluded by law, such as information protected by privilege).
36. See, People v. Sanchez, 63 Cal. 4th 665 (2016) (exclusion of case-specific hearsay relied upon by expert in criminal case).
37. See, Cal. Evid. Code 802; Fed. R. Evid. 703 (disclosure allowed on direct only if probative value substantially outweighs prejudice effect).
38. Cal. Evid. Code § 721(a)(3); Fed. R. Evid. 705.

are equal. If the expert believed the performance in year 6 was most representative of the company's performance and wanted to weight that year three times more than other years, the weighted average would be **$655,000**. Here is the calculation:

| TABLE 2: WEIGHTED AVERAGE CALCULATION | | | |
|---|---|---|---|
| **Year** | **Revenues** | **Weight** | **Product** |
| 1 | $100,000 | 0 | $0 |
| 2 | $200,000 | 0 | $0 |
| 3 | $200,000 | 0 | $0 |
| 4 | $300,000 | 1 | $300,000 |
| 5 | $600,000 | 2 | $1,200,000 |
| 6 | $700,000 | 4 | $2,800,000 |
| 7 | $800,000 | 2 | $1,600,000 |
| **Totals** | | **9** | **$5,900,000** |
| **Weighted Average: 9 ÷ $5,900,000 = $655,000** | | | |

The same data resulted in wildly different "averages" from $200,000 to $700,000 depending on the method used. If the expert is being realistic, the most recent performance for this company (years 5 to 7) appears more indicative of future revenues than its earlier years of operations. This is why a weighted average is used. The appraiser in this example believed the revenues in year 6 were the best representation of go-forward revenues so the most weight was placed on that year. The revenues in years 1 to 3 were deemed irrelevant so no weight was placed on those years.

***Representative Sample***

A reasonably illustrative time period must be used for averaging income.[39] Cherry-picking information to find an average harms the credibility of the expert and leaves the finder of fact without useful information to value the company, if the problem is exposed. The period which income is calculated "must be long enough to be representative, as distinct from extraordinary."[40]

In an opinion reversing a divorce judgment that valued a solo practitioner's law practice, the appellate court was critical that the trial court failed to spot the biased sample of income used by the wife's expert.[41] In the four years before divorce, the husband's income ranged from $73,000 in 1992, $101,000 in 1993, $71,000 in 1994, and $140,000 in 1995. The expert for the wife valued the husband's law practice on the abnormally good year of 1995.[42] Although this was a transparent effort to increase the valuation, the trial court adopted the expert's opinion.[43] The appellate court held this was an abuse of discretion: "A reasonable trier of fact could not help but conclude the expert chose to use … income from 1995—one of [the husband's] highest earning years—solely to inflate the value of goodwill."[44] In a later case by the same appellate panel, the court stated: "It is a manifest abuse of discretion to take so small a sliver of time to figure income that the determination essentially becomes arbitrary."[45]

The temptation to cherry pick one year (whether the best one to inflate value, or the worst one to depress it) may be too much for some experts to resist. Opposing counsel and their expert are expected to spot those manipulations and bring it to the court's attention. The court also has a role as gatekeeper to ensure only reliable information is allowed in evidence and to apply common sense to opinions it hears.

## SURVEY SAYS WHAT?

The other area where statistics crop up in valuation cases is the use of surveys to determine the reasonable replacement value of owner's services. Evidence of reasonable compensation is needed when valuing a business. This allows the appraiser to know the value of the owner's services to the company, which are treated as wages, and the remaining business income will be profits. A hypothetical buyer would want to know how much it would cost to replace the operator of the business, so that can be expensed on the books to reveal the extent of any profits the buyer would make from the business if purchased. Studies are often used to determine the reasonable replacement value of the owner's services to the company. In other words, statistics.

***Similarly Situated Professionals***

Compensation surveys may be used by experts in forming an opinion on the determining an owner's reasonable compensation when valuing a business.[46] To be relevant, the surveys must account for similarly situated companies and executives.[47] We need to know how many people were in the survey, the method of collecting compensation data, the definition of compensation that respondents were asked, the size of the firms, where the firms are located, what industry or practice areas do the firms serve, and how long ago was the survey conducted. A national survey of attorney compensation at large firms of lawyers in Manhattan, New York will not show the replacement value of a solo practitioner in a Decorah, Iowa.[48] Even when the survey is broken down by region and practice type, it may not be sensitive enough to provide relevant information.

In a matrimonial case involving the valuation of a cosmetic surgeon's practice in Newport Beach, California, a wealthy coastal town in Southern California, the trial court was critical of the surveys relied upon by the experts for each side.[49] The wife's expert used the Medical Group Management Association (MGMA) Physicians Compensation and Production Survey, which had statistics by region, specialty, and years in practice.[50] The expert relied on figures for the Pacific region, which encompasses the Western states.[51] The trial court was "'troubled by

39. See In re Marriage of Riddle, 125 Cal. App. 4th 1075, 1082 (2005).
40. *Id.*, citing In re Marriage of Rosen, 105 Cal. App. 4th 808, 825 (2002).
41. *Marriage of Rosen*, 105 Cal. App. 4th at 820.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Marriage of Riddle*, 125 Cal. App. 4th at 1084.
46. In re Marriage of Iredale & Cates, 121 Cal. App. 4th 321, 325–326 (2004).
47. In re Marriage of Ackerman, 146 Cal. App. 4th 191, 200 (2006).
48. *Marriage of Rosen*, 105 Cal. App. 4th at 821-822.
49. *Marriage of Ackerman*, 146 Cal. App. 4th at 200–204.
50. *Id.* at 200.
51. *Id.*

[what a national survey of the western states has] to do with a plastic surgeon who is doing essentially cosmetic surgery in Newport Beach.' The court considered it common knowledge that, unlike other types of surgery, cosmetic surgery used discretionary income and the amount of discretionary income in Southern California 'is remarkably different ... than in such places as Pocatello, Idaho; or Gallup, New Mexico; or Little Rock, Arkansas.'"[52] The trial court used its common sense in determining reasonable compensation based on the evidence, which was affirmed on appeal.[53]

***Poorly Constructed Surveys***

Compensations surveys may not be statistically significant, meaning that the study was so poorly constructed that no expert would reasonably rely upon that information in forming an opinion. But it happens and experts may not realize they are relying on conclusions from a study that are not supported by the data. When the sample size of a survey is too small, the author of the study might extrapolate the data from the population it studied to a different population, without clearly disclosing the logical leap in the "survey" results it publishes. Those judgment calls are nothing more than an educated guess. To illustrate this point, let's assume the survey author has good data showing that CEOs of manufacturing businesses in Los Angeles with $100 million in annual revenues are paid a median salary of $1 million (the midpoint of everyone's salary in the sample). But no data are available for companies with $50 million in revenues. The survey author wants to show salary figures for that size of a company, so it cuts the amounts in half from the survey of $100 million businesses and lists $500,000 as the median salary of a company with $50 million in revenues. That would be nothing more than a guess. It assumes, without foundation, that a direct correlation exists between a company's revenues and the salary paid to its CEO. Although this seems like an overly simplistic example, it is not far from how some surveys are constructed. The expert, before relying on the survey must check the data and methodology to know if the results are reasonable to rely upon. But many do not. They simply look at the result of the survey instead of asking how the author arrived at it. Attorneys, experts, and judges should not fall into that trap. Asking the critical questions about the construction of the survey may show it is unreliable and result in exclusion of the expert's opinion and avoid a faulty valuation.

***Informal Surveys***

Privately commissioned surveys for litigation are unlikely to be reliable enough for an expert to use because of the small sample size, bias issues, and other factors affecting statistical significance.[54] This was attempted in a case involving an injury in a hotel, where the plaintiff was struck in the eye by a jet of water after a shower head fell off while he was showering.[55] The plaintiff's expert was allowed to testify about an informal survey the expert conducted on hotel maintenance practices; the jury found for the plaintiff and the judgment was reversed because it was error to allow the expert to render an opinion based on the informal survey.[56] The court held that the information presented to the jury did not result from a "scientific study, survey, or investigation. … Rather, he made an unexplained, casual sampling of unknown sources within the 'hotel business.' The authenticity, reliability, or the representative nature of the responses are totally undeterminable based upon [the expert's] testimony."[57]

## CAPITALIZATION RATE

When the appraiser has found the reliable amount of profits the company will make, one way to value the business is the capitalization of benefits (or earnings) method.[58] This is part of the income approach to valuation, "whereby economic benefits for a representative single period are converted to value through division by a capitalization rate."[59] The assumption is that the company's future cash flow will grow at a slow, steady pace into perpetuity, and that a single period in the past "will provide a reliable estimate of what the business will generate for investors in the future."[60]

The amount a hypothetical buyer would pay for the business depends on how risky those future earnings are. The higher the risk, the lower the value, because the investor could lose money on the purchase. If the earnings are stable and predictable, the buyer would pay more for the business because there is little risk. This risk estimation is how the capitalization rate, also called the cap rate or discount rate, is determined. The riskier the business, the higher the cap rate will be. The cap rate is usually expressed as a percentage, such as 5% for a low-risk business. To perform the valuation, the appraiser will determine a capitalization rate for the business and divide that by the company's earnings. For example, if the business generated $100,000 per year in earnings and was very low risk, such that the appraiser determines the cap rate to be 5%, the business would be worth $2 million under this method ($100,000 divided by 0.05). The high value reflects the low risk involved in receiving the income from the business.

The inverse of the cap rate is the multiple, which is easier to conceptualize. With a cap rate of 5%, the multiple is 20 (1 divided by .05 equals 20). In the above example, it would take 20 years for the investor to recoup the amount paid for the business from its future earnings (20 years times $100,000 per year in earnings equals $2 million). The long earn-out period owes to the highly stable earnings of the company. If the business were riskier and the appraiser determined the cap rate is 33% (a multiple of 3), the value would be about $300,000. The investor would recoup the purchase price in three years.

52. *Id.* at 203.
53. *Id.* at 204.
54. Korsak v. Atlas Hotels, Inc. (1992) 2 Cal.App.4th 1516, 1526.
55. *Id.*
56. *Id.*
57. *Id.*
58. See Statement on Standards for Valuation Services (VS Section 100), AICPA (June 2007) https://www.aicpa.org/resources/download/statement-on-standards-for-valuation-services-vs-section-100 (last visited Mar. 10, 2022).
59. *Id.*
60. Mark S. Gottlieb, *The Income Approach Simplified. DCF v. Capitalization of Earnings Methods*, MSG BLOG: BUSINESS VALUATION (Feb. 2019), https://www.msgcpa.com/forensicperspectives/attorneys-should-know-the-difference-between-the-dcf-capitalization-of-earnings-methods/ (last visited Mar. 10, 2022).

The cap rate is debated in court because it involves the subjective assessment of the appraiser, wrapped in a statistical analysis to make it appear objective. "Calculation of an appropriate capitalization/discount rate is one of the most difficult, and critical, steps in valuing a business or business interest. It is also a frequently contested area, since there is no single method or formula to arrive at the discount or capitalization rate."[61] The expert will look at external risk factors (like the health of the economy and industry-wide conditions), internal factors that relate to the size, nature, and position of the business being valued, and investment factors like liquidity and expectations for capital appreciation.[62] The expert will often use a "build-up model" to determine the cap rate, which is a formula-based approach that takes the *risk-free rate of return* (the amount an investor would expect from an investment that bears no risk), plus the *expected equity risk premium* (the amount by which investors expect the future return on equity securities to exceed the risk-free rate), the *expected industry risk premium for the industry* (reflecting the relative risk of companies in that industry), the *size premium* (acknowledging that investors expect higher returns on smaller companies ), and the *specific company risk for the company valued* (which is subject to appraiser discretion).[63]

"It is extremely important that the analyst maintain consistency between the type of earnings and the capitalization or discount rates used in the valuation process. For example, a pre-tax rate should not be applied to net income because net income is assumed to be stated on an after-tax basis. This is a very simple distinction. However, often this distinction is overlooked in the valuation of a closely held business, thereby significantly overvaluing or under-valuing the business."[64]

Another common error is to use a growth rate that depends on future capital investments by the company to achieve those earnings.[65] This is usually revealed on cross-examination as an unstated assumption, which makes the expert's valuation worthless or requires an adjustment for the money that would have to be spent to yield those returns. The assumed growth rate for the company is also subject to manipulation when arriving at the cap rate. The idea behind the capitalization-of-earnings method is to base the valuation conclusion on the long-term, sustainable earnings that the company can produce.[66] But some experts will use aggressive rates of return when conducting the build-up analysis, to overstate the value.

## CONCLUSION

Statistics are powerful when used by someone who understands them, making a sea of data understandable. But when misused, the persuasive power of numbers can overcome common sense and make us believe results that did not happen. When complex issues like the valuation of a business are litigated, a statistic can make a large difference in the outcome. With a basic understanding of statistics, we can ensure that decisions are made according to reliable information and expose tricks with numbers.

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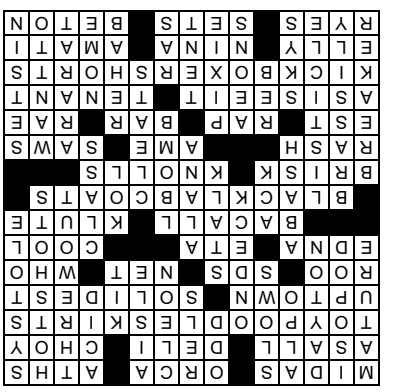
61. National Association of Certified Valuators and Analysts (NACVA), *Ch. 5: Capitalization/Discount Rates* in Fundamentals, Techniques and Theory (2012), http://edu.nacva.com/preread/2012BVTC/2012v1_FTT_Chapter_Five.pdf (last visited Mar. 10, 2022).
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*



**Answers to Crossword**

from page 83



# Judicial Accomodation of Pro Se Parties

**Michael Roundy**

A fundamental facet of our criminal legal system is that every "litigant" (defendant) is entitled to be represented by an attorney.[1] What is equally fundamental, though less frequently invoked in the criminal context, is the right of an individual to represent him- or herself.[2] Self-representation is not merely the default consequence of an inability to afford an attorney, it is an affirmative right. In *Faretta v. California*, a criminal case, the court held that forcing the defendant against his will to accept a state-appointed public defender rather than allowing him to conduct his own defense violated rights "necessarily implied" in the Sixth Amendment and was "contrary to his basic right to defend himself if he truly wants to."[3]

As there is no underlying right to counsel in most civil circumstances, it is unsurprising that judges face an enormous number of pro se litigants in civil cases, and in particular in the family courts. (Pro se parties may also be referred to as self-represented, unrepresented, or pro per (*in propria persona*) parties.) A growing number of litigants engage in the process without the benefit of counsel. As much as 80-90% of family cases in one study involved at least one party—and in many cases, both parties—who were not represented by counsel.[4]

While an inability to afford counsel is typically the primary factor underlying an individual's decision to represent themself, a fair number of people who in theory may be able to afford an attorney also choose not to engage one, as an affirmative cost-avoidance choice.[5] Another motivating factor for litigants opting to represent themselves is the degree of complexity of the case. Matters perceived to be simple or with not much at stake may tend to leave litigants confident that they can handle the matter on their own.[6] Other factors may also contribute to a person's decision to represent themselves, such as prior experience and familiarity with the courts, or a level of education or professional experience that gives them the confidence to wade through the paperwork involved and figure out the process.[7] In some cases, the pro se party simply has an unreasonable view of the strength of their own case. They may have had counsel in the past, who withdrew. Having shopped the case around, they have been unable to find an attorney willing to represent them, so they proceed on their own.[8]

While an individual has the right to represent themself in matters before the courts, this right does not normally extend to corporations.[9] A corporation is usually required to retain counsel and cannot represent "itself" through the company's CEO or other officer who is not an attorney.[10] This becomes a particular issue when a small incorporated business or LLC becomes a litigant. Such businesses are often in practice, if not in legal terms, the alter ego of one individual, and it can at times be difficult for that individual to grasp why he or she cannot represent the company. Nevertheless, courts will often strictly enforce the requirement that a company must retain counsel to proceed in court. In *Varney Enterprises*, for example, the Massachusetts Supreme Judicial Court held that the CEO of a closely held corporation, who was not a licensed attorney, could not represent the company in connection with claims or defenses exceeding the small claims threshold amount.[11] The Court noted that although a state statute permitted "parties" to manage and prosecute or defend their own cases, courts in other jurisdictions had consistently construed such statutes to apply only to natural persons, not corporations.[12]

Civil litigators who have not yet faced off against a pro se litigant may think they are missing out on the proverbial easy win.[13] The reality is that litigating against a pro se party can be among the more difficult cases to handle, presenting unexpected and frustrating challenges that one does not normally face when the opposing party is represented by another attorney. Unrepresented parties often lack a familiarity with the judicial process, the litigation process, court rules, common practices, or just an understanding of the pragmatic benefits of working coopera-

**Footnotes**

1. See Gideon v. Wainwright, 372 U.S. 335 (1963) (relying upon principles grounded in the Sixth Amendment to the U.S. Constitution).
2. McKaskel v. Wiggins, 465 U.S. 168, 174 (1984) (noting that the right to have the assistance of counsel also implies a right to conduct one's own defense).
3. Faretta v. California, 422 U.S. 806, 817-19 (1975).
4. Natalie A. Knowlton, Logan Cornett, Corina D. Gerety & Janet Drobinske, Cases Without Counsel: Research on Experiences of Self-Representation in U.S. Family Court, Institute for the Advancement of the American Legal System, May 2016, https://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf.
5. Knowlton et al., *supra* note 4, at 15.
6. *Id.* at 16; Alice Sherren & Donald Patrick Eckler, *What the Ethics Pros Say About Pro Se Litigants*, 11 Prof. Liability Def. Q., (2017), https://www.pretzel-stouffer.com/wp-content/uploads/2019/08/11.1.17_Legal.pdf.
7. Knowlton et al., *supra* note 4, at 17.
8. Sherren & Eckler, *supra* note 6.
9. See, e.g., 28 U.S.C. § 1654 ("In all the courts of the United States the parties may plead and conduct their own cases personally").
10. See, e.g., Varney Enterprises, Inc. v. WMF, Inc., 402 Mass. 79 (1988).
11. *Id.* at 81. Small claims procedures may permit a company officer to represent the company, but most other venues will not.
12. *Id.* at 82 (citing In re Las Colinas Dev. Corp., 585 F.2d 7, 12 (1st Cir. 1978), *cert. denied sub nom.* Schreibman v. Walter E. Heller & Co., 440 U.S. 931 (1979), and Oahu Plumbing & Sheet Metal, Ltd. v. Kona Constr., Inc., 60 Hawaii 372, 376 (1979)).
13. John M. Burman, Dealing with an Opposing Party Who is Proceeding Pro Se, 31 Wyoming Law., 1 (June 2008).

tively with the opposing party or counsel to help move the case through the process more quickly and with a minimum of disruptions that ultimately have no material impact on the outcome. Pro se parties may take die-on-the-hill stands on ultimately trivial issues, fail to understand or follow procedural requirements, or unexpectedly engage in ex parte communications with the court. Just as these issues may cause difficulties for opposing counsel, they pose unique challenges for judges and court personnel as well. While courts may want to show a certain amount of deference to inexperienced pro se litigators, they must also keep an eye on the efficient administration of justice, and on the overall fairness of the process to all parties.

## GUIDANCE FOR JUDICIAL OFFICERS

Case law, rules of procedure, codes and rules of judicial conduct, advisory ethics opinions, and other resources provide a framework of guidance to judges and other court personnel on how to handle issues that commonly arise in cases involving pro se litigants. These starting points for judicial conduct may be further informed by consideration of a number of common scenarios and issues that courts have encountered.

Pro se litigants are "presumed to have knowledge of the law and of correct legal procedures and [are] held to the same standard as all other litigants."[14] And while most courts try to apply that same standard evenly and fairly, the impulse to give deference to a litigant who is inexperienced in the ways of litigation can at times lead a judge to defer too much.

One of the most immediate and basic barriers a pro se party faces in advancing their case through the judicial process is a lack of understanding of the process itself or of the stages of a case. Not understanding what they should do next, they allow their case to languish on the docket until enough time goes by for opposing counsel to move to dismiss the case for lack of prosecution. Some courts, whether by rule or by established procedure, will automatically schedule the next step in the process on the court's calendar, so that each appearance of the parties in court automatically leads to the scheduling of the next appearance, often providing the litigants with detailed instructions concerning the next step.[15] Yet, judges need not rely only upon such established rules or procedures to take control of the cases assigned to them. It is certainly within the scope of judicial discretion to set a clear "next event" deadline or status conference that will help keep pro se (and represented) litigants moving the case forward, even if no rule or procedure requires it. Explaining the next steps and emphasizing the date that the parties must next appear in court may go a long way toward avoiding no-show litigants who may not fully appreciate the significance or importance of a written hearing notice received in the mail.

## CODES OF JUDICIAL CONDUCT

**"There can be a fine line between accommodating a... pro se litigant and affirmatively helping them..."**

There can be a fine line between accommodating an inexperienced pro se litigant and affirmatively helping them with their case. Rules of Judicial conduct can be of assistance in guiding the judge's thinking and understanding of the boundaries necessary to ensure that all litigants, represented and unrepresented, receive a fair day in court.

ABA Model Code of Judicial Conduct, Rule 2.2, requires that "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Indeed, all of Canon 2 of the Model Code is concerned with the performance of judicial duties in an impartial, competent, and diligent manner. Rule 2.2 is often discussed in connection with interactions with pro se parties. Comment 4 to Rule 2.2, added in 2007, notes that "[i]t is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard." This comment, although passively worded, has often been interpreted broadly as encouraging judges to exercise a fair amount of their discretion in determining what kind of accommodations fall within the scope of the rule. As the reporter's comments to the rule indicate, comment 4 makes clear that a judge does not compromise his or her impartiality by merely providing accommodations to pro se litigants unfamiliar with the legal system.[16] On the other hand, judges should reject "unreasonable" demands for help that would give the pro se party an unfair advantage.[17] As with many legal issues, this raises the ever-present question of what constitutes a "reasonable" accommodation?

The underlying ethos of Rule 2.2 and comment 4 have found expression in decisional law as well. In *Blair v. Maynard*, the West Virginia Supreme Court stated affirmatively that the goal of achieving substantial justice "commands that judges painstakingly strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules."[18] Because justice is served by making reasonable accommodations, judges are encouraged to avoid rigidity and excessively technical or formal requirements, where accommodations may help provide inexperienced parties with meaningful access to the courts.[19]

Comment 4 to Rule 2.2 has been adopted verbatim in at least a dozen states.[20] At least 14 others have adopted an expanded version of comment 4, some even incorporating the language into the Rule itself.[21] The Maryland Code of Judicial Conduct, Rule 2.2 cross-references an explanatory comment to its Rule 2.6

14. Kilroy v. B.H. Lakeshore Co., 111 Ohio App. 3d 357, 363 (1996).
15. Paula L. Hannaford-Agor, *Helping the Pro Se Litigant: A Changing Landscape*, 39 Ct. Rev., 14-15 (2003), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1124&context=ajacourtreview.
16. Jona Goldschmidt, *Judicial Ethics and Assistance to Self-Represented Litigants*, 23 Just. Sys. J., 327 (quoting reporter's comments) (2007).
17. *Id.*
18. Blair v. Maynard, 324 S.E.2d 391, 396 (W. Va. 1984).
19. Cynthia Gray, *Pro se Litigants in the Code of Judicial Conduct*, 36 Judicial Conduct Reporter, 1, 6 (2014), https://www.ncsc.org/__data/assets/pdf_file/0013/15250/jcr-fall-2014.pdf (discussing and quoting White v. Lewis, 804 P.2d 805 (Ariz. Ct. App. 1990) and In reEriksson, 36 So. 3d 580 (Fla. 2010)).
20. Gray, *supra* note 19, at 6.
21. *Id.*

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(Ensuring the Right to Be Heard), which gives voice to the underlying rationale for making reasonable accommodations: "Increasingly, judges have before them self-represented litigants whose lack of knowledge about the law and about judicial procedures and requirements may inhibit their ability to be heard effectively."[22] Such glosses on and expansions of the ABA language seek to affirmatively state a judge's discretion to afford accommodations, rather than relying on the passive "not a violation" language.[23] Yet, some states have pulled the language in the other direction as well, reminding judges that accommodations should not give pro se litigants "an unfair advantage."[24] This is the tension of which judges must be mindful when accommodating a self-represented party's lack of familiarity with the court or litigation processes.

While those principles may guide a judge's thinking and actions, they do not directly help the judge determine what will be considered "reasonable" under the circumstances. As an aid to this process, several states have provided some additional guidance, including examples.[25] Many of these common-sense examples are not only "reasonable accommodations" to the self-represented, they constitute good or best practices in managing the court's dockets, generally. The Colorado Code of Judicial Conduct provides this list of examples:[26]

- Liberally construing pleadings;
- Providing brief information about the proceeding and evidentiary and foundational requirements;
- Modifying the traditional order of taking evidence;
- Attempting to make legal concepts understandable;
- Explaining the basis for a ruling; and
- Making referrals to any resources available to assist the litigant in preparation of the case.

Despite such accommodations, the Code is clear that self-represented parties must still "comply with the same substantive law and procedural requirements" as any represented party.[27]

Some additional examples from other jurisdictions may provide additional guidance to judges in all jurisdictions:[28]

- Informing litigants what will be happening next in the case and what is expected of them;
- Refraining from the use of legal jargon;
- Explaining legal concepts in everyday language;
- Asking neutral questions to elicit or clarify information;
- Permitting narrative testimony; and
- Allowing litigants to adopt their pleadings as their sworn testimony.

As these accommodations do not inherently favor one litigant over another, they are likely to be regarded as "reasonable" in most jurisdictions.

## OTHER RESOURCES

Some states have gone a step further, anticipating the pro se party's need for assistance, and have published guidelines addressed directly to the unrepresented litigant. For example, in Massachusetts, the state publishes an online guide called "Representing Yourself in a Civil Case" on the state website.[29] The page provides links to discrete topics that describe the process of representing oneself, from the filing of the case, to what "service" is and how to accomplish it, to what "discovery" is and how to conduct it, through going to trial, how to present evidence, and what happens next after a decision is made by the court.[30] The Federal Bar Association's Access to Justice Task Force publishes a 60-page guide for self-represented parties, offering a variety of tips, pre-suit considerations, advice on finding an attorney, procedural guidance, sample forms, an overview of case management procedures, a glossary of terms, discovery, ADR, dispositive motions, trials and appeals.[31] The Minnesota Judicial Branch provides an online page of resources for parties representing themselves, including answers to frequently asked questions, tips, and a page of tools and other resources.[32] In addition to providing a wealth of information for the self-represented, these kinds of guides are also a useful resource for judges trying to understand the kinds of basic access issues that pro se litigants who appear before them are likely to be struggling with.

Massachusetts also provides an extensive set of Judicial Guidelines, with commentary, to assist judges in managing civil hearings involving self-represented parties.[33] Much of the commentary includes additional suggestions for the exercise of judicial discretion. Some of these suggestions fall within the scope of those already addressed above. Others provide further

22. Model. Code of Jud. Conduct r. 2.6 cmt. 2 (Am. Bar Ass'n 2010), https://www.courts.state.md.us/sites/default/files/import/rules/reports/codeofjudicialconduct2010.pdf.
23. Gray, *supra* note 19, at 6 (discussing and quoting California's code, stating affirmatively that "a judge has discretion to take reasonable steps … to enable the litigant to be heard.")
24. *Id.* at 7 (discussing District of Columbia, Louisiana, Maryland, and Nebraska codes of judicial conduct).
25. *Id.*
26. Colo. Code of Jud. Conduct r. 2.6 cmt. 2 (July 1, 2010) (https://www.courts.state.co.us/userfiles/file/Code_of_Judicial_Conduct.pdf).
27. *Id.*
28. Gray, *supra* note 19 at 7 (citing Colorado, District of Columbia, Iowa, Louisiana, Ohio, and Wisconsin Codes of Judicial Conduct).
29. Representing Yourself in a Civil Case, https://www.mass.gov/representing-yourself-in-a-civil-case (last visited March 3, 2022).
30. *Id.*
31. Representing Yourself in Federal District Court: A Handbook for Pro Se Litigants, Fed. Bar Ass'n (2019), https://www.fedbar.org/wp-content/uploads/2019/12/Pro-Se-Handbook-APPROVED-v2019-2.pdf.
32. Representing Yourself in Court, https://www.mncourts.gov/Help-Topics/Representing-Yourself-in-Court.aspx (last visited March 3, 2022).
33. Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants, https://www.mass.gov/guides/judicial-guidelines-for-civil-hearings-involving-self-represented-litigants-with-commentary [hereinafter "Judicial Guidelines"].

insight into what is considered an appropriate practice or accommodation.

For example, Guideline 1.1 ("Plain English") recommends that judges minimize the use of complex legal terms in conducting court proceedings. The commentary to Guideline 1.1 notes that most self-represented parties are unfamiliar with such terms and notes that the use of such terms may delay proceedings and lead to the need for lengthy explanations of legal concepts that might better be avoided by simply using plain English.

The Judicial Guidelines also contain clear instructions as to where the *limits* of court accommodation of a pro se litigant reside. For example, commentary to Guideline 1.4 ("Application of the Law") notes that whatever accommodations may be made, pro se litigants are not excused from compliance with relevant rules and law, and refers judges to various pertinent cases, such as *Mmoe v. Commonwealth*.

In *Mmoe*, the state's Supreme Judicial Court noted that the trial court should not advance legal theories not presented in the pleadings of the pro se party.[34] The pro se plaintiff had asserted 30 counts in a 35-page amended complaint consisting of 174 separately numbered paragraphs, which the defendants found too confusing to respond to.[35] When the defendants moved to dismiss, based upon a failure to comply with the procedural rules' requirements to provide short, plain, clear, and organized statements of the claims, the trial court held a lengthy hearing over three days.[36] At the hearing, the plaintiff presented oral statements and documentation to explain what her claims were.[37] The judge denied the motions to dismiss, explaining that he had "allowed the pro se plaintiff to articulate her claims orally as an alternative method for providing the defendants with adequate notice" of the claims.[38] From his analysis of the written complaint, oral statements, and documentary support, the judge concluded that the plaintiff's allegations supported ten different theories of recovery, and allowed the plaintiff to proceed with the case.[39]

The Supreme Judicial Court reversed the order denying the defendants' motion to dismiss, and remanded. Although recognizing that "the judge was sensitive to the difficulties of the pro se plaintiff, and that he obviously was motivated by a desire" to employ a procedure that would allow justice to be done, the Court held that whatever leniency might be employed, "the rules bind a pro se litigant as they bind other litigants."[40] Oral statements and other materials outside the actual, written complaint should not have been considered in denying the motion to dismiss.[41] "Pleadings must stand or fall on their own."[42] And as direct guidance to judges, the Court plainly stated: "nothing in the rules of civil procedure authorizes a judge to recast a complaint in a form that corresponds to the judge's view of what claims the plaintiff intended but failed adequately to set forth. The judge should not have gone beyond the complaint when he ruled on the defendants' motion."[43] The decision also provides some guidance to pro se litigants, in crafting effective pleadings: "The judge's decision that the amended complaint states several claims upon which relief could be granted does not respond to the defendants' argument that the document is so verbose, repetitive, argumentative, and confusing, that they cannot fairly be expected to respond to it."[44]

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Other comments and references contained in the Judicial Guidelines that Massachusetts provides for judges include encouraging judges to refer litigants to informational handouts and other sources of information and services that may be helpful. These may include the clerk's office, local bar associations, law schools, legal assistance programs and organizations, and lawyer-for-a-day programs.[45] Other guidelines encourage judges to explain essential legal and procedural requirements to untrained litigants, such as the avoidance of ex parte communications; who has the burden of proof, and what that is; the differing roles of judges and juries; the availability of alternative means of dispute resolution; and the manner in which all parties are expected to conduct themselves in the courtroom.[46]

The Judicial Guidelines also provide direct guidance to the judges themselves in how to proactively avoid inappropriate favoritism or the appearance of favoritism towards pro se parties. In accordance with Guideline 3.1 ("Courtroom decorum"), the commentary notes that judges are responsible for providing a positive environment for pro se parties. This includes addressing them with titles of respect equal to that afforded opposing counsel, and conducting proceedings in a manner that will not be perceived as improper or unfair.[47]

Where all parties are licensed attorneys, familiar with courtroom and procedural niceties, a less formal approach may be appropriate. But with pro se parties, unfamiliar with such things as proper grounds for objecting, it may be appropriate to require opposing counsel to more thoroughly state the basis of the objection, or for the judge to explain the rationale for evidentiary rulings.[48]

When a pro se party presents their case to a jury, it may also be appropriate to provide an instruction to the jury, to explain the party's right to do so. The Massachusetts Continuing Legal Education, Inc. and others publish model jury instructions that judges may deliver to juries under such circumstances. The instructions explain that a person has the perfect right to repre-

34. 393 Mass. 617, 619-20 (1985).
35. *Id.* at 618.
36. *Id.*
37. *Id.*
38. *Id.* at 619.
39. *Id.*
40. *Id.* at 619-20.
41. *Id.*
42. *Id.* at 620.
43. *Id.*
44. *Id.*
45. Mass. Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants, commentary to Guideline 1.5.
46. *Id.*, commentary to Guidelines 2.1 and 2.3.
47. *Id.*, commentary to Guideline 3.1 (citing case law examples).
48. *Id.*, Guideline 3.2 and commentary thereto.

**"How the judge handles the occurrence of such communications may be misconstrued..."**

sent themselves, without an attorney, and that a decision to do so has no bearing on the merits of the case, and should not affect the jury's deliberations.[49]

## PROVIDING ASSISTANCE TO PRO SE PARTIES

Whether and how much to assist or advise a pro se party is one of the crucial questions judges face. A decision in the California Appeals Court provides some insight into this issue in the trial context, on the question of whether a judge can or should advise an unrepresented litigant about what kind of evidence can be presented, and about whether to permit a non-lawyer support person to sit with the unrepresented party at the counsel table. In *Ross v. Figueroa*, both parties appeared at a hearing on a permanent restraining order in a domestic abuse matter without counsel.[50] The Appeals Court noted that although such hearings are often conducted informally, in this case errors affecting the parties' due process rights had been made.

The woman seeking the restraining order, Ross, appeared at the hearing with her mother for support, which is expressly permitted by the California Family Code. Although initially permitted to sit next to Ross at the counsel table, the hearing referee later ordered the mother to return to the gallery, saying that only a party and his or her counsel could sit at the table. The Appeals Court found that this was error as it was directly contrary to the statutory provision for a "support person" accompanying an unrepresented party.

Even more alarming, the responding party, Figueroa, had prepared—but not served—a written response to Ross's domestic violence petition. When he asked if he could present that evidence at the hearing, the hearing referee merely replied "no" and ruled against him, imposing a three-year injunction. In reversing, the Appeals Court noted that the referee should have advised Figueroa that he could present oral testimony, even if the written response had not been properly filed and served. The court noted that while it may be appropriate with adversarial, represented parties for the judicial officer to quietly permit a party to forfeit procedural rights, where, as here, the parties are unrepresented, "it was incumbent upon the referee to apprise Figueroa it was his right to present oral testimony" when the written evidence was excluded. Cases like *Ross* demonstrate how procedural rigidity with pro se parties can be taken too far and actually deprive the parties of substantive rights.

In another example, a New York judge had entered a judgment against a pro se defendant (a tenant in a rent dispute) without holding a hearing on contested issues concerning the unpaid rent. The NY Commission on Judicial Conduct admonished the judge in a formal determination, noting, "Every judge—lawyer or non-lawyer—is required to be competent in the law and to insure that all those with a legal interest in a proceeding have a full opportunity to be heard according to law."[51]

## EX PARTE COMMUNICATIONS

A frequent problem encountered with pro se parties is their tendency to engage in or attempt to engage in ex parte communications with the judge, often unaware of the impropriety. As with most issues presented by pro se parties, it is not that the party intends to violate norms or ethical rules; rather, it is just an unfamiliarity with the guardrails that are put in place to help ensure judicial impartiality and the overall fairness of the litigation process to all parties. The basic guiding principle for judges is:

> A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter [with certain, enumerated exceptions].
>
> ABA Model Code of Judicial Conduct, Rule 2.9(a).

This guiding principle implicates three distinct scenarios and issues. The judge shall not "initiate, permit, or consider" such ex parte communications. Perhaps the scenario most commonly encountered is the filing or mailing of letters to the court or judge, where there is no indication that the pro se party has served a copy of the communication on the opposing party or counsel. Pro se individuals may feel they are trying to appeal to the judge's sense of fairness or reason in attempting such communications, without realizing that their failure to know or comply with the service requirements may undermine their ultimate goal.

How the judge handles the occurrence of such communications may be misconstrued as actually considering the substance of the communication, though it is an improper ex parte communication. Even in the absence of any action or inaction that might be construed as "considering" the substance of the communication, if the judge or court does nothing to curtail the occurrence of such ex parte communications, they may be open to criticism for "permitting" such communications to occur. Finally, if a judge reaches out to offer unilateral assistance with the legal process, even assistance that is not itself improper, the failure to include or copy the other party or counsel with the communication would violate the rule not to initiate ex parte communications.

How a judge reacts and responds to ex parte communications may also affect the perception of fairness and neutrality that the parties take away from the incident. A harsh admonishment may do more damage to the pro se party's perception of fairness than the ex parte communication itself did to the actual fairness of the process. On the other hand, a response which tacitly permits the ex parte communication without any warnings or penalties may lead opposing parties or counsel to view the judge as bending too far backwards to help the pro se party along. A neutral, even-handed response which clearly applies the same procedural requirements to all parties is least likely to give offense to either party and least likely to impede the court's progress toward an outcome that all parties can respect as fairly met.

49. *Id.,* Guideline 3.3 and commentary thereto.
50. 139 Cal.App.4th 856 (2006).
51. In re Williams, State of New York, Commission on Judicial Conduct, Nov. 19, 2001, https://cjc.ny.gov/Determinations/W/Williams.Edward.J.2001.11.19.pdf

Judges have followed different approaches to responding to a first instance of ex parte communication. Some may be constrained by local variations on the rules of conduct, while others are a matter of personal preference. One common response to a letter written to a judge and not apparently copied to the other party is to have the clerk docket the letter and send a notice to both parties that the court is construing the letter as a motion for some form of relief. By doing so, the court puts the other party on notice and permits them time to file a response, if appropriate.

However, in some jurisdictions the rules of procedure might prohibit a judge from even considering such a letter if it is not accompanied by a proper proof of service. For example, Ohio Rule of Civil Procedure 5(B)(4) details how proof of service is to be submitted and expressly states that documents filed with the court "shall not be considered until proof of service is endorsed thereon or separately filed."[52] In contrast, Massachusetts rules require a certificate of service be included with any document filed with the court, but lack any express prohibition on consideration of a filing that lacks such a certificate.[53] Thus, on their face, the Massachusetts rules may provide a judge with more leeway in how to handle an ex parte filing than the Ohio rules.

A more cautious approach may be to send a notice of the communication to all parties. Rather than substantively considering such a filing, the court may choose to docket a "Notice of Filing" sent to all parties which merely indicates that a document was filed that lacks a proof of service, and granting the party who filed it a specified amount of time to file the document *with* an appropriate proof of service.[54] Such a notice may also include a more generic instruction, for the benefit of the pro se party, that all filings must contain such a certificate or proof of service and identifying the specific applicable rule. This may be an opportunity for the judge to explain the process of motion practice in simple, plain English terms, with appropriate reference to specific rules as applicable. By educating a pro se party who makes the mistake of attempting ex parte communication, rather than punishing them, their filings as the case moves forward may more readily be seen to conform to the court's expectations and requirements.

The most cautious approach is to simply instruct the clerk not to accept filings that lack an appropriate certificate of service. The clerk will return the attempted filing to the pro se litigant either with an explanation of the service and proof of service requirements or with no explanation at all.[55] While this approach most stringently complies with the Code of Conduct's prohibition on "permitting" or considering ex parte communications, it also does nothing to advance the right of an unrepresented party to be heard without facing what to them may be a fundamental lack of understanding of the process. "[J]udges are understandably reluctant to see injustice or unfairness happen to anyone, and yet judges cannot intervene too much."[56]

There are, of course, some circumstances in which ex parte communications are either appropriate or expected, or both. The ABA's Model Code anticipates at least five scenarios when ex parte communications may be permitted. These include where the circumstances require it for administrative and non-substantive matters; consultations with court staff and personnel whose functions are to aid the judge in carrying out their duties; when expressly authorized by law to do so; or where the parties have been consulted and consent to the judge conferring separately with the parties in connection with settlement efforts.[57] The Model Rule also makes clear that the proscription against communicating about a proceeding includes communications with persons who are not parties or participants in the proceeding, such as other lawyers or law professors, unless expressly permitted by the Rule.[58]

Finding the right balance is what each judge must strive for. To find that balance, judges are often advised to exercise their discretion, try to understand the difficulties that self-represented parties face, and avoid applying procedural rules so stringently as to defeat the goal of fundamental justice.[59]

## CONCLUSION

Managing cases involving pro se parties presents judges with challenges they may not face when parties are represented by attorneys familiar with court and procedural processes. However, with more and more parties appearing without representation, these challenges can hardly be characterized as unique or even unanticipated. Indeed, a lack of familiarity with procedures, attempts at ex parte communication, and difficulty understanding the basis for rulings are common with pro se parties. It is incumbent upon judges, in the interests of both impartial justice and efficient proceedings, to assist pro se parties in neutral and unbiased ways so that all litigants leave the courthouse, regardless of outcome, believing that at least the process was conducted fairly.

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52. Ohio R. Civ. P. 5(B)(4).
53. Mass. R. Civ. P. 5(a); Mass. R. Sup. Ct. 9B.
54. Judge Thomas A. Januzzi, *Ex Parte Communications*, FOR THE RECORD (Ohio Judicial Conference 2013),. 5 (quoting an example of such a Notice of Filing), http://ohiojudges.org/Document.ashx?DocGuid=e30fe367-0ea2-4b73-99a4-e6f1106a9e80.
55. *Id.* at 7.
56. Burman, *supra* note 13, at 7.
57. Model Code of Jud. Conduct r. 2.9(A)(1) – (5) (Am. Bar Ass'n 2010).
58. Model Code of Jud. Conduct r. 2.9, cmt.3.
59. Cynthia Gray, *Balls, Strikes, and Self-Represented Litigants*, JUDICIAL ETHICS AND DISCIPLINE (blog), https://ncscjudicialethicsblog.org/2019/03/, posted March 19, 2019.

# Access, Flexibility, and Patience

Cynthia Gray

Judges are not required to be bumps on a log in their own courtrooms, just spectators as proceedings bog down and hapless self-represented litigants flounder in confusion or attorneys use court procedures to trip up the attorneyless. Judges can use the authority they have and employ in every case, if not to level the playing field for the unrepresented (probably impossible), to at least correct the tilt a little and smooth out some of the hazards, reducing the potential for miscarriages of justice.

Over 35 jurisdictions have adopted a provision in their code of judicial conduct to encourage judicial flexibility in cases involving self-represented litigants, acknowledging that exercise of that discretion is consistent with the requirement of judicial impartiality.[1] Many have adopted comment 4 to Rule 2.2 of the 2007 American Bar Association *Model Code of Judicial Conduct:* "It is not a violation of this Rule"—which requires a judge to be fair and impartial—"for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."[2]

Other states have added to the text of the code: "A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard." That language was proposed by the Conference of Chief Justices and the Conference of State Court Administrators.[3] By placing that permission in the rule itself, not just a comment, this version emphasizes the importance of the principle, and its active voice is stronger and the wording more straightforward than the ABA model.

Some of the states have elaborated on the purpose of the provision. For example, the Arkansas code explains: "The growth in litigation involving self-represented litigants and the responsibility of courts to promote access to justice warrant reasonable flexibility by judges, consistent with the law and court rules, to ensure that all litigants are fairly heard."[4]

Several of the states explain what the provision does not mean. For example, the Colorado code notes that "self-represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants."[5] The Indiana comment states:

> A judge's ability to make reasonable accommodations for self-represented litigants does not oblige a judge to overlook a self-represented litigant's violation of a clear order, to repeatedly excuse a self-represented litigant's failure to comply with deadlines, or to allow a self-represented litigant to use the process to harass the other side.[6]

Many state versions include examples of the types of judicial engagement encouraged in cases involving self-represented litigants. For example, the D.C. code comments:

> Steps judges may consider in facilitating the right to be heard include, but are not limited to, (1) providing brief information about the proceeding and evidentiary and foundational requirements, (2) asking neutral questions to elicit or clarify information, (3) modifying the traditional order of taking evidence, (4) refraining from using legal jargon, (5) explaining the basis for a ruling, and (6) making referrals to any resources available to assist the litigant in the preparation of the case.[7]

As the Ohio code notes, these are "affirmative, nonprejudicial steps" that "individual judges have found helpful."[8]

These measures are not extraordinary departures from business as usual but reflect what many judges already do to facilitate proceedings and not just in cases involving pro se litigants. (These "accommodations" would also be helpful to inexperienced attorneys, litigants who may be poorly represented, witnesses, and the press and public who may be observing.) Judges should be explaining their rulings and avoiding legalese in every case. Judges often ask questions to clarify testimony even when

**Footnotes**

1. *See* Nat'l Ctr. for State Cts., Self-Represented Litigants and the Code of Judicial Conduct (May 2019), https://www.ncsc.org/__data/assets/pdf_file/0030/15798/proselitigantsjan2016.pdf.
2. Model Code of Jud. Conduct r. 2.2 cmt. 4 (Am. Bar Ass'n, 2007), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_2impartialityandfairness/commentonrule2_2/.
3. Nat'l Ctr. for State Cts., Resolution 2, In Support of Expanding Rule 2.2 of the ABA Model Code of Judicial Conduct to Reference Cases Involving Self-Representing Litigants (CCJ/COSCA, 2012), https://www.ncsc.org/__data/assets/pdf_file/0023/23747/07252012-support-expanding-rule-aba-model-code-judicial-conduct-self-representing-litigants.pdf (The resolution also suggested that "states modify the comments to Rule 2.2 to reflect local rules and practices regarding specific actions judges can take to exercise their discretion in cases involving self-represented litigants").
4. Ark. Code of Jud. Conduct r. 2.2 cmt. 4 (effective Dec. 15, 2016), https://opinions.arcourts.gov/ark/cr/en/1874/1/document.do?null&failedCaptcha=true.
5. Colo. Code of Jud. Conduct r. 2.6 cmt. 2 (2010), http://www.coloradojudicialdiscipline.com/PDF/Code_of_Judicial_Conduct%20-%20July%2031%202010.pdf.
6. Ind. Code of Jud. Conduct r. 2.2 cmt. (2019), https://www.in.gov/courts/rules/jud_conduct/index.html#_Toc8987510.
7. D.C. Code of Jud. Conduct r. 2.6 cmt. 1A (2012), https://cjdt.dc.gov/sites/default/files/dc/sites/cjdt/publication/attachments/code_of_conduct.pdf.
8. Ohio Code of Jud. Conduct r. 2.6 cmt. 1A (2009), https://www.supremecourt.ohio.gov/LegalResources/Rules/conduct/judcond0309.pdf.

the interrogator is an attorney and the witness has been prepped by counsel. Judicial impartiality cannot reasonably be construed as prohibiting judges from demystifying proceedings or requiring judges to be "unduly rigid," "formulaic," and "overly technical" in any case, much less one involving self-represented litigants.[9]

These efforts cannot be considered an unfair advantage for self-represented litigants in any specific case, particularly if they become routine whenever a case needs an engaged judge. To further mitigate any suggestion of judicial bias, many court systems have developed informative self-help webpages, FAQs, pamphlets, plain language forms, and other resources that are regularly made available to self-represented litigants even before the case goes near a judge so that there is less occasion for the judge to intervene.

In addition to the flexibility authorized by comment 4, providing pro se litigants "the opportunity to have their matters fairly heard" requires an emphasis on a fundamental rule in the code:

> A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.[10]

A disrespectful courtroom atmosphere created by the judge is a substantial impediment to a fair and impartial hearing for all involved. Thus, in cases involving self-represented litigants, a judge must not be intimidating, mocking, threatening, sarcastic, belittling, discouraging, hostile, or condescending. That is true in every case, of course, but appropriate judicial temperament takes on special significance in cases without adequate representation on all sides.

Unrepresented litigants seem to bring out the bully in some judges,[11] but even the most well-meaning may feel their judicial temperament start to buckle under the frustration of proceedings with self-represented litigants. (Not that attorneys are always as prepared, competent, and professional as judges wish.) As the Louisiana Supreme Court explained:

> Judges are called upon to render difficult decisions in sensitive and emotional matters. Being in court is a common occurrence for judges, but for litigants, especially pro se litigants, a courtroom appearance can be an immensely difficult experience. Litigants appear before judges to have their disputes resolved. Judges serve the public, in part, by setting an example in how to resolve these disputes in a patient, dignified, and courteous manner. If a judge acts belligerently, those before the judge believe belligerence is

9. *See* In re Eriksson, 36 So. 3d 580 (Fla. 2010). One day while presiding over a series of domestic violence injunction hearings, the judge provided no assistance to the pro se petitioners and consistently referred to his duty to remain neutral. Instead of asking the petitioners whether they wanted to testify, the judge asked, "Who is your first witness?" and dismissed petitions if petitioners failed to produce independent witnesses because petitioners did not know they were allowed to testify in their own cases. The judge refused to admit police reports and the petitioners' own sworn statements because he considered them hearsay. The judge dismissed petitions that alleged repeat violence if the petitioner was only able to establish one act of violence. The judge also questioned petitioners about who instructed them to come to court, asking, for example, "Who sent you here?" and "Who told you to file this?" As the calendar proceeded, the judge started to attempt to address the substance of the petitions pending before him. In some cases, he asked petitioner to "look in the mirror" to identify their first witness. The Court concluded that the judge's process and approach impeded the petitioners' ability to obtain the relief and protection they sought, "penalized pro se petitioners for being unfamiliar with the judicial system," and "discouraged vulnerable individuals from exercising their access to justice."
10. Model Code of Jud. Conduct r. 2.8(B) (Am. Bar Ass'n, 2007), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_8decorumdemeanorandcommunicationwithjurors/.
11. *See, e.g.,* Holt, Case No. 2013-035 (Ariz. Comm'n on Jud. Conduct May 31, 2013) (Pub. Reprimand), https://www.azcourts.gov/portals/137/reports/2013/13-035.pdf (judge described pro se criminal defendant's legal arguments as "stupid" and "screwy" and stated to him "If you don't like it, move to Mexico"); Madanick, Case No. 2013-085 (Ariz. Comm'n on Jud. Conduct June 27, 2013) (Pub. Reprimand), https://www.azcourts.gov/portals/137/reports/2013/13-085.pdf, (judge berated pro se litigant for attempting to cite Arizona law in small claims proceeding, advised parties against "quoting any of the rules or regulations of Arizona law," and displayed a "bullying tone and demeanor"); Fletcher, Case No. 2015-125 (Ariz. Comm'n on Jud. Conduct August 14, 2015) (Pub. Reprimand), https://www.azcourts.gov/portals/137/reports/2015/15-125.pdf, (after a pro se plaintiff briefly described the relief she was requesting, judge asked sarcastically, "You're done. Really?", stated that she had not meet her burden of proof, and entered judgment for the defendant, but then dismissed the case without prejudice); McMurry, Case No. 2019-176 (Ariz. Comm'n on Jud. Conduct November 8, 2019) (Pub. Reprimand), https://www.azcourts.gov/portals/137/reports/2019/19-176.pdf (judge spoke to pro se plaintiff in a condescending and mocking tone and adamantly attempted to dissuade her from exercising her right to a jury trial); Comparet-Cassani (Cal. Comm'n on Jud. Performance Aug. 16, 2011) (Pub. Admonishment), https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/Comparet-Cassani_Pub_Adm_8-16-11.pdf (judge revoked a criminal defendant's pro per status and spoke harshly to him, repeatedly stating that she did not believe him, grilling him on cases he had cited in his motion, and stating three times that he was lying to the court); McDonald (Ky. Jud. Conduct Comm'n August 12, 2013) (Pub. Reprimand), https://kycourts.gov/Courts/JCC%20Actions%20Documents/2013FindingsFactsMcDonald.pdf, (judge refused to allow a pro se defendant in a civil case to present any argument because he was not a lawyer, summarily entered an injunction against the defendant, and awarded attorney's fees of $11,579.20); *In re* Newberry Cty. Magistrate English, 625 S.E.2d 919 (S.C. 2006) (judge found pro se defendants guilty based solely on police incident reports); *In re* Walsh, 587 S.E.2d 356 (S.C. 2003) (judge required pro se defendants who requested jury trials to appear in court once a week and answer a "jury trial roll call" and to attend pretrial conferences and enter into discussions with the prosecutor); *In re* Eiler, 236 P.3d 873 (Wash. 2010) (judge engaged in a pattern of deriding the intelligence of pro se litigants who appeared before her and rudely and impatiently interrupting them).

acceptable. Judges have an opportunity to teach by example and demonstrate those attributes which all should strive to possess.

> Judges are tasked with balancing often competing considerations on the scales of justice. The obligation of a judge to be patient, dignified, and courteous is not inconsistent with affording a judge discretion to be appropriately decisive, forceful, and stern so as to maintain order and decorum in the courtroom. Often a judge's patience is tested when simultaneously confronted with crowded dockets to be managed and countless difficult decisions to be made. Litigants occasionally lash out at the judge if their side does not prevail, inappropriately casting aspersions on the judge. However, judges must strive to be patient in the face of these challenges.[12]
>
> Thus, judges need to be alert to signs that they are losing control of their temper and, therefore, the proceedings in cases involving pro se litigants.

Moreover, there are particular lapses of judicial civility only likely in cases involving self-represented litigants.

Judges must not disparage a litigant's self-represented status. While a judge may point out available alternatives, failure to respect a litigant's decision to represent themselves (which may, after all, be compelled by economics) and commenting on the perceived foolishness of that choice inevitably creates the perception that the judge cannot see past the absence of an attorney and will only listen when a party is represented.

Further, a judge must address unrepresented litigants with the same formality — "Mr.," "Ms.," or "Mrs."— as attorneys, not by their first name. On the other hand, judges must not treat attorneys appearing against pro se litigants with familiarity. Even assuming first names, jokes, personal references, and casual conversations about other cases, bar events, and professional history are appropriate at any time in a courtroom, a judge must be careful in cases involving self-represented litigants not to create the impression that they and any attorneys in the case belong to a professional fraternity from which non-attorneys are excluded or create the appearance that an attorney has special access to the judge that will benefit the attorney's client. If a self-represented litigant sees a judge chatting with an attorney just before or after a hearing, the litigant could reasonably wonder if they are talking about the case even if they are not and will reasonably question the judge's impartiality.

In addition, the judicial duty imposed by the code to require appropriate demeanor from court staff is particularly important in cases involving self-represented litigants as staff probably have more contact with self-represented litigants than they do with attorneys and than the judge does. Finally, judges also have an affirmative duty under Rule 2.8(B) to require attorneys to be patient, dignified, and courteous, meaning judges should not allow an attorney to bully or try to take unfair advantage of a litigant unprotected by counsel.

As a justice of the Arizona Court of Appeals argued, albeit in dissent:

> The courts do not treat a litigant fairly when they insist that the litigant — unaided and unable to obtain the services of a lawyer — negotiate a thicket of legal formalities at peril of losing his or her right to be heard. Such a practice manifestly excludes the poor and the unpopular, who may be unable to obtain counsel, from access to justice.
>
> Meaningful access requires some tolerance by courts toward litigants unrepresented by counsel. *Pro per* litigants are by no means exempt from the governing rules of procedure. But neither should courts allow those rules to operate as hidden, lethal traps for those unversed in law. This may require some degree of extra care and effort on the part of trial judges who already labor long and hard at a mushrooming caseload. But the alternative slams the courthouse door in the face of those who may be in greatest need of judicial relief, all for the sake of ease of administration.[13]

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12. *In re* Ellender, 16 So. 3d 351 (La. 2009) (30-day suspension without pay for judge who suggested that a petition for protection from abuse was inconsequential, suggested approval of severe corporal punishment of a child, and treated the petitioner in a condescending, demeaning, and impatient manner).
13. White v. Lewis, 804 P.2d 805, 815-816 (Ariz. Ct. App. 1990) (Lankford, J., dissenting).

# AMERICAN JUDGES ASSOCIATION: PROCEDURAL FAIRNESS INTERVIEWS

The American Judges Association (AJA) conducted interviews about procedural fairness with nine national leaders on issues involving judges and the courts. The interviews, done by Kansas Court of Appeals Judge and past AJA president Steve Leben, cover the elements of procedural fairness for courts and judges, how judges can improve fairness skills, and how the public reacts to courts and judges. The interviews were done in August 2014; job titles are shown as of the date of the interviews.

Visit http://proceduralfairnessguide.org/interviews/ to watch the interviews.

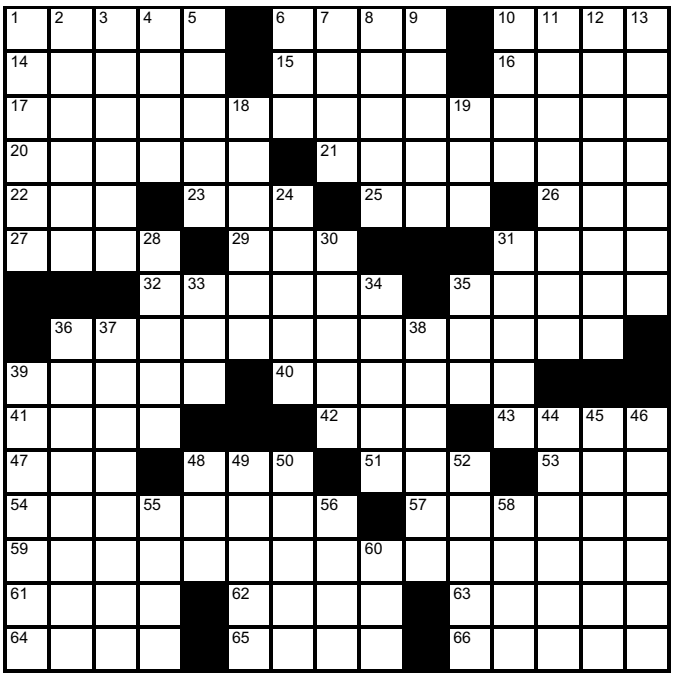
## DOG DAZE by Judge Vic Fleming © 2022

**Across**

**1** King with a golden touch
**6** "Free Willy" swimmer
**10** Players of sports (abbr.)
**14** "I'm hungry ___ get-out!"
**15** Hero's place
**16** Bok ___
**17** Mini-lap sitter's minis?
**20** 2014 Ronson-Mars megahit "___ Funk"
**21** Most compact
**22** Character whose name aptly rhymes with Pooh
**23** 1960s militant campus org.
**25** Part of a court-related basket
**26** One of the five W's
**27** Best or Krabappel
**29** Incoming flight info
**31** Hot : Cold :: Warm : ___
**32** "Key Largo" star Lauren
**35** 1971 Jane Fonda film
**36** Parkas for dark retrievers?
**39** Like nippy autumn breezes
**40** Gentle hills
**41** Ill-considered
**42** Letters in some church names
**43** Wood cutters
**47** Fig. that's not exact
**48** Knock
**51** Not allow
**53** Comedic Charlotte
**54** "From my point of view ..."
**57** Lessee
**59** Brief films about a combat sport competitor?
**61** "The Beverly Hillbillies" character ___ May Clampett
**62** 1492 trio member
**63** Big name in violins
**64** Bartender's stock
**65** Arranges, as a table for lunch
**66** Back with a wager

**Down**

**1** Adult
**2** 14-legged crustacean
**3** Ohio city
**4** Pet food brand
**5** Brakes
**6** Off the wall
**7** Aunts and uncles (abbr.)
**8** 1960s-70s Mets star ___ Jones
**9** Bride's path
**10** Battery fluid
**11** Dismissed outright, as a case, slangily
**12** Showy, skillful sorts
**13** Rhythmic heart contraction
**18** Next up, on the diamond
**19** First-aid ___
**24** Bean's support
**28** Cause blushing in
**30** ___-Dale (Robin Hood's friend)
**31** Kind of action
**33** "Egad!"
**34** Item "dropped" in an intimate convo
**35** ___ Nidre (Jewish prayer)
**36** With rude boldness
**37** Zine piece about a top-ten grouping, say



**38** Anti-skid devices
**39** Circuit ___ (switch that interrupts current flow)
**44** Ark landing site
**45** "Are you interested in doing this?"
**46** Arrives, as darkness
**48** Ole Miss player, familiarly
**49** Long stretches of time
**50** Dust-carrying fairy
**52** Part of a sobriety program
**55** "The ___ the limit!"
**56** Collapsible shelter
**58** Alaska city
**60** Support folk in some dorms (abbr.)

*Judge Fleming is a widely published cruciverbalist. Send questions and comments to judgevic@gmail.com.*

*Solution is on page 73.*

# Strip Searches in Canada and the Constitutional Right to be Free From Unreasonable Searches and Seizures

Wayne K. Gorman

On January 18, 1997, in a restaurant in Toronto, Mr. Ian Golden, a black male, was observed by the police selling what they believed to be cocaine. As a result, he was arrested and searched. The search included a "pat-down" search, but also included the police undoing and pulling back Mr. Golden's pants and underwear. The police saw a white substance within a clear plastic wrap protruding from between Mr. Golden's buttocks. The police then forced Mr. Golden to bend over a table. Mr. Golden's buttocks and genitalia were completely exposed. Mr. Golden defecated. The police retrieved a pair of rubber dishwashing gloves from one of the restaurant's employees and removed the package. By this point, Mr. Golden was face-down on the floor. The package was found to contain 10.1 grams of crack cocaine.

At his trial, Mr. Golden sought to have the crack cocaine excluded. He argued that the strip search was unconstitutional because it occurred in violation of section 8 of the *Canadian Charter of Rights and Freedoms*, *Constitution Act, 1982*, which indicates that "Everyone has the right to be secure against unreasonable search or seizure."[1] Mr. Golden's argument was dismissed by the trial judge and he was convicted. His appeal to the Ontario Court of Appeal was unsuccessful. He was granted leave to appeal to the Supreme Court of Canada.[2] The Supreme Court indicated that the question raised by the appeal was the following:

> *Whether the search incident to arrest power is broad enough to encompass the authority to strip search an arrested individual is the question before us, and is one that has never been put directly in issue before this Court.*[3]

Earlier this year, the Supreme Court of Canada considered the constitutionality of strip searches again.[4] Subsequently, in *R. v. Tim*, 2022 SCC 12, the Supreme Court applied *Golden* to a strip search at a police station after a motor vehicle accident in which a handgun was found on the driver of the vehicle as a result of a search incidental to arrest.

## THIS COLUMN

In this column, I trace how strip searches have been assessed by Canadian courts between *Golden* and *Ali and Tim*. Interestingly, three years after *Golden* was issued, it was suggested by one author that Canadian "police services continue to struggle with implementing the *Golden* principles…case law and current police policies suggest that the principles developed in *Golden* are neglected by police services in major Canadian cities."[5] A subsequent study into strip searches conducted in relation to Canadian women found that the "cases reviewed in this study demonstrate that police in Canada are indeed violating women's rights through illegal strip-searching."[6] In *R. v. Muller*, it was noted that the police involved in that case had a "routine policy" of strip searching "anyone and everyone charged with possession of drugs for the purpose of trafficking" (at paragraph 72).[7] In *Ilnicki v. MacLeod*, the police conducted a strip search upon Mr. Ilnicki, after arresting him pursuant to a warrant issued when he failed to appear in court for a highway traffic offence.[8]

I will commence with a review of what was decided in *Golden*, then look at how *Golden* has been interpreted at the appellate level and applied at the trial level. In the latter instance, I will concentrate on the time-period of January 1, 2020 to January 31, 2022. As will be seen, my review of trial court decisions in this column raises serious concerns as to whether Canadian police are conducting improper strip searches and failing to follow the guidelines set out in *Golden*.

I will be considering strip searches conducted by the police in what *Golden* describes as "in the field",[9] not by prison authorities[10] or at border crossings.

### Footnotes

1. Canadian Charter of Rights and Freedoms, Section 8 of the Constitution Act, 1982.
2. *See* R. v. Golden, [2001] 3 S.C.R. 679 (Can.).
3. *Id.* at ¶25.
4. *See* R. v. Ali, [2022] SCC 1 (Can.).
5. *See* Brady Donohue, *Operationalizing* Golden*: Measuring the Efficacy of Judicial Oversight*, 1 WINDSOR REV. LEGAL SOC. ISSUES—DIGITAL COMPANION, 1 (2014).
6. *See* Michelle Pusutka and Elizabeth Sheehy, *Strip-Searching of Women in Canada: Wrongs and Rights*, 94 CAN. BAR REV., 241, 275 (2016).
7. R. v. Muller, 2014 ONCA 780 (Can.).
8. Ilnicki v. MacLeod, 2005 ABCA 349 (Can.).
9. R. v. Golden, [2001] 3 S.C.R. 679, ¶102 (Can.).
10. *See* Florence v. Board of Chosen Freeholders, 566 U.S. 318 (2012); R. v. Monney, [1999] 1 S.C.R. 652 (Can.); R. v. Gerson-Foster, 2019 ONCA 405, ¶¶108 and 109 (Can.0. In Brown v. Polk County, Wisconsin, 141 S.Ct. 1304 (mem.) (2021), in which an application to decide "what degree of suspicion the Fourth Amendment requires to justify the physically penetrative cavity search of a pretrial detainee," was denied, Justice Stevens indicated that "the degree of suspicion required for a search should be substantially informed by the availability of less intrusive alternatives. This Court does not lightly permit an entire category of warrantless, invasive searches when less offensive options exist. Particularly searches of those who have not been convicted of any crime."

The first question is: what constitutes a strip search in Canada?

## WHAT IS A STRIP SEARCH?

In *Golden*, the Supreme Court defined a strip search as involving "the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments."[11] The Court suggested that "it is unquestionable" that strip searches "represent a significant invasion of privacy and are often a humiliating, degrading and traumatic experience for individuals subject to them.[12] Clearly, the negative effects of a strip search can be minimized by the way in which they are carried out, but even the most sensitively conducted strip search is highly intrusive."[13]

Subsequently, in *R. v. Tessling*, which did not involve a strip search, the Supreme Court indicated that:

> [p]rivacy of the person perhaps has the strongest claim to constitutional shelter because it protects bodily integrity, and in particular the right not to have our bodies touched or explored to disclose objects or matters we wish to conceal. The state cannot conduct warrantless strip searches unless they are incident to a lawful arrest and performed in a reasonable manner…in circumstances where the police have reasonable and probable grounds for concluding that a strip search is necessary in the particular circumstances of the arrest.[14]

Finally, in *Vancouver (City) v. Ward*, the Supreme Court indicated that strip searches "are inherently humiliating and degrading regardless of the manner in which they are carried out."[15]

More recently, in *R. v. Downes*, the British Columbia Court of Appeal described strip searches as constituting serious infringements "of personal privacy."[16]

## APPELLATE COURT COMMENT ON GOLDEN'S DEFINING OF A STRIP SEARCH

The Supreme Court's defining of what constitutes a strip search in *Golden* has been the subject of considerable appellate comment. In *R. v. Choi*, for instance, before the British Columbia Court of Appeal, it was suggested that the "definition distinguished strip searches 'from less intrusive 'frisk' or 'pat-down' searches, which do not involve the removal of clothing, and from more intrusive body cavity searches, which involve a physical inspection of the detainee's genital or anal regions.'"[17]

The British Columbia Court of Appeal held in *Choi* that "to fall within the *Golden* definition, a search must involve the removal or rearrangement of clothing so as to permit an inspection of the private areas of the body of an arrestee, whether those areas are fully exposed or they are covered by undergarments alone."[18] The Court of Appeal also indicated that "the purpose of a strip search is to enable police to inspect private areas of the body, which is inherently humiliating and thus requires additional safeguards to protect personal privacy and dignity."[19] However, the Court of Appeal also suggested that "a visual inspection of an arrestee's genital and anal areas," constitutes a search that "falls at the low end of intrusiveness for strip searches."[20]

**"'[W]hen Sergeant Train pulled on the waistband of the shorts ... he was engaged in a strip search.'"**

The search in *Choi* involved a visual inspection of the waistband of Mr. Choi's underwear, not his genital or anal area. The Court of Appeal concluded that "[u]nless the area of the body inspected is inherently private, whether exposed or covered by an undergarment, the search will not fall into the category of a strip search and the additional safeguards will not apply."[21] Does this mean that a male police officer can put his hand down the top portion of the pants of a female suspect without following the *Golden* guidelines?

In *R. v. Pilon* the accused was arrested in a motel room.[22] The police observed him repeatedly trying to place his hands in the front and back of the shorts he was wearing. The police took Mr. Pilon into

> the bathroom in the motel room. There, Sergeant Train conducted a strip search, which consisted of pulling the waistband of the appellant's shorts away from his body, so that Sergeant Train could view his genital area, and reaching in and pulling out objects attached by the elastic band. Sergeant Train was wearing surgical gloves at the time and did not touch the appellant's genitals. The objects retrieved were a pill bottle containing fentanyl patches and a ball of electrical tape with crack cocaine inside.[23]

The Ontario Court of Appeal concluded that "when Sergeant Train pulled on the waistband of the shorts in an effort to view the appellant's underwear, he was engaged in a strip search. The search was not an accident and therefore the principal basis for the trial judge's finding that it was reasonable is unsustainable."[24]

Finally, on this point, in *R. v. Byfield*, during a search of the accused at the scene, an officer discovered "a large hard object in the appellant's groin region, which he believed was 'non-anatomical.'"[25] The officer reached into the accused's underwear, finding a package containing cocaine.[26]

It was argued that because the accused's clothes were not removed and his genitals were not exposed, this did not constitute a strip search. The Ontario Court of Appeal disagreed. It noted that in *Golden*, "the Supreme Court of Canada made it clear

11. *Golden*, 3 S.C.R. at ¶47.
12. *Id.*
13. *Id.* at ¶83.
14. R. v. Tessling, [2004] 3 S.C.R. 432, at ¶21 (Can.).
15. Vancouver (City) v. Ward, [2010] 2 S.C.R. 28, at ¶64 (Can.).
16. R. v. Downes, 2022 BCCA 8, at ¶86 (Can.).
17. R. v. Choi, 2021 BCCA 410, at ¶68 (Can.).
18. *Id.*
19. *Id.*
20. *Id.* at ¶73.
21. *Id.* at ¶80.
22. R. v. Pilon, 2018 ONCA 959 (Can.).
23. *Id.* at ¶6.
24. *Id.* at ¶28.
25. R. v. Byfield, 2020 ONCA 515 (Can.).
26. *Id.*

**"[N]o doubt strip searches exist on a continuum."**

almost 30 years ago [*sic*] that the rearrangement of clothing in circumstances similar to this case does constitute a strip search."[27]

However, the Court of Appeal also held that the search was reasonable. It concluded that the evidence presented at the trial demonstrated that

> the searching officer's safety concerns were real and that it was appropriate to conduct a second pat down search. Given his discovery of the unknown object in the appellant's groin area, further investigation was reasonable and necessary. We disagree with the appellant's submission that, because the police station was only four minutes away, the strip search could have waited until then. The strip search was necessary to ensure the safety of all concerned (as described above) during this journey to the police station, even if that journey was to be brief.[28]

In summary, the conceptualization of what constitutes a strip search as set out in *Golden* suggests a broad and encompassing rule. This is illustrated by the decision in *Byfield*. Having said this, no doubt strip searches exist on a continuum ranging from what occurred in *Golden* to much less intrusive searches. This may be irrelevant in determining if the search complied with section 8 of the *Charter*, but crucial in determining if any evidence obtained should or should not be excluded.

Having considered what constitutes a strip search, I now intend to return to *Golden* to analyze the Court's overall ruling.

## THE SUPREME COURT'S RULING IN GOLDEN

The Supreme Court commenced its consideration of the constitutionality of strip searches in *Golden* by noting that "a search will be reasonable within the meaning of s. 8 of the *Charter* where (1) it is authorized by law; (2) the law itself is reasonable; and (3) the search is conducted in a reasonable manner."[29] The Court held that thus, "the first question is whether the common law of search incident to arrest authorizes the police to conduct strip searches. If it does, the next question is whether the common law is reasonable. If the strip search was authorized by law and the law is reasonable, the final question is whether the strip search of the appellant was conducted in a reasonable manner."[30]

## A POWER TO STRIP SEARCH INCIDENT TO ARREST?

The Supreme Court concluded in *Golden* that a warrantless search of the person, conducted incident to arrest, is permitted under the common law.[31] The Court held that in

> order for a strip search to be justified as an incident to arrest, it is of course necessary that the arrest itself be lawful.…The second requirement before a strip search incident to arrest may be performed is that the search must be incident to the arrest. What this means is that the search must be related to the reasons for the arrest itself... reasonableness of a search for evidence is governed by the need to preserve the evidence and to prevent its disposal by the arrestee. Where arresting officers suspect that evidence may have been secreted on areas of the body that can only be exposed by a strip search, the risk of disposal must be reasonably assessed in the circumstances.[32]

Subsequently, in *Tim*, the Supreme Court indicated that a strip search "can be justified at common law as incident to a lawful arrest where there are 'reasonable and probable grounds justifying the strip search, in addition to reasonable and probable grounds justifying the arrest'.…Reasonable and probable grounds exist to justify a strip search 'where there is some evidence suggesting the possibility of concealment of weapons or other evidence related to the reason for the arrest'.…The strip search must also be conducted reasonably, in a manner that 'interferes with the privacy and dignity of the person being searched as little as possible," (at paragraph 66).

However, the Supreme Court indicated that strip searches "cannot be carried out as a matter of routine police department policy applicable to all arrestees."[33] The "fact that the police have reasonable and probable grounds to carry out an arrest does not confer upon them the automatic authority to carry out a strip search, even where the strip search meets the definition of being 'incident to lawful arrest' as discussed above. Rather, additional grounds pertaining to the purpose of the strip search are required."[34]

## THE ADDITIONAL GROUNDS REQUIRED

The Supreme Court stated that strip searches:

> are only constitutionally valid at common law where they are conducted as an incident to a lawful arrest for the purpose of discovering weapons in the detainee's possession or evidence related to the reason for the arrest. In addition, the police must establish reasonable and probable grounds justifying the strip search in addition to reasonable and probable grounds justifying the arrest. Where these preconditions to conducting a strip search incident to arrest are met, it is also necessary that the strip search be conducted in a manner that does not infringe section 8 of the *Charter*."[35]

Finally, the Supreme Court held that strip searches:

27. *Id.* at ¶13.
28. *Id.* at ¶15.
29. *Golden* at ¶44.
30. *Id.* at ¶45.
31. *Id.* at ¶87.
32. *Id.* at ¶¶91–93; The *Criminal Code of Canada*, R.S.C. 1985, now includes a number of provisions that allow the police to obtain search warrants to search a person. For instance, section 487.092, allows for "body impressions" (footprints, teeth impressions, etc.) to be obtained; section 320.29, allows for blood samples to be taken; section 487.01, allows for searches and seizures "in relation of a person or a person's property." The former can only be authorized if the search will not interfere "with the bodily integrity of any person"; and section 487.05, allows for bodily substances to be obtained for the purpose of DNA analysis.
33. Golden at ¶95.
34. *Id.* at ¶98.
35. *Id.* at ¶99.

should generally only be conducted at the police station except where there are exigent circumstances requiring that the detainee be searched prior to being transported to the police station. Such exigent circumstances will only be established where the police have reasonable and probable grounds to believe that it is necessary to conduct the search in the field rather than at the police station.[36]

The Court held that strip searches:

conducted in the field could only be justified where there is a demonstrated necessity and urgency to search for weapons or objects that could be used to threaten the safety of the accused, the arresting officers or other individuals. The police would also have to show why it would have been unsafe to wait and conduct the strip search at the police station rather than in the field. Strip searches conducted in the field represent a much greater invasion of privacy and pose a greater threat to the detainee's bodily integrity and, for this reason, field strip searches can only be justified in exigent circumstances."[37]

The importance of complying with the *Golden* requirements is illustrated by the decision of the Ontario Court of Appeal in *Muller*. In *Muller*, the Court of Appeal held that a strip search conducted at a police station in the following circumstances was conducted unreasonably and in violation of the *Charter*:

The strip search was carried out in an appropriate room at police headquarters by two officers of the same gender as the appellant. However, no supervisory authorization was sought, much less obtained. Rather than close the door to the search room, as was the usual practice, the officers left the door open. The appellant was required to stand naked, facing a hallway accessible by other persons of either gender. The search was videotaped and available for viewing by others at various places in the station. The evidence was unclear about whether the appellant had been informed that he was being videotaped. Nor was he given the choice to remove the plastic bag from between his buttocks himself. A police officer removed it, albeit without touching the appellant's genitalia. Apart from the videotape, the police created no adequate record of the strip search.[38]

## ARE STRIP SEARCHES LIMITED TO SAFETY CONCERNS?

In *Pilon*, it was argued that for a strip search to be valid, it "must be related to a safety concern and not the preservation of evidence."[39] The Ontario Court of Appeal declined to answer this question. Justice Hourigan suggested that "it is at least arguable that the Supreme Court in *Golden* left open the possibility that the need to preserve evidence could qualify as exigent circumstances that permit a field search."[40] However, Justice Hourigan held that it was not necessary to answer the question raised because "in the present case I am not satisfied that there was an exigent need to preserve evidence. I leave open the possibility that another case might provide a factual matrix that presents very serious and immediate concerns about the preservation of evidence such that there is an urgent and necessary need to conduct a strip search in the field."[41]

**"'[T]he arresting officers had no reasonable and probable basis for conducting the strip search in the restaurant.'"**

The answer to the question the Ontario Court of Appeal declined to answer may have been found in the Supreme Court of Canada's decision in *R. v. Saeed*.[42] In *Saeed*, which will be considered later in this column, the Supreme Court indicated that bodily searches incident to arrest were permissible to "preserve evidence of the offence for which the accused was arrested" or to "reveal and preserve evidence of the offence."[43]

## THE SUPREME COURT'S CONCLUSION IN GOLDEN

The Supreme Court concluded in *Golden* that

the search at issue in this appeal was unreasonable, and violated the appellant's rights guaranteed under section 8 of the *Charter*.…In this appeal, the Crown has failed to prove that the strip search of the appellant was carried out in a reasonable manner. More specifically, the evidence adduced at trial fell far short of establishing that a situation of exigency existed so as to warrant a strip search outside of the police station.[44]

The Supreme Court also concluded that:

the arresting officers had no reasonable and probable basis for conducting the strip search in the restaurant. No information was given to them by Constable Theriault that the appellant had reached into his pants to remove any substances, nor had they ever witnessed such conduct themselves. There was no bulging or protrusion in the appellant's buttock area to suggest that he was concealing evidence. In the result, the decision to strip search was premised largely on a single officer's hunch, arising from a handful of personal experiences. These circumstances, coupled with the absence of exigency discussed above, compel us to conclude that the police officers' decision to strip search the appellant in the restaurant was unreasonable.[45]

Thus,

[w]here the circumstances of a search require the seizure of material located in or near a body cavity, the individual being searched should be given the opportunity to remove

36. *Id.*
37. *Id.* at ¶102.
38. *Muller* at ¶83.
39. *Pilon* at ¶21.
40. *Id.*
41. *Id.* at ¶27.
42. R. v. Saeed [2016] 1 S.C.R. 518 (Can.).
43. *Id.* at ¶¶6 and 42.
44. *Golden* at ¶¶105 and 107.
45. *Id.* at ¶110.

**"The Supreme Court took the opportunity provided ... to offer guidance to the police in the conducting of strip searches."**

the material himself or the advice and assistance of a trained medical professional should be sought to ensure that the material can be safely removed.[46]

## GUIDANCE TO THE POLICE

The Supreme Court took the opportunity provided by the appeal in *Golden* to offer guidance to the police in the conducting of strip searches by indicating that the "following questions…provide a framework for the police in deciding how best to conduct a strip search incident to arrest in compliance with the *Charter*:

1. Can the strip search be conducted at the police station and, if not, why not?
2. Will the strip search be conducted in a manner that ensures the health and safety of all involved?
3. Will the strip search be authorized by a police officer acting in a supervisory capacity?
4. Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?
5. Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?
6. What is the minimum of force necessary to conduct the strip search?
7. Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
8. Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?
9. Will the strip search involve only a visual inspection of the arrestee's genital and anal areas without any physical contact?
10. If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?
11. Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?[47]

The Supreme Court does not suggest in *Golden* that this is an exhaustive list or that a failure to follow it will result in a strip search being unreasonable. However, in its subsequent decision in *Saeed*, the Court suggested that the police "must…follow certain restrictive guidelines in carrying out" strip searches.[48] This suggests a much stricter approach to the guidelines than suggested in *Golden*. However, in *R. v. Lee*, though it was acknowledged that "the strip search at the police station was not perfect, in terms of its compliance with the guidelines set out in *R. v. Golden*," the Ontario Court of Court of Appeal concluded that the strip search was still reasonable because "in the circumstances of this case, it was a minor deviation."[49] Similarly, in *R. v. Davis*, 2020 ONCA 748, the Ontario Court of Appeal agreed with the trial judge's conclusion that the failure of the police in that case to have "have kept a proper record respecting 'the reasons for and the manner in which the strip search was conducted' was "a 'minor deviation from the *Golden* guidelines, insufficient to found a *Charter* breach.'"[50]

Though the Supreme Court indicated that these questions provide a framework for the police in deciding how best to conduct a strip search incident to arrest in compliance with the *Charter*, they would also appear to provide a framework for trial judges in determining if a strip search incident to arrest is in compliance with the *Charter*.

## A SUMMARY

I would summarize the holding in *Golden* in the following manner:

1. the Court defined a strip search as involving "the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments";[51]
2. all strip searches "represent a significant invasion of privacy and are often a humiliating, degrading and traumatic experience for individuals subject to them. Clearly, the negative effects of a strip search can be minimized by the way in which they are carried out, but even the most sensitively conducted strip search is highly intrusive";[52]
3. a warrantless search of the person conducted incident to arrest is permitted under the common law;[53]
4. in order for a strip search to be justified as an incident to arrest, the arrest must be lawful;[54]
5. the search must be related to the reasons for the arrest itself;[55]
6. a strip search designed to preserve evidence must involve the need to preserve the evidence and to prevent its disposal by the arrestee. Where "arresting officers suspect that evidence may have been secreted on areas of the body that can only be exposed by a strip search, the risk of disposal must be reasonably assessed in the circumstances";[56]
7. strip searches "cannot be carried out as a matter of rou-

46. *Id.* at ¶114.
47. *Golden*, at ¶110.
48. *Id.* at ¶40.
49. R. v. Lee, 2018 ONCA 1067 at ¶15 (Can.).
50. R. v. Davis, 2020 ONCA 748, at ¶22 (Can.).
51. R. v. Golden, [2001] 3 S.C.R. 679 (Can.).
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*.
56. *Id.*

tine police department policy applicable to all arrestees";[57]

8. there is no automatic authority to carry out a strip search incident to lawful arrest. Additional grounds "pertaining to the purpose of the strip search are required";[58]
9. strip searches "are only constitutionally valid at common law where they are conducted as an incident to a lawful arrest for the purpose of discovering weapons in the detainee's possession or evidence related to the reason for the arrest';[59]
10. the strip search must be conducted in a manner that does not infringe section 8 of the *Charte*r. Thus, they "should generally only be conducted at the police station except where there are exigent circumstances requiring that the detainee be searched prior to being transported to the police station";[60]
11. exigent circumstances "will only be established where the police have reasonable and probable grounds to believe that it is necessary to conduct the search in the field rather than at the police station";[61]
12. strip searches conducted in the field can "only be justified where there is a demonstrated necessity and urgency to search for weapons or objects that could be used to threaten the safety of the accused, the arresting officers or other individuals. The police would also have to show why it would have been unsafe to wait and conduct the strip search at the police station rather than in the field";[62] and
13. the Court provided a non-exhaustive list of questions (or guidelines) that can assist the police and trial judges in determining if a strip search incident to arrest is in compliance with the *Charter*.[63] A failure to comply with these guidelines does mean that the strip search will be deemed to be unreasonable.

Thus, "the inquiry into the unreasonableness of a strip search is not co-extensive with the basis for the arrest to which it is said to be incident. As with all searches incident to arrest, a strip search must be for a purpose related to the arrest. But reasonable and probable grounds beyond those that justify the arrest are required to render the strip search reasonable. And where the purpose of the strip search is to discover or prevent the destruction of evidence, the mere possibility that evidence might be found falls short of what is required."[64]

## THE EXTENSION OF GOLDEN TO PENILE SWABS

In *Saeed*, the police took a "penile swab" from the accused during a sexual assault investigation. The police supported their authority to do so by relying on their power to search incident to arrest. The circumstances involved were described by the Supreme Court of Canada in the following manner:

**"The police supported their authorization to [conduct a penile swab] on their power to search incident to arrest."**

> after Mr. Saeed had finished speaking to counsel, Detective Fermaniuk directed Constable Mitchell to place him in a dry cell, with no toilet or running water, to preserve the evidence. Mr. Saeed was handcuffed to the wall to prevent him from licking his hands or otherwise washing away evidence. Mr. Saeed was fully clothed.…The procedure took at most two minutes. Mr. Saeed was fully clothed, but pulled his pants down in order to take the swab. Constable Mitchell handed Mr. Saeed a swab with a cotton tip and a four to five inch-long handle. Under Constable Mitchell's direction, Mr. Saeed wiped the cotton tip of the swab along the length of his penis and around the head before returning the swab to Constable Mitchell. The swab came into contact only with the skin on the outside of Mr. Saeed's body. Mr. Saeed then pulled up his pants. Constable Mitchell returned the swab to Constable Craddock, who sealed it in order to preserve the evidence.…The swab was tested. It revealed the complainant's DNA on Mr. Saeed's penis.[65]

The Supreme Court concluded that that:

> while a penile swab constitutes a significant intrusion on the privacy interests of the accused, the police may nonetheless take a swab incident to arrest if they have reasonable grounds to believe that the search will reveal and preserve evidence of the offence for which the accused was arrested, and the swab is conducted in a reasonable manner… the police may take a penile swab incident to arrest if they have reasonable grounds to believe the swab will reveal and preserve evidence of the offence, and if the search is carried out in accordance with guidelines that are designed to respect the accused's privacy interests and interfere with them as little as possible.[66]

The Court held that the "privacy interests here are similar to those implicated in strip searches, and they can be protected by a similar approach."[67] The Court indicated that "as with every search incident to arrest, the arrest itself must be lawful. The swab must be truly incident to the arrest, in the sense that the swab must be related to the reasons for the arrest, and it must be performed for a valid purpose. The valid purpose will generally be to preserve or discover evidence."[68]

The Court also held that "the police must also have reasonable

57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *See* R. v. Gonzales, 2017 ONCA 543, at ¶142 (Can.).
65. *Saeed*, at ¶¶ 18, 25, and 26.
66. *Id.* at ¶¶6 and 42.
67. *Id.* at ¶62.
68. *Id.* at ¶74.

**"[T]he Court ... set out 'a number of factors to guide police in conducting penile swabs incident to arrest reasonably.'"**

grounds to believe that a penile swab will afford evidence of the offence for which the accused was arrested….Finally, the penile swab must be conducted in a reasonable manner."[69]

As in *Golden*, the Court took the opportunity presented to set out "a number of factors to guide police in conducting penile swabs incident to arrest reasonably:"[70]

1. The penile swab should, as a general rule, be conducted at the police station;
2. The swab should be conducted in a manner that ensures the health and safety of all involved;
3. The swab should be authorized by a police officer acting in a supervisory capacity;
4. The accused should be informed shortly before the swab of the nature of the procedure for taking the swab, the purpose of taking the swab, and the authority of the police to require the swab;
5. The accused should be given the option of removing his clothing and taking the swab himself, and if he does not choose this option, the swab should be taken or directed by a trained officer or medical professional, with the minimum of force necessary;
6. The police officer(s) carrying out the penile swab should be of the same gender as the individual being swabbed, unless the circumstances compel otherwise;
7. There should be no more police officers involved in the swab than are reasonably necessary in the circumstances;
8. The swab should be carried out in a private area such that no one other than the individuals engaged in the swab can observe it;
9. The swab should be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time; and
10. A proper record should be kept of the reasons for and the manner in which the swabbing was conducted.[71]

## WHOSE DNA WAS BEING OBTAINED?

One of the factors that led to the Supreme Court's conclusion in *Saeed* that the search was *Charter* compliant was the fact that the penile swab was used by the police to obtain DNA material belonging to the victim rather than the accused. Thus, Justice Moldaver indicated that:

> a penile swab is not designed to seize the accused's own bodily materials but rather, the complainant's. The privacy interest accused persons have in their own samples and impressions stems, in part, from the fact that these samples and impressions are part of their bodies and can reveal personal information about them. The complainant's DNA is not part of the accused's body, and does not reveal anything about him.[72]

However, in an earlier decision, the Supreme Court had held that that the police must have consent or a warrant to seize bodily samples and certain impressions from an accused person.[73] This distinction caused one author to note that "[b]ecause the majority in *Saeed* reaffirmed *Stillman's* main holding—that the police cannot seize the accused's own bodily samples incident to arrest—the end result is that cutting off a lock of hair or clipping a fingernail will be off-limits incident to arrest, but swabbing the accused's penis will not be."[74]

## THE APPLICATION OF GOLDEN BY CANADIAN TRIAL JUDGES IN 2020 TO 2022

*Golden* was considered by a number of trial judges in the period of January 1, 2020 to January 31, 2022. They contain numerous comments suggesting the rules set out in *Golden* are not always being followed by Canadian police.

### 2020

In *R. v. Sekhon*, for instance, a strip search was found to have violated section 8 of the *Charter* because the "grounds for the strip search…was partially based on the police's knowledge and experience that individuals will generally try to hide drugs when they are stopped for trafficking."[75] Similarly, in *R. v Lerch*, the strip search conducted in that case was found to be unreasonable because the police officer involved indicated in his evidence "that the principal reason for the strip search was the fact that Mr. Lerch was arrested on [*Controlled Drugs and Substances Act*] charges and he said that it is his standard practice to seek approval for a strip search in such cases."[76] In *R. v. Gomez*, Justice Fraser lamented the fact that "almost 20 years after the *Golden* decision police are either not keeping a proper record of strip searches or that they are not providing the record to the Crown."[77]

### 2021

In *R. v. Smith*, the trial judge suggested that "[e]ither the three officers involved in Mr. Smith's strip search weren't aware of the law established in *Golden* or chose to ignore it. The former is an outrageous systemic failure. The latter is high-handed disregard for Mr. Smith's *Charter* rights."[78] In *R. v. Sidhu*, the trial judge pointed out that the police officer who conducted a strip search in

69. *Id.* at ¶¶ 75 and 78. One study concluded that in the United States, "the results of DNA analysis from penile swabs have generally, but not always, been admitted at trial where exigent circumstances existed for the seizure" (see John Burchill, *Persistence and Variability of DNA: Penile Washings and Intimate Bodily Examinations in Sex-Related Offences*, 42 Man. Law J., 69, 78 (2019)).
70. *Saeed* at ¶78.
71. *Id.*
72. *Id.* at ¶45.
73. *See* R. v. Stillman, [1997] 1 S.C.R. 607(Can.).
74. *See* Christine Mainville, R. v. Saeed*: Penile Privacy and Penal Policy*, SCLR: Osgoode's Annual Constitutional Cases Conference, 195, 203 (2019).
75. R. v. Sekhon, 2020 BCSC 2180, at ¶160 (Can.).
76. R. v Lerch, 2020 BCSC 441, at ¶56 (Can.).
77. R. v. Gomez, 2020 ABQB 439, at ¶104 (Can.).
78. R. v. Smith, 2021 ONCJ 650, at ¶75 (Can.).

that case had testified that "strip searches in trafficking arrests were fairly routine. He was asked if in almost every case of possession for the purposes of trafficking and trafficking he would feel it necessary to do a strip search and he said 'correct.'"[79] The trial judge noted that despite *Golden* suggesting that "a proper record be kept of the reasons for and the manner in which the strip search was conducted," that "did not occur here. Indeed, the record in this case does not even indicate that the strip search was approved."[80] Similarly, in *R. v. Brown*, it was pointed out that "there was no cogent or proper record or log made of the search, or at least presented in evidence before me.…The lack of details surrounding the strip search in this case is remarkable."[81]

In *R. v. Rodriguez*, a police officer testified "he could not think of an instance when he had not requested a strip search" in drug-trafficking investigations. The officer testified that "he has requested a strip search in all instances, but he said that he does try to base his decision on the circumstances."[82] This evidence led the trial judge to point out that "[t]his is the type of generalized suspicion that *Golden* set its face against. Being charged with a particular type of offence alone is not an appropriate basis for a strip search."[83]

## 2022

More recently, in *R. v. Bootsma*, 2022 ABQB 45, a strip search was found to be unreasonable because "the police were not looking for weapons or evidence related to the arrest on an outstanding warrant; the police did not demonstrate they had reasonable and probable grounds for the search; and, without exigent circumstances, the field strip search was not conducted in a reasonable manner."[84]

Having said this, Canadian trial judges concluded in several decisions that the police had conducted constitutionally correct strip searches.[85]

This is undoubtedly a limited review of judicial pronouncements in strip search cases, but it has been suggested that "studies of published decisions do tell us something: they reflect judicial responses that are available on the public record and that convey to citizens, police, and lawyers the limits of police powers and whether and when those limits are enforceable by legal remedy. It seems therefore defensible to suggest that published decisions are more likely to shape future police conduct and are particularly relevant to the question of why illegal strip-searching continues fifteen years after the Supreme Court of Canada released its decision in *Golden*."[86]

**"Canadian trial judges concluded in several decisions that the police had conducted constitutionally correct strip searches."**

As we can see from these decisions, the issue arises primarily in drug possession cases. This makes sense because drugs are relatively easy to hide and to place in an area of the body that is out of sight. In addition, there are concerns about drugs making it to into lock-ups and as regards the potential dangers such drugs can subsequently cause to the person hiding them. However, these are concerns inherent in drug investigations. Being charged with a drug-related offence is not a basis upon which a strip search can be conducted. As pointed out by the Alberta Court of Appeal in *R. v. Upright*, such searches must be based upon "appropriate, fact-specific considerations" that justify the strip search.[87] They cannot be based upon "impermissibly vague criteria that could apply to a vast category of offenders" or where there is "a bare assertion that the [accused] should be searched simply because [the accused] was charged with drug trafficking offences."[88] Similarly, in the Unites States it has been held that "[A] post-arrest strip search must be based upon reasonable suspicion that an arrestee is hiding contraband beneath his or her clothing, and . . . a search involving visual examination of an arrestee's anal and genital cavities—a distinctly elevated level of intrusion, which must be separately justified—may not be performed except upon a 'specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity.'"[89]

## R. V. ALI

In *Ali*, the accused was convicted of the offence of possession of cocaine for the purpose of trafficking, contrary to the *Controlled Drugs and Substances Act*.[90] The evidence presented against him at his trial included drugs found as a result of a strip search. The Alberta Court of Appeal noted that "when he was strip searched three white baggies containing cocaine were found in his 'butt crack area.'"[91]

79. *R. v. Sidhu*, 2021 YKTC 47, at ¶50 (Can.).
80. *Id*, at ¶71.
81. R. v. Brown, 2021 ONSC 3862 at ¶¶18 and 19 (Can.).
82. R. v. Rodriguez, 2021 ABQB 372, at ¶232 (Can.).
83. *Id.*
84. R. v. Bootsma, 2022 ABQB 45, at ¶86.
85. *See*, for instance, R. v. Tonkin, 2020 ONSC 5206 (Can.), R. v. Black, 2020 ONSC 495 (Can.), R. v. Francis, 2020 ONSC 391 (Can.), R. v. Chahine, 2020 BCPC 294 (Can.), R. v. Curry, 2020 ONSC 86 (Can.), R. v. Hector, 2021 ONSC 7543 (Can.), R. v. Calhoun, 2021 ONSC 2634 (Can.), R. v. Drakes-Simon, 2021 ONSC 130 (Can.), and R. v. Martin, 2021 ONCJ 82(Can.). In *Martin*, the accused was stripped searched and her brassiere was removed. After the search was completed, the police refused to give it back to her. The trial judge concluded that the strip search was reasonable, but that retaining the brassiere was not: "the officer failed to consider the specific circumstances in this case. Instead she relied on her own personal policy. A policy that is not supported by any evidence and appears to be nothing more than a discriminatory practice that causes additional hardship to women held in custody. Moreover, even if there was some justification for seizing the bra, the failure to provide a replacement undergarment is not acceptable. In my view Ms. Martin's section 8 rights were violated when the officer seized her bra and failed to provide a replacement bra and thereby deprived her of her necessary undergarment" (¶ 37).
86. *See* Michelle Psutka and Elizabeth A. Sheehy, *Strip-Searching of Women in Canada: Wrongs and Rights*,94 CAN. BAR ASS'N, 241 at 245–46 (2016).
87. R. v. Upright, 2020 ABCA 227 (Can.).
88. *Id.* at ¶24.
89. *See* People v. Curry, 2021 NY Slip Op 01890 (N.Y. App. Div. 2021)..
90. R v. Ali 2020 ABCA 344 (Can.); *Controlled Drugs and Substances Act*, R.S.C. 1985.
91. *Ali* at ¶3.

**"Justice Cote [needs punctuation for name, see text] also concluded that any evidence obtained as a result of the strip search was admissible."**

The Court of Appeal indicated that on the *voir dire* to determine if the drugs found as a result of the search was admissible, Constable Darroch (the lead investigator) testified that he had been told by another officer (Constable Odorski) that he had seen the accused "reaching towards his nether region."[92] Though Constable Odorski testified on the *voir dire*, he "was never asked any questions about these observations, either in chief or during his cross-examination. It was Constable Darroch who testified that he had obtained this information from Constable Odorski, and that he had relied on that information in deciding to recommend a strip search."[93] Constable Darroch passed on the information he received from Constable Odorski to the Staff-Sergeant who made the decision to proceed with the strip search.

The accused appealed from conviction. The Alberta Court of Appeal (with Veldhuis J.A. dissenting) dismissed the accused's appeal from conviction. It concluded that the trial judge did not err in holding that the strip search was reasonable. The Court of Appeal indicated that the trial judge:

> was not required to find, as a matter of fact, that the appellant "reached towards his nether region." If such a finding had been necessary to sustain a conviction, it could only have been made based on admissible evidence. The trial judge, however, was only required to decide if, at the time the decision was made to conduct a strip search, the police team had "reasonable and probable grounds" to conduct that search. That depended on the information known to, believed, and reasonably relied on by the police team, specifically the Staff Sergeant. The fact that some of it may have been inadmissible as evidence at a trial was irrelevant.[94]

In her dissent, Justice Veldhuis held that the evidence presented, "including the presence of the cell phone, scale, cash, marijuana and the lack of cocaine found on the appellant after his pat down and pocket search; information from the informers; and the short period of time, do not support reasonable and probable grounds for a strip search.…While there was evidence that Officer Darroch subjectively believed that the appellant had secreted drugs on his body, there was no objective evidence to establish reasonable and probable grounds that drugs would be found there."[95]

The accused appealed as of right to the Supreme Court of Canada. The appeal, with a dissent, was dismissed.

## THE SUPREME COURT'S RULING

The majority of the Supreme Court held that "[w]here a strip search is conducted as an incident to a person's lawful arrest, there must be reasonable and probable grounds justifying the strip search, in addition to reasonable and probable grounds justifying the arrest.…These grounds are met for the strip search where there is some evidence suggesting the possibility of concealment of weapons or other evidence related to the reason for the arrest."[96]

The majority concluded that:

> there were reasonable and probable grounds justifying the strip search: the police had confidential source information that their target was in possession of a large quantity of cocaine and that he kept most of his drugs on his person; Mr. Ali was found next to a table with drugs, other than cocaine, and with items consistent with drug trafficking, including a scale, money, and a ringing cell phone; Mr. Ali's pants were partially down as he was being arrested; and one of the officers reported seeing Mr. Ali reaching towards the back of his pants. Viewed in its totality, this was clearly some evidence suggesting the possibility that Mr. Ali had concealed drugs, particularly cocaine, in and around the area of his buttocks.[97]

In her dissenting judgment, Justice Côté concluded that the Crown "failed to discharge its burden of establishing the legal basis for the strip search of Mr. Ali in accordance with the principles set out by this Court in *Golden*. As such, I find that Mr. Ali's s. 8 *Charter* rights were violated, substantially for the reasons of Veldhuis J.A., at paras. 27–61."[98]

However, Justice Côté also concluded that any evidence obtained as a result of the strip search was admissible. Justice Côté concluded that "the seriousness of the police conduct in this case was at the lowest end of the spectrum"; the "impact of the strip search on Mr. Ali's privacy interests, while serious, was somewhat attenuated by the reasonable manner in which it was conducted" and the Crown "would have no case without this evidence. There is a strong societal interest in adjudicating this case on its merits."[99] Justice Côté concluded as follows:

> On balance, I conclude that excluding the evidence would bring the administration of justice into disrepute. To be clear, I would emphatically re-affirm the principles arising from *Golden* and the high threshold the Crown must meet to justify a warrantless strip search. However, while the Crown failed to meet that threshold in this case, the conduct of the police did not undermine the integrity of the justice system. Therefore, I would not exclude the evidence.[100]

## R. V. TIM

The Supreme Court's decision in *Tim* arose out of the accused being arrested for a weapon offence after a handgun was found on him. It was found as a result of a search incidental to arrest fol-

92. *Id.*
93. *Id.* at ¶¶ 9-10.
94. *Id.* at ¶15.
95. *Id.* at ¶¶ 58–59.
96. *Id.* at ¶2.
97. *Id.* at ¶3.
98. *Id.* at ¶7.
99. *Id.* at ¶¶13–15.
100. *Id.* at ¶16.

lowing a motor vehicle collision. The strip search, conducted at a police station, played a minor role in the Supreme Court's decision thus its description of how it was conducted was brief: "The appellant was asked to strip down to his underwear and an officer searched around his waistband to see if he had hidden anything else. No more contraband was found" (at paragraph 12).

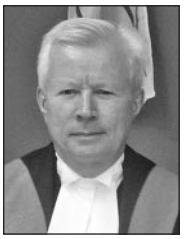
In relation to the strip search, the Supreme Court held that it "was incident to [the] weapons arrest, because it was for the purpose of discovering concealed weapons or evidence related to the offence for which the appellant was lawfully arrested.…Strip searches unquestionably 'represent a significant invasion of privacy and are often a humiliating, degrading and traumatic experience for individuals subject to them'.… However, the strip search here was minimally intrusive, as it was conducted reasonably, in a manner consistent with this Court's guidelines for strip searches.…It was performed at the police station, it was limited to the appellant's underwear waistband, and the appellant wore his underwear throughout the search.…I therefore conclude that the strip search did not infringe s. 8 of the *Charter*" (at paragraphs 68 and 69).

## CONCLUSION

The decision in *Ali* was brief and presented orally. It may, as a result, be disappointing to those who saw it as an opportunity for the Supreme Court of Canada to revisit a landmark decision that is over two decades old, particularly as to how it impacts women and minority groups. It is illustrative of a worrisome trend of the Supreme Court of Canada routinely rendering brief oral decisions in cases of significance.[101]

What is clear from *Golden* and *Ali* is that the Supreme Court of Canada has created a broad police power to bodily search suspects. As some of the cases reviewed illustrate, this power to search though not unlimited, appears to require minimal evidence in support of strip searching or taking penile swabs from suspects.[102] The use by the Supreme Court in *Ali* of the words "some evidence suggesting the possibility of concealment" of evidence, illustrates the low threshold that has been crated.[103]

Finally, the trial decisions reviewed raise serious concerns that Canadian police are not even complying with the minimal requirements described.



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101. In 2020, the Supreme Court of Canada rendered oral judgments in a number of potentially significant cases. See, for instance, R. v. Reilly, [2020] S.C.C. 27 (Can.)(which involved the constitutionality of holding by the police of individuals charged with an offence in contravention of Canada's bail laws); R. v. Li, [2020] S.C.C. 12 (Can.) (dealing with the defence of entrapment); R. v. Kishayinew, [2020] S.C.C. 34 (Can.) (dealing with the issue of the capacity of an intoxicated complainant to consent to sexual activity); R. v. Doonanco, [2020] S.C.C. 2 (Can.)(which considered the requirement of the Crown to disclose expert medical reports to the accused); R. v. Slatter, [2020] S.C.C. 36, (Can.), (which considered how trial judges are to assess the evidence given by individuals who have an intellectual or developmental disability); and R. v. Delmas, [2020] S.C.C. 39 (Can.)(in which the issues of stereotypical reasoning and the consequences of failing to conduct a *voir dire* before considering a complainant's prior sexual activity with the accused were raised).

    In 2021, this trend continued. See, for instance, R. v. Lai, [2021] S.C.C. 52 (Can.) (dealing with the right to be tried within a reasonable period of time as protected by section 11(b) of the *Charter*); R. v. Reilly, [2021] S.C.C. 38 (Can.) (dealing with the admissibility of evidence unconstitutionally obtained); R. v. Dingwall, [2021] S.C.C. 35 (Can.) (dealing with the admissibility of circumstantial evidence); R v. Waterman, [2021] S.C.C. 5 (Can.)(dealing with the requirement of expert evidence in sexual assault trials); R. v. Strathdee, [2021] S.C.C. 40 (Can.) (dealing with liability for group assaults leading to a death); and R. v. Morrow, [2021] S.C.C. 21 (Can.)(dealing with how the offence of attempting to obstruct the course of justice should be defined).
102. As an example, in R. v. Johal, 2015 BCCA 246 (Can.), the British Columbia Court of Appeal concluded that the following generic circumstances were sufficient for a strip search to be conducted (at paragraph 31):

    Johal was operating a dial-a-dope operation and he sold crack cocaine to an undercover officer, yet there were no other drugs found in his vehicle. In the experience of the arresting officers, traffickers sometimes conceal drugs in their underpants or rectum. The facts were quite similar in Golden and the Court held that there were reasonable and probable grounds for a strip search at the police station
103. In R. v. Saeed*: Bodily Integrity and the Power to Search Incident to Arrest*, 81-1 SASKATCHEWAN L. REV. 87 (2018), Meagan Ward argues that reasoning of the Court in *Saeed* "has the potential to broaden the scope of the power to search incident to arrest by allowing for searches, no matter how intrusive":

    While the power to search incident to arrest is an exception to the warrant requirement, it is an extraordinary power. Accordingly, the courts must carefully delineate and limit its scope. As stated by Cory J. in *Stillman*, "[n]o matter what may be the pressing temptations to obtain evidence from a person the police believe to be guilty of a terrible crime, and no matter what the past frustrations to their investigations, the police authority to search as an incident to arrest should not be exceeded." While sexual assaults are unquestionably serious crimes, the reasoning of the majority in *Saeed* has the potential to broaden the scope of the power to search incident to arrest by allowing for searches, no matter how intrusive, where individuals do not have a privacy interest in whatever is sought by the search. In addition, the majority's reasoning suggests that law enforcement officers have the ability to search for anything, regardless of the privacy interest implicated, so long as they do not intend to tender as evidence what they recover from the search. It is for this reason that courts must be careful in interpreting and applying Saeed, and more broadly, the search incident to arrest doctrine.

## *Court Review* Author Submission Guidelines

*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 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.

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**Essays**: Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

**Book Reviews**: Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

**Pre-commitment**: For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

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# The Resource Page

## THE ASSOCIATION OF FAMILY AND CONCILIATION COURTS

The Association of Family and Conciliation Courts is an excellent resource for judicial officers in both the domestic relations and juvenile areas. The AFCC had its beginnings in California in 1963 and since that time it has grown to be an interdisciplinary, international association of professionals dedicated to improving the lives of children and families through the resolution of family conflict.

Per the AFCC website: *The AFCC promotes a collaborative approach to serving the needs of children among those who work in and with family law systems, encouraging education, research, and innovation and identifying best practices. AFCC members have led the way in developing new processes and programs to meet the needs of families in conflict. Members of the association have conducted research and written books that served as the impetus for reform in family courts and public policy arenas throughout the world. Indeed, the changes in family court systems and within AFCC over the years have been remarkable. What has not changed, however, are the ideas that inspired AFCC's founders: that an organization facilitating an interdisciplinary exchange of ideas and information can serve as an agent of change and a catalyst for the needs of families, and especially children, in conflict.*

The AFFC publishes a quarterly journal, *The Family Court Review*, which provides scholarly articles on a variety of topics touching on families and children in the court system. The AFCC also conducts an annual conference that attracts respected professionals from all relevant disciplines to discuss the important topics in the field.

Information on membership, the *Family Court Review,* and the annual conference can be found at: https://afccnet.org/

## BOOKS, JUSTICE, AND DISCRIMINATION

Kristin Henning (Blume Professor of Law and Director of the Juvenile Justice Clinic and Initiative at Georgetown Law) has recently published, *The Rage of Innocence: How American Criminalizes Black Youth* (Pantheon, 2021). For more than 25 years, Henning has been an attorney representing youth accused of committing crimes in the Washington, D.C. area. This book brings forth the stories of some of those youth and the ways in which the criminal justice system is discriminatory toward Black children. Henning highlights how Black children have been systematically criminalized and marginalized in ways that white children have not been. Publisher's website: https://www.penguinrandomhouse.com/books/623467/the-rage-of-innocence-by-kristin-henning/

## JUVENILES AND MENTAL HEALTH DIVERSIONS

The National Judicial Task Force to Examine Courts' Response to Mental Illness was established by the Conference of Chief Justices and the Conference of State Court Administrators in 2020. The Task Force's objective is to "assist state courts in their efforts to more effectively respond to the needs of court-involved individuals with serious mental illness." In the spring of 2022, the Task Force released its *Juvenile Justice Mental Health Diversion Guidelines and Principles.* Over half of the youth involved in the juvenile justice system had had more than one traumatic experience such as family violence, emotional or physical abuse, or neglect. Nearly 90% have at least one such experience and such issues are prevalent in our juvenile justice systems. The *Guidelines* provide courts with practical guidance for constructing systems that help address these mental health needs and divert appropriate youth away from "deeper involvement with the justice system at multiple points of contact." The *Guidelines* help courts find paths to cross-system collaboration and advise on the appropriate use of standardized screenings and assessments. The report also provides an informative list of resources for a court ready to tackle this critical challenge. The *Guidelines* can be accessed at https://www.ncsc.org/__data/assets/pdf_file/0029/74495/Juvenile-Justice-Mental-Health-Diversion-Final.pdf

## JUDICIAL ETHICS

One of the great resources for new and experienced judges wanting to be sure they maintain the high ethical standards of our office is the Center for Judicial Ethics (CJE). The CJE is a clearinghouse for information about judicial ethics and discipline. As the CJE itself explains, it "provides research support for the conduct commissions that investigate complaints of judicial misconduct, publishes education material for judges, and tracks opinions issued by ethics advisory committees." The quarterly *Judicial Conduct Reporter* is a must-read for any judge looking to learn lessons from the missteps of others. Few will read it without having some decisions of their own come to mind, whether with comfort or discomfort. CJE's weekly blog called Judicial Ethics and Discipline is also an excellent source for brushing up on the daily ethical challenges we face as judges. Both are overseen by *Court Review*'s own judicial ethics columnist, Cynthia Gray. You can sign up for either service, find weekly ethics tips, and find more information at https://www.ncsc.org/topics/judicial-officers/ethics/center-for-judicial-ethics

## ONLINE WORKPLACE HARASSMENT/DISCRIMINATION TRAINING FOR JUDGES

The CJE provides another handy resource if you are involved in judicial discipline or have an administrative role in your court—an online training course, Judicial Branch Workplace Sexual Harassment & Discrimination Training. This training provides helpful insights to judicial officers about their unique roles and responsibilities in the workplace, helping to bring a perspective that is too often overlooked in judicial training and that can lead to serious problems for the individual judge as well as the court system as a whole. This can be a very useful tool for dealing with situations, hopefully before they develop, in your courthouse. It can be accessed at https://www.ncsc.org/topics/judicial-officers/ethics/center-for-judicial-ethics/judicial-branch-workplace-sexual-harassment-and-discrimination-training