For The Defense™

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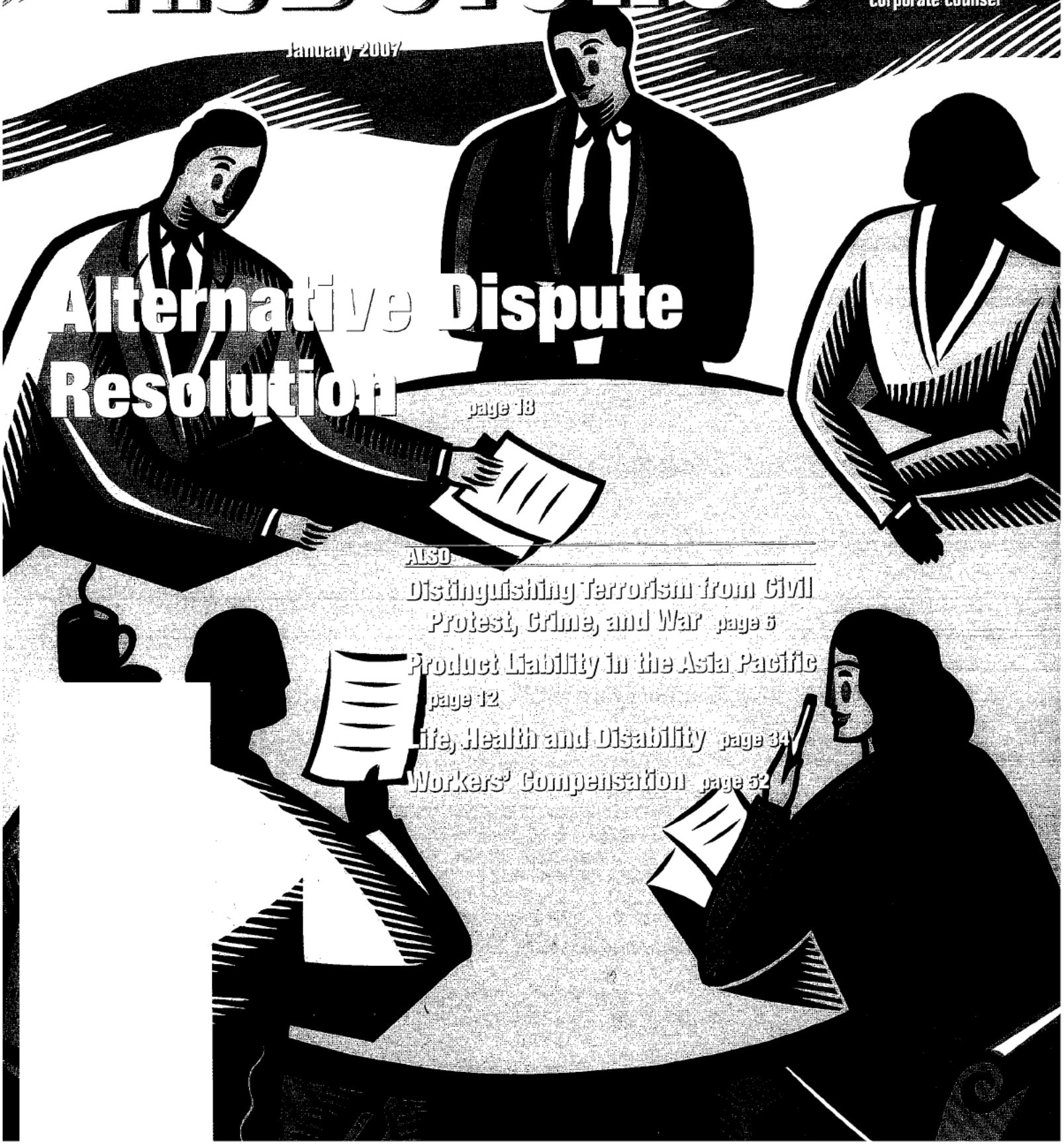

Alternative Dispute Resolution

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Also

Take Care Not to Rub the Court the Wrong Way

"You Watch Your Phraseology!"

By Robert M. Frey

The Mayor of River City in Meredith Willson's *The Music Man* had definite ideas about what sort of language was—and wasn't—acceptable. "You watch your phraseology!" he was wont to scold.

In a certain sense the readers of *For The Defense* have no need for the Mayor's advice. None, for example, are likely to earn a public reprimand and a thousand dollar fine (and a lasting reputation with the court) by describing a contributor to a judge's campaign as "the highest bidder." *See Welsh v. Mounger*, 912 So. 2d 823, 824 (Miss. 2005). Nor are any likely to describe the trial court's reasoning as "apelike," and assert that "shallower logic could not blow from an empty skull." *Waterman v. Wood*, 185 Iowa 897, 171 N.W. 171, 175 (1919). *See also Hoefferle Truck Sales, Inc. v. Divco-Wayne Corp.*, 523 F.2d 543, 553 (7th Cir. 1975) (brief accused trial judge of "kindergarten mental gymnastics"); *White v. Sloss*, 245 Ind. 289, 292, 198 N.E.2d 219, 220 (1964) (brief described trial judge as having "a bent and warped mind"); *Strowbridge v. City of Chiloquin*, 130 Or. 444, 277 P. 722, 723 (1929) (brief asserted that trial judge erred "either carelessly or of premeditated prejudice").

But what of the following? Had this come from your pen in the zeal of a first draft, might it have remained in the as-filed brief?

> The district court's order, albeit prolix, establishes that the court failed to engage in the 'rigorous analysis' mandated by *Falcon* and Rule 23 by glossing over the widely divergent claims of the named plaintiffs and 1.5 million class members, altering the substantive law, and trampling on Wal-Mart's due process rights instead of recognizing the impossibility and unfairness of litigating these claims in a single, massive class action.

As several fine blogs—Crime & Federalism, Appellate Law & Practice, and Minor Wisdom—have reported in detail, one Ninth Circuit judge found this passage offensive, so much so that he brought it up at oral argument:

> Let me ask you this question.... [Your brief has] language in there that's a little arrogant, that's a little offensive toward the District Judge, talking about the Judge being prolix and wordy and long winded and trampling on Wal-Mart's due process rights, ignoring unrebutted evidence, twisting substantive justice, making unfounded assumptions and working gross and manifest injustice. Do you regard this as an effective way to present written advocacy?

Not the kind of question one wants to receive from the bench.

Take another example. What about writing that your client ought to be allowed to intervene in a case because it is an organization established to:

> aid and strengthen the administration of justice by inculcating and encouraging a fearless respect for and appreciation of plain truth and simple honesty; to endeavor to make hatred of all common law fraud a principle of adjudication of controversies in the civil courts; to promote and support endeavors to bring about practical and salutary application of the cliché, "Ours is a government of laws and not of men"; and to devise means for opening the channels of communication between the courts and the public to enable the people to perceive that justice is being done.

Would this have escaped your blue pencil? The Supreme Court of Tennessee gave this paragraph as example number one of "material we find to be scandalous and impertinent." *State ex rel. Inman v. Brock*, 622 S.W.2d 36, 47 (Tenn. 1981).

One more example:

> The vast majority of opinions issued by this August Body exemplify the virtues of scholarship, intellectual honesty, neutrality, balance, justice and fair play. Win or lose the facts and law of the case are fairly stated. Unlike those opinions, the opinion in this case does not meet these standards. The opinion does a disservice to the Court and the parties and almost certainly will cause confusion and uncertainty among the bench and bar.

The court to whom this motion for rehearing was addressed did not receive it well. *See City of Jackson v. Estate of Stewart*, 939 So. 2d 758, 760 (Miss. 2005).

In all of these cases there is reason to believe that other portions of the brief did not please, and that had these paragraphs stood alone they would not have drawn com-

Phraseology, continued on page 78

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out and made personal contact with him or her during the weeks before you make that first offer or demand, even if it's for a relatively trivial matter such as confirming a future court date or collaborating on selecting a mediator. Having had this repeated contact on neutral ground, both you and the other party will be at ease, leading the way to a more productive and profitable negotiation.

Going Once, Going Twice, Gone!

Picture yourself at an auction and imagine having your eye on an 18th century desk during the preview. The auction starts and the desk is brought onto the floor; bidding begins, but you don't want to appear anxious, so you don't start bidding right away. As other bids come in, you start raising your number, your adrenaline starts pumping and your heart beats faster as the thought of losing *your* desk creeps into your head. You can't let that happen, so you continue to bid until you hear, "Going once, twice ... Sold!" You can finally rest knowing that you're going home with the desk you saw only an hour earlier and priced in your own mind at $800 less than you just agreed to pay. Almost everyone is vulnerable to this phenomenon in some form, and if you think you haven't been previously affected by it, think again. The reality is that opportunities seem more valuable to us when they are less available. The thought of losing something will motivate an individual much more than the thought of gaining something of equal value, which provides you with an opportunity to harness the threat of potential loss in a negotiation.

Imagine a situation where your client has run out of patience with the litigation and you have a trial date quickly looming ahead, yet your adversary refuses to engage in any genuine settlement discussions with you. One means of addressing this situation is to make an offer or demand that is available only for a limited time period before it is revoked. The party on the receiving end of this demand or offer is likely to perceive the figure to be better than he or she normally would because of its limited availability. This should not be surprising knowing that individuals generally perceive things that are difficult to get as typically better than those that are easy to get. Furthermore, by increasing the scarcity of the offer or demand in this fashion, the recipient will react by wanting and trying to decide and respond to the figure within the parameters you've set. They understand that to do otherwise might lead to a loss, and as we've explored already, the threat of this loss alone can and often will make people act when they otherwise might not. Caution is recommended in that this practice should be used only sparingly and when utilized must be carried out to its fullest. If you set repeated time limitations within the same negotiation, it will clearly not carry the same weight and effect as the first time you impose this constraint. Similarly, you must act consistently with your ultimatum by revoking the offer or demand when you said you will, otherwise, you will not only lose ground within the negotiation, but more importantly, lose credibility in this and future negotiations with your adversary.

Ready or Not, Here I Come

The next time you find yourself thinking, "I'm finished asking nicely," reflect on some of these ways to exert influence to persuade the other side to reconsider your request:

1) Allow for a series of small reciprocal concessions and counteroffers that will result in the final dollar figure that is being sought; 2) Consider the stream of Costco food samples or the plight of the Krishnas and think of a "flower" that you can give today that will lead to a reciprocated *gift* tomorrow; 3) Create the opportunity for another to take a position in line with yours, no matter how small, and then reap the benefits when he or she feels the need to act consistently with that position even after you have increased the stakes to your advantage; 4) Create ways for people to connect with you and your client by finding similarities and familiarity throughout the litigation process, thereby increasing your appeal to the other side; and 5) Finally, bear in mind that losses weigh heavier than gains psychologically and by creating a sense of scarcity when it comes to the availability of an offer or demand, you can make others act and react when they otherwise might not. FD

Phraseology, from page 74
ment. The important fact for the advocate, though, is that they rubbed the court the wrong way. Had they stood alone, and gone unremarked, they still would have rubbed the court the wrong way.

There are relatively few cases on the subject, and few of these are recent, but the real hot button seems to be unsupported accusations of judicial bias or unprofessionalism.

This is easy to avoid. There is no need to attribute to intent what may be ascribed to honest mistake. No one expects a trial judge to be better at his or her job than, say, a U.S. Air Force Thunderbird pilot is at his or hers. If a Thunderbird pilot can create a $20 million fireball (and barely escape with his life) simply by forgetting the airfield's altitude—which is exactly what happened at an airshow at Mountain Home, Idaho, in 2003—then a trial judge can honestly misapprehend the rule in *Smith v. Jones*. No one expects an appellate court to perform better than a team of rocket scientists. If a NASA team can burn up the Mars Climate Orbiter because some team members were using the metric system and others were using English units—which is exactly what happened in September of 1999—then an appellate court can overlook an exhibit. As for the witness who swore that the meeting was on the 19th, when the documents clearly show otherwise, think how many times we have used the expression "I could have sworn...." "I could have sworn that I left my glasses on the mantle—until I found them in my coat pocket." If we can be sincerely mistaken, the witness can be also.

The Appellate Law & Practice blog's comment on the Wal-Mart case was simple. "Okay, associates, repeat after me: The District Court *ERRED*. The judge *misunderstood*. The judge *misconstrued*. Or even 'the judge was *misled*.'"

That's advice we all can use. FD