ILLINOIS STATE BAR ASSOCIATION

JULY 2017 VOL 48 NO. 1

Bench & Bar

The newsletter of the Illinois State Bar Association's Bench & Bar Section

Editor's introduction

BY HON. EDWARD SCHOENBAUM (RET.)

Greetings, readers of the Bench and Bar newsletter.

This is the first issue since I became the chief editor along with Evan Bruno and Ed Casmere, the assistant editors.

I hope that many of you readers whether you are a judge, former judge, practicing attorney, retired attorney, law clerk, secretary or a spouse or child of someone who receives this newsletter, will have something of interest to share with the other readers.

Each of you may have some experience or view points that you could share with other readers. Thanks for considering this. Please drop me an email tell me what you might write about. JudgeEdS@gmail.com. ■

The importance of dialogue: Preserving the right to oral argument

BY CHIEF JUSTICE LLOYD A. KARMEIER

Oral advocacy is the foundation of the English legal system and was central to the American system of justice during its formative years. It is no surprise then that when most Americans are asked to imagine what happens when a case is appealed to a court of review, they are likely to describe an erudite attorney making an eloquent plea for justice before a panel of judges who are thoroughly familiar with the case and determined to test the lawyer's arguments with probing and insightful questions.

Such scenes may still be commonplace in courts of last resort. They are increasingly rare in the intermediate appellate courts of Illinois. As I recently discussed in a presentation to the Appellate Court Conference, oral argument in our appellate court has become the exception rather than the rule.

Data compiled by the clerks of the five appellate court districts reveals that in 2016, only 735 of the 3,783 appeals disposed of through Rule 23 order or published opinion—a mere 19.4%—were decided following oral argument. In 2011, by contrast, 903 cases were decided after

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(**Notice to librarians:** *The following issues were published in Volume 47 of this newsletter during the fiscal year ending June 30, 2017: July, No. 1; September, No. 2; October, No. 3; November, No. 4; December, No. 5; January, No. 6; February, No. 7; March, No. 8; April, No. 9; May, No. 10; June, No. 11.).*

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The importance of dialogue: Preserving the right to oral argument

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oral argument. In 2006, oral argument was held in 1,314 cases. In 1996, the number was 1,608. Complete statistics are set forth in a table appended to this article. The overall trend is clear and downward.

The statistics may be even more stark depending on where an appeal is heard. In the Fifth District, litigants are still more likely than not to receive the benefit of oral argument in cases decided by Rule 23 order or published opinion. Last year, that court, which has seven judges, conducted oral argument in 154 of 293 (52.6%) such cases. It, however, is a clear outlier. Consider the First District. Its 24 judges heard oral arguments in just 182 of the 1881 appeals (9.7%) it disposed of through Rule 23 orders or opinions. The numbers in the Second District were somewhat higher than in the First District, with oral argument being held in 19.5% of the 554 cases its nine members decided by Rule 23 order or opinion. The rates in the Third and Fourth Districts were, in turn, higher than in the Second District. The seven judges in the Third District heard oral argument in 26.5% of the 510 appeals decided by Rule 23 order or opinion, while the Fourth District's seven judges held oral argument in 28.6% of the 545 such cases it decided. These figures are greater than in the First District, to be sure, but they are still low.

The relative rarity of oral arguments cannot be attributed to higher case loads and greater pressures on judges' time. Case loads in 2016 were lower than they were a decade ago and much less than they were in 1996. With fewer cases to decide, judges would be expected to have more time for oral argument rather than less. So what is going on?

In my view, the trend is attributable in significant part to a growing belief among attorneys and judges that oral argument adds little to the decision-making process and is therefore unimportant. That is a belief I do not share. It is certainly true that oral argument may offer little or no benefit in particular cases. As experienced judges and advocates have discovered, however, it is difficult to know with certainty and in advance which cases those are.

By nature, lawyers tend to be good talkers. They are not always the best writers. More than once I have seen a case with poorly written briefs rescued by counsel who was not able to fully articulate his or her client's position until they had a chance to speak to the court directly and engage in a dialogue with the judges to explain what they really meant. Communication is multi-dimensional. If we leave it to the written word alone, we are apt to miss the message.

Oral argument provides counsel an opportunity to isolate and clarify the core issues in a case and to direct the court's attention to matters that may have been overlooked or misunderstood. It also enables counsel to engage and explore the justices' mental processes and make certain that the members of the court are focused where counsel thinks their focus should be. In other words, the interactive nature of oral argument can be invaluable in helping the court "zero in" on the issues that are most important. In a "50/50," "51-49" or even a "60-40" case, the significance of this cannot be overstated.

Another dimension of oral argument that is not always fully appreciated is its implications for the collective decision making process in which multi-member courts of review must necessarily engage. Oral argument is not just an interchange between counsel and the court. It is an opportunity for the individual members of the tribunal to interact with one another. Questions posed by one judge provide insight into what that judge is thinking and offer new perspectives the others may not have considered. A point pressed by one judge may lead another judge to seek clarification from counsel and so, step by step, point by counter-point, a more complete understanding of the case emerges.

The benefits of interaction are not limited to the oral argument itself. At the Supreme Court level, the justices' home offices and clerks are spread out across the state from Chicago to Rock Island to Danville to Nashville. In the Fifth District,

Bench & Bar

Published at least four times per year. Annual subscription rates for ISBA members: $25.

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OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS
Hon. Edward J. Schoenbaum (ret).
Evan Bruno
Edward M. Casmere

MANAGING EDITOR / PRODUCTION
Katie Underwood
kunderwood@isba.org

Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

where I am from, the chambers of the various appellate judges are similarly separated by considerable distance. While the members of the court can and do discuss cases long after argument by telephone and through the exchange of written memos, oral argument settings provide an opportunity for the court to meet and debate issues face to face. It has been my experience that the undivided focus of such conferences yields insights and understanding that an exchange of written memoranda simply cannot duplicate.

Finally, those who give short shrift to oral arguments may be overlooking its importance in providing public visibility and institutional legitimacy to our system of judicial review. Oral arguments provide litigants with their literal day in court where they can witness, firsthand, the arguments for and against their claims. Through the impaneling of three or more judges in a public forum, oral arguments provide affirmation that the judiciary is willing to devote time and resources to help resolve the claims of all who come before it. They give effect to the conviction, deeply rooted in our rejection of the Star Chamber, that the work of the judiciary should be carried out in the full light of day subject to public scrutiny and in accordance with law. They help educate the public on what the courts do and how they do it. They provide reassurance that judges themselves and not some unseen bureaucratic machine are deciding disputes. In sum, they ensure that the guarantee of due process under law is being honored. At a time when the legitimacy of the courts has come under increasing attack, the importance of these functions cannot be underestimated. Whatever efficiencies may be gained through dispensing with oral argument, they are not worth the loss of public trust in the rule of law. ■

This article previously appeared on June 23, 2017 in the Illinois Courts Connect and is republished with permission of the author.

Appellate Court-Cases Filed and Disposed of and Number of Oral Arguments by District from 1996 to 2016

	1996	2006	2012	2013	2014	2015	2016
First District							
Filed*	4641	4001	4074	4290	4224	3893	3617
Disposed	4857	4008	3709	3902	3864	3787	3639
# of Oral Arguments	729	729	288	232	175	182	182
Disp by R23 or Opinion	2971	2222	1697	1709	1864	1908	1881
% of Oral Arguments/Disp	24.5%	32.8%	17.0%	13.6%	9.4%	9.5%	9.7%
Second District							
Filed*	1534	1352	1485	1396	1317	1333	1157
Disposed	1537	1273	1429	1323	1376	1284	1135
# of Oral Arguments	78	58	142	139	143	103	108
Disp by R23 or Opinion	742	701	738	662	668	605	554
% of Oral Arguments/Disp	10.5%	8.3%	19.2%	21.0%	21.4%	17.0%	19.5%
Third District							
Filed*	1097	958	1067	994	1023	906	799
Disposed	1067	1061	1057	966	972	1012	877
# of Oral Arguments	251	153	139	131	171	149	135
Disp by R23 or Opinion	577	681	644	568	595	611	510
% of Oral Arguments/Disp	43.5%	22.5%	21.6%	23.1%	28.7%	24.4%	26.5%
Fourth District							
Filed*	1032	1126	1176	1141	1125	1055	957
Disposed	1027	1188	1221	1166	1004	999	958
# of Oral Arguments	229	118	154	158	149	187	156
Disp by R23 or Opinion	689	849	790	691	586	634	545
% of Oral Arguments/Disp	33.2%	13.9%	19.5%	22.9%	25.4%	29.5%	28.6%
Fifth District							
Filed*	874	706	591	607	629	568	558
Disposed	909	721	646	597	600	527	511
# of Oral Arguments	321	256	180	169	177	167	154
Disp by R23 or Opinion	540	394	406	307	302	306	293
% of Oral Arguments/Disp	59.4%	65.0%	44.3%	55.0%	58.6%	54.6%	52.6%
Totals							
Filed*	9178	8143	8393	8428	8318	7755	7088
Disposed	9397	8251	8062	7954	7816	7609	7120
# of Oral Arguments	1608	1314	903	829	815	788	735
Disp by R23 or Opinion	5519	4847	4275	3937	4015	4064	3783
% of Oral Arguments/Disp	29.1%	27.1%	21.1%	21.1%	20.3%	19.4%	19.4%

*Filed Cases include Industrial Commission Division Cases and Reinstated Cases.

No Pudd'nhead

BY HON. MIKE HYMAN, JUDGE, ILLINOIS APPELLATE COURT, IMMEDIATE PAST CHAIR BENCH AND BAR SECTION

A few weeks ago, while waiting for a flight at Midway, I happened to sit next to an elderly gentleman with curly white hair and a drooping white mustache. He wore a rumpled white suit which gave off the scent of a box of stale cigars. He said he was catching a flight to Hannibal, Missouri. I knew right away that he was a St. Louis Cardinals fan. Under his suit jacket, he wore a red t-shirt depicting a cardinal whitewashing the ivy at Wrigley Field. He introduced himself as Mark.

We started talking about the rivalry between the Cardinals and the Cubs. He said Chicago "is where they are always rubbing the lamp, and fetching up the genie, and contriving and achieving new impossibilities." I defended our city's ball clubs as superior to his redbirds, but once he learned that I was a judge, instantly his eyes widened and he grinned as if he had just caught a huge bullfrog. I wrote down everything he said next, every word is his, with a few minor edits.

Mark: "The more I see of lawyers, the more I despise them. They seem to be natural born cowards, and on top of that they are God damned idiots. I suppose my lawyers are above average; and yet it would be base flattery to say that their heads contain anything more valuable than can be found in a new tripe. If we had as many preachers as lawyers, you would find it mixed as to which occupation could muster the most rascals."

MBH: A sore subject?

Mark: "Like the weather–everybody talks about the legal profession, but nobody does anything about it. I say a good lawyer knows the law; a clever one takes the judge to lunch." He flashed a smile, and glanced around. "Lawyers are like other people–fools on the average; but it is easier for an ass to succeed in that trade than any other. To succeed in other trades, capacity must be shown; in the law, concealment of it will do."

MBH: You should be more open minded about lawyers.

Mark: "An open mind leaves a chance for someone to drop a worthwhile thought in it."

MBH: Then, at least, try not to speak so ill of lawyers.

Mark: "Ah, well, I have been an author for years and an ass for 55."

MBH: I recall that you studied law.

Mark: "I had studied law an entire week, and then given it up because it was so prosy and tiresome. I was sorry my Aunt Mary thought I intended to study law. In my mind, that is proof positive that her excellent judgment erred one time. I did not love the law. Anyway, I was young and foolish then; now I am old and foolisher."

MBH: Wasn't your father, John Marshall Clemens, a self-educated lawyer?

Mark: "It is a wise child that knows its own father, and an unusual one that unreservedly approves of him."

MBH: And your oldest brother, Orion, practiced law, even studied under Edward Bates who served as attorney general for President Lincoln.

Mark: "Orion was as good and ridiculous a soul as ever was. When we remember we are all mad, the mysteries disappear and life stands explained."

MBH: Whatever you may think of lawyers, law gives shape and substance to society.

Mark: "In this topsy-turvy, crazy, illogical world, Man has made laws for himself. He has fenced himself round with them, mainly with the idea of keeping communities together, and gain for the strongest. No woman was consulted in the making of laws. And nine-tenths of the people who are daily obeying–or fighting against–Nature's laws, have no real opinion." Mark sighed, and shook his head. "It would not be possible for Noah to do in our day what he was permitted to do in his own. The inspector would come and examine the Ark, and make all sorts of objections."

MBH: After that, I'm reluctant to ask about jury trials.

Mark: "I believe the jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury. The jury is the most ingenious and infallible agency for defeating justice that wisdom could contrive." He paused to check the time on his pocketwatch, and continued. "Trial by jury is the palladium of our liberties. I do not know what a palladium is, having never seen a palladium, but it is a good thing no doubt at any rate."

MBH: I don't know what a palladium is either. What have you to say about our system of jury trials in criminal cases?

Mark: "It is superior to any in the world; and its efficiency is only marred by the difficulty of finding 12 people every day who don't know anything and can't read. And I may observe that we have an insanity plea that would have saved Cain."

MBH: How about some advice for lawyers, if I dare ask.

Mark: "Realize that the edifice of public justice is built of precedents, from the ground upward; but also realize that all the other details of our civilization are likewise built of precedents."

MBH: Interesting.

Mark: "People forget that no man is all humor, just as they fail to remember that every man is a humorist." His manner turned serious. "It is a worthy thing to fight for one's freedom; it is another sight finer to

fight for another's."

MBH: Let me ask about a favorite topic of yours—politicians.

Mark: "Imagine, if you will, that I am an idiot. Then, imagine that I am also a Congressman. But, alas, I repeat myself. Our lives, our liberty, and our property are never in greater danger than when Congress is in session."

MBH: A lot of Americans might agree with you.

Mark: "Politicians and diapers must be changed often, and for the same reason. If we would learn what the human race really is at bottom, we need only observe it in election times."

MBH: Washington seems to be in one bad fix today.

Mark: "There is something good and motherly about Washington, the grand old benevolent National Asylum for the Helpless."

MBH: Your plane has started boarding. I truly enjoyed our few minutes together. Despite what people might say, you're no pudd'nhead!

Mark: "Compliments make me vain; and when I am vain, I am insolent and overbearing. It is a pity, too, because I love compliments."

Mark stood up and, with a hint of sadness, looked directly at me. "Remember, Judge—my kind of loyalty was to one's country, not to its institutions or its officeholders. The country is the real thing, the substantial thing, the eternal thing; it is the thing to watch over, and care for, and be loyal to; institutions are extraneous, they are its mere clothing, and clothing can wear out, become ragged, cease to be comfortable, cease to protect the body from winter, disease, and death."

As I watched Mark disappear into the jetway, I noticed a copy of the U.S. Constitution peeking out of his carry-on.

Rehearing:

> "The rain…falls upon the just and the unjust alike; a thing which would not happen if I were superintending the rain's affairs. No, I would rain softly and sweetly on the just, but if I caught a sample of the unjust outdoors I would drown him."
>
> –Mark Twain ■

Originally appeared in April/May CBA Record, published by the Chicago Bar Association. Reprinted with permission.

Recent appointments and retirements

The Administrative Office reports no changes in the judiciary during June 2017. ■

Boring but useful tools: Prerequisites to filing for foreclosure under federal mortgage programs

BY ERIC SIROTA

As I'm sure was once said by someone's grandfather, "you have to use the tools you've got." I come from a long line of men who are not particularly handy. I think my grandfather's main "tool" was a pen. My grandfather was a lawyer. The point is: lawyers use boring tools.

When I was young I wanted to grow up to use tools like cranes and forklifts. Instead, I use paperclips and affirmative defenses. Glorious? No. Important? I hope so. In any case, I am a non-profit foreclosure defense attorney and, when you're up against Wells Fargo, Bank of America or some other monolithic billionaire, you have to use whatever tools you've got, unsexy as they may be.

As most who practice foreclosure defense likely know, the Illinois Third District Court held in *Bankers Life v. Denton,*[1] that the servicer of an FHA-insured loan's failure to abide by 24 C.F.R. 203.604 provides the borrower with an affirmative defense to foreclosure. Per 24 C.F.R. 203.604, if a borrower with an FHA-insured mortgage defaults on their payments, the loan servicer must solicit the borrower for a face-to-face meeting with a servicer representative within three months of default.[2] Complying with this requirement is a prerequisite to filing for foreclosure,[3] and thus, per Denton, failure to abide provides an affirmative defense to foreclosure. Denton based its holding largely on the fact that the face-to-face meeting is required by regulation, which has the effect of law.[4] On this basis, the Denton court distinguishes the face-to-face meeting requirement, implemented via regulation (which has the force of law) from other types of requirements, implemented via agency guidelines (which do not have the force of law).[5]

As such, when evaluating whether to bring an affirmative defense based upon a lender's failure to take prerequisite steps before filing the foreclosure action, an attorney should examine whether such prerequisite steps have the effect of law or whether they are, instead, mandated by guidelines or the like which do not have

the effect of law.[6] Unfortunately, most programs' foreclosure filing prerequisites ("prerequisites") are established by guidelines. Fortunately, the FHA is not the only mortgage program to establish such rules via regulation.

By "mortgage programs", I am referring to various Federal programs which govern how mortgage-loans affiliated with various Federal entities are to operate. "FHA-insured mortgages" refer to mortgages insured by the Federal Housing Administration, a subset of H.U.D., such that, if the borrower defaults on the mortgage, the FHA insures that the lender does not suffer a loss.[7] As this is a pretty good deal for lenders, lenders of FHA mortgages (referred to often as "FHA lenders" or "FHA servicers"), have to abide by certain guidelines and regulations propagated by H.U.D. One such regulation, which thus has the force of law, is that mortgage lenders must solicit borrowers for a face-to-face meeting before filing for foreclosure.[8]

The FHA, however, is by no means the only Federal entity that operates a mortgage program. Rather, Fannie Mae and Freddie Mac each purchase and securitize mortgage loans and Veterans' Affairs and the U.S. Department of Agriculture insure mortgage loans. The loans themselves are generally serviced by private entities. However, if the private entity services a loan affiliated with one a government program, that entity must follow that respective program's rules in servicing that respective loan. Servicer's of USDA loans have to follow the USDA's loan servicing rules, and so on.

Further, servicers of loans not affiliated with a government entity may still be accountable under a government program – the Federal Government's Making Home Affordable ("MHA") program – if they agreed to operate under that program in exchange for certain incentives provided by the Federal government.[9] If a loan servicer agreed to participate in the MHA program, the servicer must service its entire portfolio according to MHA rules; the exception, though, is that if a loan is associated with another government program (FHA, Fannie Mae, etc.) then the servicer is to follow that government entity's rules.

The point is: there are lots of rules. More importantly, every program mandates that, after a borrower defaults, the servicer must take certain steps to help the borrower avoid foreclosure as a prerequisite to filing for foreclosure. Again, some of these prerequisites have the force of law, and others do not, which the rest of this article will be devoted to sorting through:

- **USDA.** The USDA imposes prerequisites to filing for foreclosure upon lenders. Such prerequisites are passed through regulation and, of the programs here discussed, are the most closely analogous with the FHA's requirements. Not only do USDA regulations mandate that servicer's take proactive steps to help borrowers after the borrower defaults, but such explicit purpose of such steps is to prevent foreclosure. Pursuant to such regulations, "Lenders shall take prompt action to collect overdue amounts from borrowers to bring a delinquent loan current in as short a time as possible to avoid foreclosure to the extent possible and minimize losses."[10] Lenders must, for example, inform borrowers of potential workout options before formally accelerating the loan.[11] Further, "Before an account becomes 60 days past due or before initiating liquidation," for example "the lender must assess the physical condition of the property, determine whether it is occupied, and take necessary steps to protect the property."[12] Importantly, USDA regulations seem to use "foreclosure" and "liquidation" fairly interchangeably, or at least operate under the assumption that foreclosure is part of the liquidation process.[13] As such, the principle established in Denton would thus dictate that a lender's failure to make this contact as required would provide a borrower an affirmative defense in a foreclosure.
- **Veterans' Affairs.** Like the USDA and FHA, the VA has the authority to pass regulations. Further, VA regulations mandate that lenders take certain action to contact the borrower and attempt to mitigate losses in the event of a borrower's default.[14] Such regulations, in fact, like FHA regulations, mandate that under some circumstances the lender attempt to set up a face-to-face meeting with the borrower.[15] However, while it is clear that the purpose of such regulations is to prevent borrowers from losing their homes, VA regulations are framed less explicitly as prerequisites to a foreclosure filing. They do not contain action that the lender must take certain loss mitigation steps "prior to acceleration," as specified by the USDA regulations,[16] or make explicit that a lender may not "commence foreclosure . . . until the requirements . . . have been followed," as stated in FHA guidelines.[17] Certainly, the spirit and structure of the regulations may support a defense under *Denton*, but the language provides foreclosure defendants with less to hang their hats on.
- **Fannie Mae/Freddie Mac.** Fannie Mae and Freddie Mac have distinct servicing rules, but will be discussed together here for a simple reason: they do not have the authority to make regulations.[18] Rather, Fannie and Freddie are government-established corporations held in conservatorship and regulated by the Federal Housing Finance Agency ("FHFA").[19] Fannie and Freddie each institute their own respective servicing guidelines,[20] but these are not regulations and thus do not have the inherent force of law.[21] The FHFA, which does have regulatory authority, does not institute servicing regulations analogous to those discussed above.[22] As such, in and of themselves, failure to abide by Fannie's and Freddie's perquisites would not fall within the penumbra of *Denton*.
- **Making Home Affordable.** Similarly, courts have made clear that the Making Home Affordable Guidelines do not have the force of law, though, as discussed, they may be bootstrapped into UDAP statutes.[23]

As such, the tools with which *Denton* provides to foreclosure defense attorneys extend beyond defending against the foreclosure of FHA loans. *Denton* would also, likely, apply to the prerequisites established by USDA regulations, and, arguably, VA regulations. In contrast, a lender's failure to adhere to the foreclosure prerequisites established by Fannie Mae, Freddie Mac, and Making

Home Affordable guidelines does not itself constitute an affirmative defense. However, foreclosing without taking these prerequisite steps could be considered an unfair or deceptive practice. In conclusion, as I'm sure was once said by someone's grandfather, "Well, yes, that all seems very interesting, but the ballgame's on." ■

This article was originally published in the June 2017 issue of the ISBA's Administrative Law newsletter.

1. 120 Ill. App. 3d 576, 579-81 (3rd Dist. 1983)

2. This rule does not apply in every case, as there are some noticeable exceptions if, for example, the servicer does not have a branch office near the borrower's home. *See* 24 C.F.R. 203.604(c).

3. 24 C.F.R. 203.500

4. *Denton*, 120 Ill. App. 3d 578.

5. *Id.*, at 580 (distinguishing *Roberts v. Cameron-Brown Co.*, 556 F.2d 356 (5th Cir. 1977) (Fannie Mae handbook does not have the effect of law)).

6. This is not to say that a foreclosure Plaintiff's failure to abide by such guidelines cannot constitute an affirmative defense. Federal courts have held that failure to abide by such guidelines can violate state Unfair and Deceptive Acts and Practices statutes, *see, e.g., Boyd v. U.S. Bank*, 787 F.Supp.2d 747 (N.D. Ill. 2011), and, thus may provide an affirmative defense to foreclosure when, for example, the lender's abiding by such guidelines would have prevented the foreclosure or decreased the potential deficiency judgment. However, violation of the guidelines, per *Denton*, does not provide an affirmative defense to foreclosure, while violation of applicable laws regulations does.

7. "The Federal Housing Administration," available at <https://portal.hud.gov/hudportal/HUD?src=/program_ offices/housing/fhahistory>, last checked June 10, 2017.

8. 12 C.F.R. 203.604

9. MHA, "About HMPadmin.com," available at <https://www.hmpadmin.com/portal/resources/overview.jsp>.

10. 7 C.F.R. 3555.301(a)

11. 7 C.F.R. 3555.306(a)

12. 7 C.F.R. 3555.301(f)

13. *See*, *e.g.*, 7 C.F.R. 3555.306(b)(1) ("The lender must initiate foreclosure within 90 calendar days of the decision to liquidate unless Federal, State, or local law requires that foreclosure action be delayed. When there is a legal delay (such as bankruptcy), foreclosure must be initiated within 90 calendar days after it becomes possible to do so. Foreclosure initiation begins with the first public action required by law such as filing a complaint or petition, recording a notice of default, or publication of a notice of sale."

14. 38 C.F.R. § 36.4278

15. 38 C.F.R. § 36.4278(g)(iv)

16. 38 C.F.R. 355.306(a)(2)

17. 24 C.F.R. 203.500

18.*See United States ex rel. Adams v. Aurora Loan Servs.*, 813 F.3d 1259, 1260 (9th Cir. 2016),

19. *Id.*, at 1260-1262.

20. *Servicing Guide: Fannie Mae Single Family*, May 10, 2016, available at https://www.fanniemae.com /content/ guide/svc051017.pdf; *Single-Family Seller/Servicer Guide, Freddie Mac, available at* <http://www.freddiemac.com/*singlefamily/guide/*>.

21. *See Roberts v. Cameron-Brown Co.*, 556 F.2d 356 (5th Cir. 1977).

22. *See* 12 C.F.R. 1200-1299.

23. *See Boyd*, at supra.

Learning essential steps to conflict resolution is for everyone

BY SANDRA CRAWFORD, JD, MEDIATOR, COLLABORATIVE LAW PROFESSIONAL

As recent incidents involving airline passengers and personnel highlight, conflict is pervasive whether in a public setting, like an airport, or a private setting, like a boardroom or bedroom. Learning to deal effectively with conflict is a skill that is essential to peaceful coexistence, no matter the setting. The concept of the "The Conflict Partnership Process" is the brainchild of Dudley Weeks, PhD, from his book *The Eight Essential Steps to Conflict Resolution,* Penguin Putman, Inc, New York, New York (1992). The eight skills, or steps, are used to empower people and groups to build mutually beneficial relationships and resolve conflict effectively. At the heart of Week's process are the following basic principles:

1. We, Not I versus You

An "I versus you" or "us versus them." pattern of conflict resolution is an adversarial, combative pattern focused on win-lose outcomes. Where as a "we" patten promote cooperation, collaboration and togetherness to improve relationships, deal with differences and create healthy attitudes. Weeks says that "virtually all of the eight steps in conflict partnership help to establish "we relationships" page 64. Skills can be learned to help strengthen the "we" relations and move away from the "war" paradigm of "us versus them". That paradigm creates "an opponent" of the other, be that your spouse or child, a colleague or a friend. Moving to a "we" approach gets away from an "get-all-you-can" or "may-I-can-slip-something-by you" atmosphere created by a demand-based approach of conflict resolution.

2. Conflicts Are Dealt with in the Context of the Overall Relationship

Weeks observes that conflict typically "punctuates a relationship rather than defining the entire relationship," page 64. Skills that focus on clarifying what the conflict is about, can help keep the needs and goals of the relationship top-of-mind when dealing with individual conflicts during the course of a relationship. When parties allow competing demands to define each other they forfeit the greater perspective of being able to learn about and share perceptions, values, concepts of power, and range of feelings. Seeking first to understand then to be understood can replace the demand, counter-demand mode of negotiation for better outcomes for all involved.

3. Effective Conflict Resolution More Likely Improves Relationships

Weeks' theory is that although most conflicts can be "negotiated" in the shot term, the traditional processes of conflict resolution do nothing to improve the

Bench & Bar
Illinois Bar Center
Springfield, Illinois 62701-1779
July 2017
Vol. 48 No. 1

Learning essential steps to conflict resolution is for everyone

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long-term relationship and in fact some of them may even do harm to the future relationship. This is evident often in family law litigation where the outcome of the dispute over a particular point regarding parenting may find a judge ruling in favor for one parent over the other and not helping the parents to see that their partnering around parenting items is essential into ensure successful future-focused outcomes for their child(ren). Weeks' eight steps focus on the principle of relationships-building. Improving relationships allows for greater effectiveness when specific conflict arise because it redirects the negative energy of "give-and-take," concession, comprise to the more positive energy of creation—creating a relationship from the fully expressed, diverse perspectives of who will have to live with the resolution.

4. Effective Conflict Resolution Results in Mutual Benefits

For conflict resolution to be effective each party must have some need, value, or feeling satisfied. Learning the specific things that can be done to promote mutual gain, empower and benefit all involved is therefore critical. Some of this may come naturally to some people but understanding what the specific tools and tasks are and employing them intentionally may still need to be practiced to insure more effective resolution of discrete conflicts within a relationship.

5. Relationships Building and Conflict Resolution are Connected

According to Weeks "damaging conflicts often occur because a relationship has not been developed and maintained well" p.68. In conflict partnerships "the goal is not to defeat the other party and seize a temporary advantage, but to develop a sustainable resolution of the conflict, made possible in part because an improvement of the relationship has been established." Think how important to healthy family relationships it could be to move away from a mindset of seizing temporary advantages to one that looks to develop sustainable outcome to lead to growth in intimacy, cooperation, compassion and empathy.

Weeks provides many real-life scenarios to give context to how Conflict Partnership Process can be developed and sustained within the context of work, home and community. His book The Eight Step is a recommended read for those engaged in conflict resolution and in conflict—namely, everyone. ■

This article was originally published in the June 2017 issue of the ISBA's Alternative Dispute Resolution newsletter.