perspectives

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Message from the Chair

by Anna W. Howard

Dear Younger Lawyer Division Members:

As Chair of the Younger Lawyers Division, it is my honor to introduce you to this year's first YLD *Perspectives* e-newsletter. This is the first of three such publications during my term.

The YLD represents the newest additions to the federal bar, composed of members who are 40 years old or younger or have been admitted to practice for less than 10 years. It is governed by up to 20 Board of Directors, composed of 5 officers and up to 15 directors from throughout the federal circuits.

This year is not what anyone would have expected, and it is certainly not what I thought my year as Chair would look like. But the YLD, like its members, is resilient. Notwithstanding the challenges that a global pandemic presents us, the YLD is committed to continuing its award-winning programming. Take, for example, this e-newsletter. Publications Committee co-Chairs Ashley Gallagher and Dan Weigel have (alongside their able committee and the articles' authors) put together a timely publication that addresses today's challenges—*force majeure* clauses in the time of COVID-19, a guide to take remote depositions, and many more. Special thanks, too, to former Publications Committee Chair Erin McAdams Franzblau for her assistance in helping our new Co-Chairs with their first publication, and new Director of Sections and Divisions Mike McMcarthy for helping us get the e-newsletter across the finish line.

If I can encourage you to do one thing, it's to get involved. The YLD is now busy planning the Thurgood Marshall Memorial Moot Court Competition and Summer Law Clerk Program, to name a few. We need each of you to help us make these events happen, and with so many programs and events moving to a virtual format, it's more convenient than ever. For more information on how to get involved, please become a YLD member, join a committee by contacting the committee chair, and keep up to date on our activities by continuing to read the YLD *Perspectives*. For the most up-to-date information, like us on Facebook, join us on LinkedIn, and follow us on Twitter, too.

I look forward to working with you this year!

Anna W. Howard
FY21 Younger Lawyers Division Chair

Message from the Editors

by Ashley Gallagher and Dan Weigel

Dear Younger Lawyers Division Members:

Happy New Year! And welcome to the Winter 2021 edition of *Perspectives*, the Federal Bar Association Younger Lawyers Division's newsletter. Our names are Ashley Gallagher and Dan Weigel, and it is our pleasure to serve as Co-Chairs of the *Perspectives* Publications Committee.

With this being our inaugural year as Co-Chairs, we have a lot to learn and are excited to get to know our membership through the articles you submit and your feedback. For this edition, we were fortunate to have received a diverse collection of articles authored by attorneys from across the United States. We look forward to working with more of you and are excited to see what 2021 has in store for the Younger Lawyers Division and the Federal Bar Association at large.

Thank you to our authors, the 2020-2021 Publications Committee, Younger Lawyers Division Chair Anna W. Howard, Director of Sections and Divisions Mike McCarthy, and former editor and Chair of the *Perspectives* Publications Committee, Erin McAdams Franzblau, who offered invaluable experience and guidance throughout the publication process.

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Dan Weigel is a Litigation Attorney at Taylor English Duma, LLP in Atlanta, Georgia, with a practice focusing on Intellectual Property and Commercial Litigation matters. He has served on the board of the Federal Bar Association Younger Lawyers Division since 2020 and is an active member of the Atlanta Division of the Federal Bar Association.

Goodbye 2020, Hello 2021: The Unanticipated Challenges and Lessons Learned While Starting a Career During a Pandemic

by Gaela Normile, Esq.

After receiving the coveted law school admissions letter, I heard the following phrase for the first time: "First year they scare you to death, second year they work you to death, and third year they bore you to death." Well, I can attest that my third year of law school was anything but boring. After all, I completed my last semester and graduated during a worldwide pandemic.

I was on spring break in March 2020 when COVID-19 shut down the nation. I chose to stay on campus that week to finalize the law review symposium I had been planning for an entire year. The long-awaited event was scheduled to finally take place the following week. Unsurprisingly, I was disappointed when the school ultimately cancelled the symposium due to the outbreak. At the time, the severity of the virus was not yet appreciated, and it was difficult to comprehend how not only my event, but so many others across the nation, would be shut down overnight.

A few weeks later, friends from law school began receiving calls from their future employers rescinding offers or substantially delaying start dates due to COVID-19. Around this same time, state bar associations began informing bar applicants that the already dreaded and feared bar exam was delayed for weeks, months, or, in some cases, indefinitely. I was one of the lucky ones that was able to take the Virginia bar exam on its originally scheduled date and start my legal career on time.

When I started working full-time, the onboarding process was quick, easy, and conducted entirely through video conferencing. At the end of my first full week, my firm organized a virtual happy hour. I was fortunate enough to have worked for the same firm in-person the previous summer and enjoyed seeing so many familiar faces. In fact, the virtual happy hour was the first time in months that I was able to converse with so many people. Although the event itself was relatively simple, I appreciated the firm's effort to make me feel like a welcomed colleague during such an uncertain time.

With the excitement of finally becoming an attorney came a number of unexpected challenges. One such challenge was learning how to effectively communicate with partners, other associates, and staff while working remotely. I soon came to realize that the first-year associate learning curve was best experienced in-person. I initially found it difficult to reach out by email or phone to let a partner know that I was unsure of an assignment or needed clarification. For some reason, working in a completely virtual realm created more anxiety and I found myself taking more time to ensure that my short emails were worded perfectly and grammatically correct. On the contrary, working in-person as a summer associate, I never felt hesitant to ask questions or seek clarification. I could easily and confidently walk to a partner's office, knock on the door, ask my question, and return to my office with an answer.

I quickly learned that emailing or calling a partner is not as formal as I initially thought. As a first-year attorney, partners and associates with more experience do not expect first-year attorneys to know everything. In fact, there are times when a partner is expecting the associate to ask for clarification or briefly summarize the assignment in order to ensure that the associate understands the task at hand. Other times, partners assign projects and forget that the associate is a new attorney who may not be familiar with the courts or internal administrative functions. In these instances, I have learned that the best strategy is to inform the partner as early as possible so he or she can provide clear, in-depth instructions. Contrary to suggestions in television or other media, most partners want new associates to learn, grow, and succeed. I have found that this can only be made possible through direct communication and by asking for clarification when needed.

Relatedly, this lack of face time with partners and other associates has made it difficult to find new projects or assignments. Finding assignments pre-COVID was easier because a partner would walk by my office and be visually reminded of my availability. When the entire workplace is virtual, it is easy to forget that there is a new associate at the firm.

To overcome this challenge, I now make an active effort to reach out to partners and seek assignments when work is slow. I keep a running list of partners I have reached out to, when I reached out to them, whether they assigned a project in response to my solicitation, and, if so, the due date of that project. I move through the list each week to make sure that I am working in varied practice areas under various partners. Through this process, I have gained invaluable advice that I likely would not have gained, had I not stepped outside my comfort zone and solicited assignments.

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Through my experience of working remotely, I have gained confidence in my work product, developed and maintained professional relationships through a screen, and learned to step outside my comfort zone to meet my goals. Although 2020 was quite the year to graduate law school and start a career, I remain hopeful that the skills I have developed thus far will improve as I continue to work virtually in 2021.

Gaela is an Associate at Vandeventer Black LLP where she is a member of the firm's Litigation practice group. She joined the firm in 2020 after completing the firm's summer associate program in 2019.

Gaela received her J.D. (magna cum laude) from Penn State Law and earned her B.A. from the College of William & Mary.

Force Majeure Litigation: Not Just A Concept You Learned As A First Year Law Student

by Stephanie L. Denker and Christie R. McGuinness

In a somewhat distant past, we all sat in our contracts class and learned the basics of what makes a contract: offer, acceptance, and consideration. In that same class, we also learned about the defenses to a breach of contract action, such as: substantial performance, impracticability, and *force majeure*.

Most law students stored this information until the bar examination, and then quickly forgot it based on the assumption that it was unlikely they would actually need this information in practice. However, in light of the COVID-19 pandemic, the likelihood of receiving the following message from a partner has increased dramatically: "A client of ours, who had to cancel a large conference due to a stay-at-home order, is being sued for breach of contract. I need you to look at the contract's *force majeure* provision and give your thoughts on whether it excuses performance. We are speaking with the client in a half hour. Thanks."

This article attempts to address this legal issue question and pinpoint some of the issues that must be tackled in order to adequately analyze a contract's *force majeure* clause in the wake of COVID-19.

A. *Force Majeure*

Force majeure (which translates to "superior force") is a contractual concept that is invoked by a party seeking to excuse performance under a particular contract by asserting that an unforeseen, unpredictable event (such as an "Act of God") prevented performance. *Force majeure* clauses tend to include a list of specific events followed by a "catch-all." In New York and many other states, the catch-all is read in connection with the *ejusdem generis* rule, meaning "words constituting general language of excuse are not to be given the most expansive meaning possible, but are held to apply only to the same general kind or class as those specifically mentioned."[1] Notably, although Delaware courts generally follow the rule of *ejusdem generis*, an unpublished Delaware decision focused on the word "whatsoever" contained within the catch-all phrase to broaden "fire, strikes, acts of God, or any other reason whatsoever beyond the control of [the party]" to include "delays."[2]

In addition to *force majeure*, many states recognize the common law doctrines of impossibility of performance, impracticability, and frustration of purpose to excuse performance in light of an unforeseen circumstance. Such doctrines may also need to be considered when addressing the issue of whether there is a defense to a potential breach of contract claim.

B. COVID-19 & Two Recent New York Cases

In response to COVID-19, governors across the United States issued stay-at-home and other executive orders, which, *inter alia*, required people to stay home except for essential matters, closed non-essential in-person business operations, and limited the amount of people that were permitted to attend a gathering. The ultimate effect of these orders was to cancel events, close retail operations, and modify manufacturing. While COVID-19 is not a natural disaster in the traditional sense, the effect has been the same. However, the question remains whether courts will classify COVID-19 as a *force majeure* event.

New York and other courts across the United States have seen an influx of lawsuits concerning whether contractual performance can be excused using a contract's *force majeure* clause or any of the related common-law doctrines such as impossibility of performance and frustration of purpose. Although the outcome of each case will be based on the specific circumstances and the language of the subject contract, two recent New York court decisions provide guidance on how courts may analyze a contract that has potentially been impacted by COVID-19.

For example, in *In re: Condado Plaza Acquisition LLC*, the debtors disputed the purported termination of an agreement to purchase a hotel property following the owner's inability to deliver an operating hotel in May 2020 due to the COVID-19 pandemic.[3] The purchase and sale agreement set forth circumstances under which the parties could extend the closing date and indicated that "time is of the essence." The debtors argued that their "receipt of an operating hotel was the very foundation of the contract, even though the [purchase and sale agreement] itself expressly disclaimed any obligation to maintain operations at the hotel," and "that the effects of the COVID-19 pandemic on the hotel's operations were unforeseeable, even though the entire [purchase and sale Agreement] was reaffirmed in mid-March 2020, after the pandemic had begun and after the first shutdown orders had been issued by the Governor of Puerto Rico."[4] The debtors also argued "that the pandemic reduced the value of the hotel and that the effect was unforeseeable."[5]

Instead of determining the viability of these arguments, the court stated that the debtors did not identify any "support for the proposition that frustration of purpose [or impossibility] arguments can be used to extend a Closing Date in the face of express time of the essence clauses. Either the purpose was completely frustrated as of the scheduled closing in May 2020, or it was not. If the purpose was not frustrated, then [the debtors were] obligated to close. If the purpose was frustrated, then [the debtors have] a defense to enforcement of the PSA and an argument as to the recovery of the escrowed deposit. But the Closing Date deadline still applied. Either way the contract came to an end because the Closing did not occur."[6] In short, the Bankruptcy Court for the Southern District of New York found that the doctrines of frustration of purposes and impossibility did not extend the time-of-the-essence closing date in the purchase and sale agreement.

In *Backal Hospitality Group LLC v. 627 West 42nd Retail LLC*,[7] the Court declined to issue a preliminary injunction in a landlord-tenant action where the tenant (a catering hall) argued, among other things, that it was impossible for it to perform under the lease because Governor Cuomo issued an executive order prohibiting large gatherings. Doc. 20 (Aug. 3, 2020). The Court found the lease contained a provision that "contemplated a scenario in which performance of the lease terms by plaintiffs might become prohibited by a governmental order, and agreed that, if such a situation arose, they would reach an agreement regarding the collection of rent at the conclusion of the governmental restriction." Specifically, the lease provided as follows:

> If the fixed rent or any additional rent shall be or become uncollectible by virtue of any law, governmental order or regulation, or direction of any public officer or body, Tenant shall enter into such agreement or agreements and take such other action (without additional expense to Tenant) as Landlord may request, as may be legally permissible, to permit Landlord to collect the maximum Fixed Rent and Additional Rent which may, from time to time during the continuance of such legal rent restriction be legally permissible, but not in excess of the amounts of fixed rent or additional rent payable under this Lease.[8]

The Court noted that the plaintiffs had not complied with this provision and instead attempted to terminate the lease, and therefore, performance was not excused.

C. Take-Away

Before jumping on that call with the client, consider the following three questions:

1. Does your client's contract have a *force majeure* provision and does the current situation fall within the enumerated events?
2. Does the state in which your client conducts business recognize any of the common law doctrines that excuse contractual performance?
3. Are there conditions precedent included within the *force majeure* clause that prevent it from being invoked?

Having answers to these initial questions will provide some understanding as to the options available to the client. Keep in mind that each jurisdiction applies these concepts differently, and therefore, it is important to research the state-specific case law.

Also, remember to be creative and think outside the box. Although a *force majeure* clause may not include terms such as pandemic, epidemic,

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or quarantine, it may include events such as government orders, government action, or labor shortages. These terms may bolster the argument that the actions taken to curtail the spread of COVID-19 fall within the contract's *force majeure* clause.

Stephanie Denker

Christie McGuiness

"Mrs. Denker and Ms. McGuinness are associates in Saul Ewing Arnstein's Litigation Department. In addition, they are both members of the firm's Force Majeure Task Force."

Endnotes:

[1] *Team Mktg. USA Corp. v. Power Pact, LLC*, 41 A.D.3d 939, 942–943 (N.Y. App. Div. 3d Dep't 2007) (citation omitted); *see also Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, No. 82 CIV 2770 (RLC), 1984 WL 677, at *4 (S.D.N.Y. Aug. 2, 1984); *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 903 (N.Y. 1987) (finding that "the events listed in the force majeure clause . . . are different in kind and nature from [plaintiff's] inability to procure and maintain" insurance).

[2] *Stroud v. Forest Gate Dev. Corp.*, No. Civ. A. 20063-NC, 2004 WL 1087373, at *5 (Del. Ch. May 5, 2004).

[3] In *re: Condado Plaza Acquisition LLC*, No. 20-12094 (MEW), 620 B.R. 820 (Bankr. S.D.N.Y. 2020),

[4] *Id.* at 840.

[5] *Id.* at 841.

[6] *Id.* at 840-841.

[7] *Backal Hospitality Group LLC v. 627 West 42nd Retail LLC*, No. 154141/2020 (N.Y. Cnty. Sup. Ct.)

[8] *Id.* at *8.

[9] *Id.* at *8-9.

Top 10 Zoom Mediation Traps and How to Avoid Them

by Harold Oehler, Oehler Mediation

Zoom mediations have exploded in popularity due to social distancing and delayed trial dockets caused by Covid-19. Not only is Zoom easy to use, it is also a very convenient and inexpensive way to mediate with parties from remote locations. While the vast majority of Zoom mediations go off without a hitch, our early experiences have taught us many lessons about what **not** to do during a Zoom mediation. Here are the most significant Zoom mediation traps and how to avoid them.

1. Inadvertent Disclosures

You and your client log into a mediation from different locations. The mediator has not yet joined. Your client mentions confidential information not realizing the other side's counsel is listening but hasn't activated his camera. Inadvertent disclosures prior to the mediation may be prevented by confirming that the mediator will enable Zoom's "Waiting Room" feature and disable the "Join Before Host" setting. This will prevent participants from joining the mediation until they are allowed entry by the mediator. Clients should be advised before the mediation not to discuss the case on Zoom until counsel and client are assigned to a caucus room and the mediator confirms the rooms have been correctly assigned. If the client would like to discuss anything with counsel during the Zoom mediation, this should be done via cell phone or text with Zoom audio and video muted.

2. Unauthorized Recording

Participants may attempt to record a portion of the mediation on the Zoom platform, which has a recording function. To avoid this problem, the mediator should disable the recording function and obtain the commitment of the participants not to record any portion of the mediation on other devices to preserve confidentiality. If you have any concerns or uncertainty about this, you should confirm with the opposing party (preferably, in writing) that he or she does not intend to record the mediation.

3. Surprise Guests

While the parties and counsel may have agreed to confidentiality, it is impossible to detect if a non-party is listening to the mediation off camera. To help prevent a potential breach of confidentiality, you should remind your client that courts issue significant sanctions for violating the confidentiality of a mediation.

It is also important to secure a location that will minimize the potential for interruption by children, employees, or pets. Ahead of the mediation, you should confirm that your client has such a location available.

Lastly, be wary of "Zoom Bombers." A "Zoom Bomber" is someone who invades a Zoom conference without authorization. There have been reports of a password generation program called "zWarDial" being used to guess Zoom meeting identification numbers. A mediator proficient in Zoom technology will routinely utilize meeting passwords and the Waiting Room feature to prevent unauthorized access to the mediation. Do not hesitate to call the mediator ahead of the scheduled mediation to ensure that such precautions are being taken.

4. Lost Connection

It is not uncommon to lose a participant during a Zoom mediation. The interruption may be short-lived or persistent due to loss of WIFI or other equipment issues. For instance, a participant's WIFI signal may be interrupted by a storm or other members of a household using WIFI bandwidth for other purposes. To prevent this, rely on a hardwired Ethernet cable connection, if possible. If you do use WIFI, advise your client attending from home to ask members of their household not to use the same WIFI network during the mediation as that can compromise bandwidth. Since no connection is totally reliable, emails and cell phone numbers should be exchanged with the mediator so that the mediation may continue if a connection is lost.

5. Dress for Success

Part of the magic of mediation is the cathartic effect that occurs when a party has the opportunity to vent his frustration to someone in authority on the opposing side who respectfully listens to his or her story. This can often satisfy a party's need to have their "day in court." This cathartic effect is severely undermined if the attorney or client representative on the other side dresses in a manner which demonstrates a lack of respect. It is important that counsel prepare the client to dress for the Zoom mediation as the client would in court. Judges have reprimanded lawyers for not dressing respectfully during virtual court proceedings, and the same level of decorum required in court should be observed during Zoom mediations. Dressing respectfully helps build trust and creates an atmosphere of mutual respect and cooperation.

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6. Unflattering Camera Angles and Other Distractions

Today's trial lawyer must feel that it is no longer enough to be Clarence Darrow, he or she must also be Steven Spielberg. It is challenging to establish rapport during a Zoom mediation, but it is even more difficult if counsel or client present themselves in a distracting fashion. The two most common traps that impede your visual presentation on Zoom are poor lighting and an unflattering camera angle. Both are easily remedied. Position yourself and your client so that your light is projected onto your face. Strong light coming from behind you will produce a silhouetted appearance reminiscent of Deep Throat. Light from a window or an inexpensive "ring light" in front of you will provide much better lighting than an overhead light but position the ring light to minimize light reflecting off of your glasses.

The best camera angle is level to your eyes. The camera should be placed close enough to your face so that your head fills the screen with just a little head room, much like Wolf Blitzer. If an external camera is used, avoid the common traps of placing the camera below your face, which makes you appear to be peering into a well, or placing the camera high above your head, which creates the look and feel of a surveillance camera. Finally, make sure that you or your client are not seated in front of a messy, cluttered, or otherwise distracting background. A plain or tastefully decorated wall can be preferable to a Zoom background, which can make your features appear to fade in and out.

7. Audio Issues

Carefully choose a quiet location free of interruptions and background noise for your Zoom call. If an external mike is used, opt for a stand-alone microphone or lavalier mike over a headset which can be visually distracting. Ensure that there will be no background noise during the mediation.

8. Lack of Familiarity with Zoom Technology

Most clients, and many attorneys, are not familiar with Zoom technology. Attorneys should confirm that clients, adjusters and other attendees are equipped with the equipment to effectively participate. This includes holding a dry run if the client will appear from a separate location. A mediator comfortable with Zoom will be happy to have a pre-mediation call with you and your client on Zoom to discuss the issues and ensure that you and your client are comfortable and know exactly what to expect during the mediation.

9. Document Sharing

If you intend to share documents, confirm with the mediator that the "Screen Share" feature will be enabled. Assemble your documents in advance and save them in PDF format in a separate folder for the mediation. Practice displaying your documents via "Screen Share" in advance. Finally, turn off all notifications on your computer so privileged information does not pop up during your presentation.

10. Execution of the Settlement Agreement

Once an agreement in principle is reached, Zoom mediations present additional challenges for drafting and signing the settlement agreements. To expedite preparation of the final settlement agreement, counsel should prepare a draft settlement agreement prior to the mediation which identifies the anticipated material terms. This draft agreement can be filled in and emailed to the parties once a verbal agreement is reached. The documents can be executed without charge on Docusign's platform at https://www.docusign.com/esignature/sign-documents-free/

Taking these steps prior to your Zoom mediation will result in an outstanding video presentation that will maximize your client's chances for a successful mediation.

Harold Oehler is a full-time, certified circuit civil mediator with over 30 years of experience representing clients in employment, personal injury, product liability, insurance, commercial and consumer claims. Harold is Chair of the Mediation and Arbitration Section of the Hillsborough County Bar Association. For more information, visit www.oehlermediation.com

These 3 Clickbait Heading Insights Could Change Your Legal Writing Forever

by Kyle R. Kroll

Did I get your attention with that title? Are you curious to read more? Sensational or "clickbait" headlines have that effect: they draw interest and prompt a reader to fill the "curiosity gap" left by the headline, sometimes using colorful language to heighten the intrigue.[1]

Instilling the desire to read more is one of the most elusive challenges in legal writing. So that made me wonder: do clickbait headings have a place in legal writing—and, if so, how? Can legal writers learn anything from the success of clickbait headlines in online journalism? My research revealed useful insights applicable to legal writers of all stripes.

This is why clickbait headings have some of the qualities of strong headings in legal writing, but also serious potential downsides.

The key strength of a clickbait heading is that it catches attention and generates interest. An enticing headline leaves out just enough detail to motivate the reader to inquire further. Who could resist this standard clickbait fare:

If You're Serious About Blogging to Get New Business, Read Me![2]

Can You Solve This Ancient Riddle? 90% of People Gave the Wrong Answer.

This Law Student Skipped the Reading, and You Won't Believe What Happened!

Judges Won't Be Able to Resist Your Arguments if You Use This Simple Trick.

Do Pineapples Make Great iPhone Cases?[3]

A person of even modest curiosity would want to channel their inner salesperson, test their wits, satisfy their sadism, learn a new tip, and get a chuckle. Strong headings in legal writing should also include interesting, particularized content that catches the inquisitive eye.

Clickbait headings also have the benefit of being declarative. In this way, they are similar to strong "point headings"[4] in legal writing. Point headings are full sentence propositions that advance a premise. Generally speaking, a point heading is better than a pointless heading. Compare:

Article II of the U.S. Constitution.
with
Article II Provides No Basis to Override the Florida Supreme Court's Decision.

What makes the second (point) heading better than the first is that it declares a proposition, which makes the brief in which it is written more focused, readable, interesting, and—ultimately—persuasive. A point heading not only orients a reader to the subject matter, but also makes known (and in the best examples *shows*) its relevance.

The below analysis of over 100 million headlines reveals that the most engaging clickbait headings contain the following phrases:

Starting Phrases	Linking Phrases	Ending Phrases
"X reasons why"	"will make you"	"the world."
"X things you"	"this is why"	"X years."
"This is what"	"can we guess"	"goes viral."
(to name the top three)[5]		

Notice the use of terms such as "this," which are ambiguous without context and thus arouse curiosity. Linking phrases establish a connection between the subject and the potential impact and importance to the reader—they explain why the reader should care about the subject of the writing. Effective headings in legal writing should accomplish that same goal.

The most effective clickbait headings are also short; they tend to have just 15-20 words.[6] Bryan Garner recommends 15-35 words for point headings.[7] Two lines of heading text is often advantageous in legal writing (usually around 20 words). Three is appropriate if the added detail transforms a conclusory heading into a plausible one. Four, and it might as well have its own heading.

But if clickbait headings are not detached from their sensationalist origins, they are ill-suited for legal writing. For example, clickbait headings often over promise and under deliver.[8] A lawyer who does that is unlikely to be writing briefs for very long, and will have nothing to promise, nor deliver. Because clickbait headings often seek to entice by intentionally omitting the lead, they frequently lack the necessary detail to make a cogent point.[9] That can frustrate a legal reader. For many judges, clickbait vernacular is also likely too informal and unprofessional for legal writing. Misleading a reader could even be unethical—not to mention illegal.

3 ways clickbait-inspired "curiosity headings" might work well in legal writing.

The topic of clickbait headings in legal writing has received little to no attention. Nevertheless, headings that blend the hallmarks of strong point headings, with the interest-piquing characteristics

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of clickbait headlines, could be effective in legal writing in specific situations, if drafted in an ethical and professional way. A suggested name for this kind of hybrid heading is the "curiosity heading."

In addition to simply piquing interest, a curiosity heading could be used to vary content, thereby better maintaining and bridging reader interest section-to-section:

I. The USPTO's determination whether a petition for inter partes review is time-barred under 35 U.S.C. 315(b) is not judicially reviewable.

A. The text, structure, and history of the AIA demonstrate that the USPTO's Section 315(b) determinations are not reviewable.

B. This Court's decision in *Cuozzo* confirms that the USPTO's Section 315(b) determinations are not reviewable.

to

B. This correct holding in Cuozzo is the reason the USPTO's Section 315(b) decisions have been properly unreviewable for 10 Years.

C. Precluding review of the USPTO's Section 315(b) determinations is consistent with the AIA's purposes.[10]

Turning the bland B subheading in the above list into a curiosity heading could generate intrigue and increase the likelihood of keeping the reader's interest.

Curiosity headings may also be appropriate to identify a specific list of key points, thereby heightening reader intrigue, impressing upon the reader the importance of the points, and improving memorability of each of those points. For example, in *Gubarev v. BuzzFeed, Inc.*[11]—which involved the kingpin of clickbait, online social news site BuzzFeed—counsel used a clickbait-style title for the plaintiff's opposition to BuzzFeed's motion to dismiss. It read: "Six Ways BuzzFeed Has Misled the Court (Number Two Will Amaze You) and a Picture of a Kitten."[12] This strategy was effective; the court denied BuzzFeed's motion.

In a similar fashion, explicitly identifying a list could make a memorable impression on a reader, particularly if the reader investigates with eager anticipation:

These 10 Key Witnesses Say They'll Never Trust the Defendant Ever Again, and Neither Should the Court.

Of the 5 Accused Products, Not a Single Consumer in 100 Guessed That These 4 Products Were Counterfeits.

The 3 Procedural Reasons the Court Can Dispense with this Case Without Ever Reaching the Merits, Which Are Nevertheless Also in Defendant's Favor.

A reader who encounters these curiosity headings is more likely to remember that there are 10 key witnesses, 4 highly-deceptive counterfeits, and 3 dispositive procedural deficiencies—in addition to remembering the facts pertaining to each of those items in their respective lists.

Finally, because curiosity headings naturally introduce spark and flair, they may be well suited as headings for thematic and policy-based arguments:

Six Ways BuzzFeed Has Misled the Court (Number Two Will Amaze You).[13]

This Unthinkable Tragedy Will Befall Healthcare Workers if the Court Overturns Its Long-standing Collective Bargaining Precedent.

These Astonishing Admissions About Nutrition Will Have Everyone Eating Organic Vegetables After The Conclusion of This Case.

Despite these potential opportunities, unconventional curiosity headings should be used sparingly. Know your audience's preferences before adding any to your brief. Always employ professional diction. Think about how each curiosity heading will fit into the entire structure of the brief—and its placement in the table of contents (if your brief includes one). And always make sure to deliver what is promised.

Endnotes:

[1] *100 Mil Headlines Analysis. Here's What We Learned, BuzzSumo* (June 26, 2017), https://buzzsumo.com/blog/most-shared-headlines-study/; *Curiosity Gap*, Wikipedia, https://en.wikipedia.org/wiki/Clickbait (last edited July 16, 2020).

[2] Laurence Bodine, *If You're Serious About Blogging to Get New Business, Read Me!* Wisconsin Lawyer, Vol. 92, No. 10 (Nov. 6, 2019) https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=92&Issue=10&ArticleID=27319.

[3] G. Clay Whittaker, *Do Pineapples Make Great iPhone Cases?*, Popular Science (June 7, 2016), https://www.popsci.com/do-pineapples-make-great-iphone-cases/.

[4] Bryan Garner, *Good Headings Show You've Thought out Your Arguments Well in Advance*, ABA J. (Sept. 1, 2015), http://www.abajournal.com.

[5] BuzzSumo, *supra*.

[6] *Id.*

[7] Garner, *supra*.

[8] *Tantaros v. Fox News Network, LLC*, No. 17-CV-2958 (GBD), 2018 WL 2731268, *4 n.8 (S.D.N.Y. May 18, 2018) (citation omitted).

[9] *See* Samuel Jones, *100 Times 'Stop Clickbait' Hilariously Summarized Clickbait Articles and Saved You a Click*, Bored Panda, https://www.boredpanda.com/funny-stop-clickbait-headings/ (last visited July 16, 2020); *see also* Amanda Alge Bales, *In 34 Words, a Powerful Writing Tip from Joseph Pulitzer #writinglegally*, LexTalk (July 29, 2015), https://www.lextalk.com/b/lextalk_blog/archive/2015/07/29/in-34-words-a-powerful-writing-tip-from-joseph-pulitzer-writinglegally.aspx.

[10]

[11] 253 F. Supp. 3d 1149, 1152 (S.D. Fla. 2017).

[12] Six Ways BuzzFeed Has Misled the Court (Number Two Will Amaze You) and a Picture of a Kitten, *Gubarev v. BuzzFeed, Inc.*, No. 0:17-CV-60426-UU (S.D. Fla. Mar. 27, 2017), 2017 WL 6040977.

[13] *Id.*

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Choose a Proceedings Supplementary Form Wisely: The Time Limitations Between State and Federal Court Can Vary by Sixteen Years

by Marisol Ruiz and Ben Fechter

Background

A federal and state court have recently split on the time limitations applied by Florida's proceedings supplementary statute,[1] which allows a judgment creditor to collect its judgment against a judgment debtor without having to file a separate action. Previously, in 2014, Florida's First District Court of Appeal ("First DCA") held that a proceedings supplementary may be initiated at any time during the twenty-year life of the judgment.[2] Five years later, the U.S. Bankruptcy Court for the Southern District of Florida determined that the proceedings supplementary statute applies the Uniform Fraudulent Transfer Act's ("UFTA") four-year statute of repose to bar claims for fraudulent transfers occurring four years prior to the claim.[3] As evidenced by the foregoing, and discussed in more detail below, practitioners should be cautious when determining the timeliness of bringing a proceedings supplementary claim once a judgment has been awarded.

Part I: *Biel Reo*

In 2014, the First DCA determined that a judgment holder may initiate proceedings supplementary at any point during the life of the judgment.[4] In that case, a corporate borrower defaulted on a loan in 2008.[5] Soon after, the borrower "transferred millions of dollars into newly established irrevocable family trusts," presumably to avoid having to pay back the lender.[6] After the lender obtained a $4.5 million judgment against the borrower in 2010, the judgment assignee ("Biel Reo") initiated proceedings supplementary against the trustees to satisfy the execution.[7] The trustees moved for summary judgment, arguing, in part, that Biel Reo's claims were barred by UFTA's statute of limitations.[8] The trial court granted summary judgment for the debtor, finding the claims time-barred, but the First DCA reversed.[9]

The appellate court noted that proceedings supplementary are a "speedy and direct means" for the holder of a judgment to execute without having to initiate "an entirely separate action for a creditor's bill."[10] Further, "[m]ost often,...the procedure is used to challenge the fraudulent transfer of property that would otherwise be subject to execution."[11] As such, Biel Reo initiated proceedings supplementary in 2012 in hopes of satisfying its $4.5 million judgment against large sums that the debtors had fraudulently transferred into irrevocable trusts.[12] Initially, the trial court found Biel Reo's claims time-barred because §56.29 "makes use of substantive provisions of [UFTA]."[13] Notably, UFTA has a four-year statute of limitations. Thus, the claim would have expired since the alleged transfers occurred in July of 2008 and the proceedings supplementary claim was brought in September of 2012.

In reversing the trial court's decision, the First DCA cited *Young v. McKenzie*, 46 So.2d 185 (Fla. 1950). Based on the Florida Supreme Court's holding, the First DCA concluded that "proceedings supplementary could be brought for the twenty-year life of the judgment."[14] Most critically, the First DCA stated:

> Although the Trustees are correct that the manner of proving and defending fraudulent transfer claims under §56.29 borrow substantively from UFTA, this fact does not require the adoption of the UFTA's much shorter limitations period.[15]

Thus, although the transfers in question had occurred more than four years prior to Biel Reo's proceedings supplementary claim, the claim was not barred because it was brought within the twenty-year life of the 2010 judgment.

Part II: *BAICO*

In 2019, the United States Bankruptcy Court for the Southern District of Florida determined that a judgment creditor's proceedings supplementary claim would have been barred by UFTA's four-year statute of repose.[16] In this case, an insurance company ("BAICO") obtained a $122 million judgment against an individual in 2017.[17] The individual, however, had allegedly transferred more than $800,000 to his wife ("Baldini") between 2013 and 2018 in an attempt to defraud BAICO.[18] BAICO initiated proceedings supplementary in 2019 against Baldini, seeking to void the transfers and execute the judgment.[19]

Baldini filed a motion to dismiss, arguing that certain transfers were made more than four years prior to BAICO's claim.[20] The court first acknowledged that any transfers made within four years of the proceedings supplementary were still fair game.[21] Transfers made more than four years prior, however, may have been subject to dismissal.[22] The court then noted how "BAICO's claims against Ms. Baldini directly track the provisions of [UFTA]."[23] While the court agreed with Baldini that UFTA is a statute of repose rather than a statute of limitations, the court determined that, regardless, "[i]n this case, it does not matter whether [UFTA] is a statute of repose or a statute of limitations as the outcome is the same."[24]

Importantly, the court then discussed how §56.29 was amended in both 2014 and 2016.[25] The amendment in 2014 explicitly incorporated UFTA "by providing that a court may entertain fraudulent transfer claims under [UFTA] and that "claims under [UFTA] are subject to the provisions of [UFTA] and applicable rules of civil procedure."[26] The 2016 amendment rearranged the statutory language and added an explicit requirement that claims brought under UFTA be brought by complaint.[27] Based on these amendments, the Bankruptcy Court concluded:

> [S]ubstantively and procedurally, a fraudulent transfer claim pursued under §56.29(9) is identical to one pursued independently under [UFTA]. Both causes of action are subject to the statute of repose in [UFTA].[28]

Hypothetically, if BAICO had brought its fraudulent transfer claim as an independent action under UFTA, the claim would have been time-barred under UFTA's four-year statute of repose.

At last, the court addressed *Biel Reo*. The first problem was that *Biel Reo* was issued in December 2014, but §56.29 had been amended only a few months prior.[29] Specifically, "[i]t is hard to understand how the 2014 amendments to section 56.29 were not considered in the *Biel Reo* ruling," and "[t]he explanation seems to be that the court in *Biel Reo* did not consider the claim before it to arise under [UFTA] but instead under the more limited provisions of [§56.29(3)]."[30] The court continued, "*Biel Reo* stands for the proposition that a claim pursued under current [proceedings supplementary] is not subject to any statute of repose provided for fraudulent transfer actions," and that "[s]uch a claim may be pursued at any time during the viability of the judgment, no matter how long ago the transfer occurred."[31] This was unacceptable to the Bankruptcy Court:

> It is difficult to imagine the Florida Legislature intended this outcome or that the Florida Supreme Court would today condone such an expansive application of the statute.[32]

Under *Biel Reo* then, Party A could fraudulently transfer assets in the year 2020, then, after obtaining a judgment against Party A in 2040, Party B would have another 20 years to initiate proceedings supplementary against Party A to avoid those fraudulent transfers. Theoretically, no time limit exists as to how far back a judgment creditor can seek to avoid fraudulent transfers, as long as that creditor acts within the life of the judgment. Ultimately, though, the Bankruptcy Court found it unnecessary to "accept or reject the rule of *Biel Reo* as it appears BAICO did not present a claim permitted under Fla. Stat. 56.29(3)(b)."[33]

Conclusion

One lesson from *Biel Reo/BAICO* is for federal practitioners to familiarize themselves with state procedures. Under Federal Rule of Civil Procedure 69, proceedings supplementary "must accord with the procedure of the state where the court is located."[34] A federal court may need briefing on its state's rules, such as time limitations. Additionally, "there is no specific federal statute of limitations on how long [a federal] judgment is effective. When no federal statute applies, state practices and procedures are utilized."[35] Thus, although *Biel Reo* indicates a generous twenty-year period with which to initiate the claim, other states have vastly different judgment expiration dates (Georgia: 7 years, D.C.: 3 years, and Delaware: no limit).

Ultimately, given the *BAICO* court's dicta, §56.29 may have a four-year statute of repose. To be safe, assume *BAICO* is correct that you have four years from the date of a fraudulent transfer to initiate proceedings supplementary if you have a judgment. If you do not have a judgment, consider an independent action under UFTA, also within four years of the transfer.

Endnotes:

[1] *See* Fla. Stat. §56.29.
[2] *Biel Reo, LLC v. Barefoot Cottages Development Co., LLC*, 156 So. 3d 506 (Fla. 1st DCA 2014).
[3] *In re British Am. Ins. Co. Ltd.*, 607 B.R. 755 (Bankr. S.D. Fla. 2019).
[4] *Biel Reo*, 156 So. 3d at 511.
[5] *Id.* at 507.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 508 (citing §56.29).
[11] *Id.* at 509.
[12] *Id.*
[13] *Id.* at 510.
[14] *Id.* (citing *Young*, 46 So.2d at 185-86).
[15] *Id.* at 511.
[16] *BAICO*, 607 B.R. at 755.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 756.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 758.
[26] *Id.* (*quoting* Fla. Stat. § 56.29(5)).

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[27] Fla. Stat. § 56.29(9).
[28] *BAICO*, 607 B.R. at 759.
[29] *Id.* at 760.
[30] *Id.*
[31] *Id.* at 760-61.
[32] *Id.* at 761.
[33] *Id.*
[34] *Gibson Guitar Corp. v. Tokai Gakki Co., Ltd.*, No. 3:04-CV-0449, 2019 WL 6332170, at *1 (M.D. Tenn. Feb. 27, 2019) (quoting Fed. R. Civ. P. 69(a)(1)).
[35] *Lillie v. Hunt (In re Hunt), 323 B.R. 665, 666–67 (Bankr.W.D.Tenn.2005)* (citing Fed. R. Bankr. 7069 (applying Fed. R. Civ. P. 69(a)(1) to adversary proceedings)).

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Guide to taking Remote Depositions

by Alex Vandiver

Even with vaccinations becoming available, remote depositions are likely a mainstay for the foreseeable future. Therefore, now is a good time to become proficient at taking remote depositions. Whether you are a lawyer new to remote depositions or new to depositions in general, the tips set forth below will help you improve your deposition skills and help you establish yourself as the choice associate at depositions.

1. PLAN EARLY.

Determine who will lead the deposition and who will handle the exhibits. A deposition is a two-person job. The best depositions flow naturally. To accomplish this, the leading attorney needs to listen to the deponent's answers and proceed accordingly—she should not be scrolling through file folders looking for exhibits. It is your job to ensure that the lead attorney does not get lost in the exhibits and lose her momentum as a result.

Decide how to conduct the deposition. Federal Rule of Civil Procedure 29 provides parties wide latitude on how to conduct a deposition but always be sure to check local rules and each judge's practices for additional guidance. Once you have familiarized yourself with the governing rules, then consider the following: Will the reporter be in the same room as the deponent? Will a videographer record the deposition? If the video quality is poor, or the internet connection drops, can the deponent and her attorneys dial into the meeting? The answers to the foregoing questions will help you and the lead attorney decide how to conduct the deposition.

Talk to opposing counsel. You should attempt to speak with opposing counsel regarding how the parties plan to conduct the deposition. For example, you should discuss who will receive copies of the exhibits and when. Once discussed and agreed-upon, you should memorialize the anticipated procedure in a detailed notice. This can help prevent and resolve any subsequent disputes that may arise.

Plan the exhibits. Some lead attorneys draft their own outlines. Oother lead attorneys ask the assisting attorney to write a first draft of the deposition outline, particularly if the assisting attorney has been involved with document review in the case. Either way, the lead attorney should plan which exhibits to use and the order in which she wants to review the exhibits with the deponent. The outlines should give the assisting attorney a guide to organizing the exhibits.

Download and label the exhibits. You should start by downloading the exhibits into a local file folder. Then, you should name the exhibits in a consistent manner to make them easily identifiable in the event that the lead attorney changes course and jumps out of the planned order during the deposition. The most consistent method of identifying and naming documents is usually by the document's bates stamps and dates. For example:

- Emails: Name with sent date and bates number (*i.e.*, "2020.04.01_PLT000123").
- Business Documents: Name with bates number and written title (*i.e.*, "PLT000124_Business Plan," "PLT000234_Business Org Chart," or "PLT000345_Cert of Incorporation").

Organize the exhibits. You should also organize the exhibits within your file folder. Use a system that makes sense to you and for your case. For example, if you know the order of the exhibits, then you can add numbers at the beginning of the file name to organize the exhibits accordingly:

- "1 – 2020.04.01_PLT000123"
- "2 – PLT000234_Business Org Chart"

If you do not know the exact sequence the exhibits will be used, then you can simply organize the exhibits by topic and assign each topic a number:

- "1 – Partnership Emails – 2020.04.01_PLT000123"
- "2 – PLT000234_Business Org Chart"
- "2 – PLT000345_Cert of Incorporation"

The methods set forth above are just a few examples. You should always use what makes sense to you. However, as a general rule, **do not name a file by its role in the case** (*e.g.*, "Gotcha Email," "THE Email," or "That Incriminating Video"). It is important to remember that everyone can see the file name when you share your screen during the deposition.

2. PREPARE EARLY AND OFTEN.

Review the exhibits with the lead attorney. This is very important. You should take note of any pages or portions of an exhibit that the lead attorney knows that she will use as you will likely need to quickly find these pages or portions of an exhibit during the deposition. Because *depositions are time limited*, every minute that you use looking for a page or portion of the exhibit is a lost minute of questioning the deponent.

For example, imagine an attachment to a pleading. The attachment has its own numbering that was independently created from the pleading to which it was ultimately attached. The lead attor-

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ney says, "Pull up Exhibit B of the Plaintiff's Complaint. And, then, scroll down to page three." The complete file is 250 pages long. In this request, you must understand that the lead attorney does not mean for you to pull up page 3 of the Plaintiff's Complaint. If documents are saved in PDF format, consider using Adobe Acrobat's bookmark feature for quick navigation of lengthy documents.

Be prepared. Take the time before the deposition to look through the exhibits. Write down the page number of the document—not the written number on the page. You will save yourself the time and stress of scrolling through the document to find the pages or portions of the exhibits that the lead attorney needs.

Check the equipment. You should run a system check to ensure that there is an internet connection at least a day before the deposition just in case any hardware changes are necessary. (Tip: Physically connect your computer to the internet. WIFI is convenient and doable, but a hardwire signal is more reliable.)

Check the environment. You should choose a quiet location and remove distractions. For example, you can lock your chair to avoid fidgeting and angle the camera to avoid disruptions. You should also get good lighting. (Tip: The light source should come from behind the camera. If this is not an option, then consider purchasing a cheap ring light.) If you are working from home and have a pet, consider whether the pet will need to go outside or will demand attention during the deposition, and make plans to minimize potential disruptions.

Make sure everyone has the information to join the meeting. Write down the phone number and access code to dial into the meeting in case of an emergency. You should also consider dialing into the meeting and keeping your telephone on mute in case of an emergency.

Remember to dress and act professionally. We all have Zoom fatigue, but we still need to dress professionally on the top and bottom. Avoid snacking.

3. DURING THE DEPOSITION.

Block distractions. For example, you can use a "Do Not Disturb" sign on the door. You should also mute your telephone. Consider automatic replies on your email, so that others will be notified that you are unreachable because you are in a deposition.

Close the unnecessary. Generally, you only need three things on your computer screen during the deposition: (1) The meeting room (*e.g.*, Webex or Zoom), (2) the file folder with your exhibits, and (3) your PDF reader (*e.g.*, Adobe Acrobat or Foxit) with the relevant exhibit open. You do not want emails or other notifications popping onto your screen, which can distract you and others during the deposition.

Only open the exhibits as they are called. Do not have all of the exhibits open. When you offer to share your screen, the system will show you all of your open windows—*in thumbnails*. This is can be both confusing and overwhelming. And most importantly, you do not want to accidentally share the incorrect exhibit or window.

Do not have your notes and/or outline on the screen. Instead of having your notes and/or outline on your screen, you should print them out and have them in front of you. Accidentally showing the wrong exhibits is one thing, but accidentally showing your notes or outline could have a substantial and detrimental impact on your case.

Other parties should mute themselves. Generally, only the attorneys and the witness should have their microphones on throughout the deposition. Everyone else should mute themselves. If the other parties are not on mute, respectfully request that they do so.

4. CONCLUSION

In sum, the key to a great deposition, like many other things in life, is preparation. Take the time before the deposition to review your exhibits, organize them, and figure out a way to neatly present them. Review everything with the lead attorney and witness. Do it twice. Run the system checks. Dress up. And show up. This all may seem tedious. But "Serendipity always rewards the prepared." – Katori Hall.

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VIRTUAL

CAPITOL HILL DAY

Plan to participate in this virtual event as FBA leaders from across the country meet with House and Senate offices to discuss important FBA legislative issues that impact the administration of justice and the federal courts. During these meetings, FBA participants will discuss issues critical to the Third Branch of government, including: adequate funding for the federal courts, filling judicial vacancies, adding new judgeships, and establishing an independent immigration court.

FBA Capitol Hill Day is becoming more popular each year. Don't miss out on this opportunity to broaden the FBA's visibility and influence in Congress.

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Calendar of Events

February 25:
Making an Impact on Capitol Hill: An Introduction to FBA's Government Relations and Capitol Hill Day Program (noon ET)

March 17:
Legislative Update (on-demand viewing available)

April 14:
Capitol Hill Day Preparatory Briefing (3 pm ET)

May 3-7:
Meetings with Lawmakers and Staff

May 7:
Capitol Hill Day Debrief (noon ET)

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