"CALL ME ISHMAEL"[1]—THE SIGNIFICANCE OF NAMING IN PERSUASIVE WRITING

Amy Bitterman*

I. INTRODUCTION

"What's in a name?" Juliet famously asks in Act 2, Scene 2 of Shakespeare's *Romeo and Juliet*.[2] In literature and legal advocacy, the answer is often "quite a bit." As David Lodge points out in *The Art of Fiction*, names in literature "are never neutral. They always signify, if it is only ordinariness."[3] Just as parents often assign first names to their children "with semantic intent," writers choose names for their characters to create an immediate impression on readers.[4]

For example, William Thackeray, in his novel *Vanity Fair*, names his scheming anti-heroine Becky Sharp.[5] Thus, while Becky initially presents herself as a submissive and modest young woman, the reader is tipped off by her last name that this public persona is a ruse.[6] Becky is indeed "sharp"; she is both clever and dangerous.[7] Prick her and you will likely bleed.[8] Notably, Thackeray uses the consonant heavy diminutive for his character, rather than "Rebecca," the full version of her name, with biblical

 Associate Clinical Professor at Rutgers Law School-Newark. B.A. *magna cum laude*, Bryn Mawr College, Bryn Mawr, Pennsylvania; J.D. *cum laude*, Harvard Law School, Cambridge, Massachusetts; M.F.A., Rutgers University. I would like to thank Irma Calderon for her assistance in editing this Article.

1. Herman Melville, *Moby Dick; or, the Whale, in* 48 GREAT BOOKS OF THE WESTERN WORLD 1, 1 (The Univ. of Chi. ed., 2d ed. 1990).

2. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2, l. 43 (1597).

3. DAVID LODGE, THE ART OF FICTION 37 (1993).

4. *Id.* (noting that the names of characters in novels "work subliminally on the reader's consciousness").

5. WILLIAM MAKEPEACE THACKERAY, VANITY FAIR 41 (John Carey ed., Penguin Books 2001) (1848).

6. *See generally id.*

7. Peter J. Capuano, *At the Hands of Becky Sharp: (In)visible Manipulation and* Vanity Fair, 38 VICTORIANS INST. J. 167, 176 (2008).

8. *See generally* THACKERAY, *supra* note 5.

associations of matriarch and charity.[9] In contrast, the other key female character in *Vanity Fair*, who identifies herself with the traditional roles of a wife and mother, is named Amelia, a name full of soft vowels.[10] A more recent example of the importance of "naming" in a novel is David Lodge's main character in *How Far Can You Go?*[11] As Lodge explains in *The Art of Fiction*, "I named the man Vic Wilcox to suggest, beneath the ordinariness and Englishness of the name, a rather aggressive, even coarse masculinity (by association with *victor, will and cock*)."[12]

As names and other forms of address "help shape how others view [a person] as a human being,"[13] name choices in legal writing can be as significant as nomenclature in literature. Although lawyers do not have the option of inventing names for clients, they can make choices about nomenclature that support a key argument or help generate empathy for a client. For example, using a party's name in briefs helps humanize a party, while referring to an adversary by judicial status can have the opposite effect.[14] Similarly, using actual names in transactional documents, instead of referencing parties to agreements by their legal roles, can strengthen the connection parties "feel . . . to the documents that embody their current obligations and future responsibilities."[15] This Article explores the communicative power of: (1) nicknames; (2) first names; (3) gender prefixes; (4) honorifics; and (5) pronouns, and suggests ways counsel can harness this power in court submissions.

II. NICKNAMES

The associative power of names is arguably even stronger when it comes to nicknames as they are usually generated by

9. Oliva DePreter, *Women of Genesis: Mothers of Power*, 10 DENISON J. RELIGION 45, 49–50 (2011); Lisa Jadwin, *The Seductiveness of Female Duplicity in* Vanity Fair, 32 STUD. IN ENG. LITERATURE, 1500-1900 663, 665 (1992).

10. *See* THACKERAY, *supra* note 5, at 42; Jadwin, *supra* note 9, at 664.

11. *See generally* DAVID LODGE, HOW FAR CAN YOU GO? (1980).

12. THE ART OF FICTION, *supra* note 3, at 37–38.

13. Kirsten K. Davis, *He, She, or They: Thinking Rhetorically About Gender and Personal Pronouns*, L. PROFESSOR BLOGS NETWORK: APP. ADVOC. BLOG (Sept. 5, 2019), https://lawprofessors.typepad.com/appellate_advocacy/2019/09/he-she-or-they-thinking-rhetorically-about-gender-and-personal-pronouns.html#google_vignette.

14. RUTH ANNE ROBBINS ET AL., YOUR CLIENT'S STORY: PERSUASIVE LEGAL WRITING 245–46 (Vicki Been et al. eds., 2013).

15. Susan M. Chesler & Karen J. Sneddon, *Telling Tales: The Transactional Lawyer as Storyteller*, 15 LEGAL COMMC'N & RHETORIC: JALWD 119, 128–29 (2018).

something specific to the individual.[16] Moreover, nicknames can have commercial value in and of themselves and, thus, constitute a property right.[17]

A. The Prejudicial Impact of Nicknames

Nicknames can be especially effective in creating impressions as they stem from an individual's personality, physical traits, or occupation.[18] For example, nicknames are a key signifier in Alice Walker's *The Color Purple*.[19] Celie, the novel's protagonist, is married off at a young age to a man she refers to as "Mister."[20] For much of their marriage, Mister abuses Celie both verbally and physically; she consequently views him as an all-powerful source of pain.[21] When Mister's longtime lover, Shug Avery, comes to stay with them, Celie is surprised to hear her call Mister by his actual name, "Albert": "First thing she said, 'I don't want to smell no stinking blankety-blank pipe, you hear me, Albert?' Who Albert, I wonder. Then I remember Albert Mr. ___first name."[22] Hearing Shug say his name and witnessing his love for Shug humanizes Mister for Celie. By the end of the book, she is able to be friends with Mister.[23] The turn in their relationship is underscored by her decision to at last call him "Albert."[24]

Notably, "Mister," the nickname Celie uses for Albert, was an honorific that was often denied African American men, who were instead referred to by first name as a form of social denigration.[25] Thus, Celie's reference to her husband as "Mr." not only reflects his authority over her, but also shows how verbal indignities were passed down from one group with power to another group with less

16. David Amoruso, *The American Mafia and Its Use of Colorful Nicknames*, GANGSTERS INC. (Aug. 6, 2016), http://gangstersinc.org/profiles /blogs/the-american-mafia-and-its-use-of-colorful-nicknames (noting that a nickname "can derive from someone's past history or from a particular incident. It may relate to a physical characteristic or it may convey status").

17. *See* McFarland v. Miller, 14 F.3d 912, 920–21 (3d Cir. 1994).

18. Amoruso, *supra* note 16.

19. ALICE WALKER, THE COLOR PURPLE 12, 73, 242 (1982).

20. *Id.* at 12.

21. *See generally id.*; *see also* Patricia Harris Abrams, *The Gift of Loneliness: Alice Walker's* The Color Purple, 1 LANGUAGE ARTS J. OF MICH. 28, 28 (1985).

22. WALKER, *supra* note 19, at 43.

23. Abrams, *supra* note 21, at 30.

24. WALKER, *supra* note 19, at 243.

25. Chan Tov McNamarah, *Misgendering*, 109 CAL. L. REV. 2227, 2240 (2021) (describing how language, including the denial of honorifics, "played a role in Black people's social degradation").

power. As an African American male, Mister is subject to abuse by white men; Celie, an African American woman, has even less power than Mister and is subject to his abuse.

Probably the most famous, or infamous, real-life illustration of the persuasive power of nicknames is their use by gangs and gangsters.[26] By way of example, John Gotti, the onetime head of the Gambino crime family, was known variously as "Johnny Boy," the "Teflon Don" (because he was acquitted in several criminal cases), and the "Dapper Don" (because he liked to wear expensive suits).[27] While the mafia may have initially used nicknames "to conceal the real identity of their members," in criminal cases, the custom could link a defendant to organized crime as the Mafia's propensity for using sobriquets is well known.[28]

The power of nicknames is reflected in legal cases where their use at trial raised issues about jury prejudice.[29] For example, in *United States v. Farmer*, the Second Circuit determined that repeated references to the defendant's nickname, "Murder," were sufficiently prejudicial to warrant vacating his conviction for attempted murder.[30] Likening the use of a nickname to "evidence of a person's character or a trait of character," neither of which are admissible under Federal Rule of Evidence 404(a), the court found that the defendant was entitled to a new trial.[31] The court specifically noted that the defendant's nickname "was strongly 'suggestive of a criminal disposition' and a propensity to commit particularly heinous crimes."[32] Citing Federal Rule of Evidence 403, the court determined that using the defendant's nickname was not necessary to identify him or connect him to the crime, and,

26. Amoruso, *supra* note 16.

27. *Id.*

28. *Id.*

29. *See, e.g.*, United States v. Aloi, 511 F.2d 585, 602 (2d Cir. 1975) (determining that the use of the defendants' nicknames was not prejudicial as the use was "occasional" and, thus, did not "materially divert[] the attention of the jury"); United States v. Mitchell, 328 F.3d 77, 83–84 (2d Cir. 2003) (reasoning that brief and isolated references to defendant's nickname, while not relevant to his identity, were not prejudicial given substantial evidence of guilt).

30. United States v. Farmer, 583 F.3d 131, 148 (2d Cir. 2009). *But see* United States v. Hill, 658 F. App'x 600, 604 (2d. Cir 2016) (holding that the defendant was not prejudiced by the use of his nickname, "gun man," during his trial for murder as it was only used once, and the trial court responded by striking the statement from the record and directing the prosecutor to instruct the witness not to use the nickname).

31. *Farmer*, 583 F.3d at 146, 148.

32. *Id.* at 146 (quoting United States v. Dean, 59 F.3d 1497, 1492 (5th Cir. 1995)).

thus, had no probative value.[33] The court also pointed out that, even in cases where a defendant's nickname was relevant, courts also had to consider "the frequency, context, and character of the use" to determine if it was prejudicial.[34]

As with any other potentially prejudicial evidence, objection to the use of nicknames must be made in a timely manner.[35] In *Crowder v. Green*, the petitioner filed a writ of habeas corpus on the ground that the prosecutor's use of his nickname, "Killer," had denied him the right to a fair trial.[36] Inter alia, the court denied the motion because the defense failed to contemporaneously object to the use of the nickname at trial.[37] On a more substantive level, the court reasoned that, in this instance, "while there may have been some instances of improper use of the defendant's nickname, reference to the defendant's nickname was relevant to his identity as one of the shooters."[38] Specifically, an eyewitness and one of the victims identified the defendant by his nickname.[39]

Attorneys should take note at the very start of criminal proceedings of the potential damage of referring to a defendant by a nickname.[40] For example, in *United States v. Allen*, counsel for the defendant filed a pre-trial motion to strike surplusage from the indictment.[41] Specifically, defense counsel moved to strike the use of Allen's nickname, "Killer Kev," as unduly prejudicial as he was charged with murder, among other crimes.[42] The court granted defendant's motion, finding that "presenting an indictment containing repeated references to defendant Allen as 'Killer Kev' to the jury in the beginning of the case, before any evidence is introduced, is unduly prejudicial in light of the serious and violent nature of the charges."[43] The court left open the possibility of the

33. *Id.* at 135, 146. *But see* United States v. Williams, 974 F.3d 320, 356 (3d Cir. 2020) (affirming a defendant's conviction for drug trafficking and racketeering; the court determined that a witness's use of Kelly's nickname, "Killer," was relevant as he only knew defendant by that name).

34. *Farmer*, 583 F.3d at 146.

35. *See, e.g.*, Crowder v. Green, No. 05 CV 2556, 2005 WL 2678811, at *3 (E.D.N.Y. Oct. 20, 2005).

36. *Id.* at *1.

37. *Id.* at *3.

38. *Id.*

39. *Id.*

40. *See, e.g.*, United States v. Allen, No. 09–CR–329, 2014 WL 1745933, at *6 (W.D.N.Y. Apr. 29, 2014).

41. *Id.* at *1.

42. *Id.* at *5.

43. *Id.* at *6.

prosecutor referencing the nickname during the course of the trial if it had some probative value.[44] However, the court reasoned that limiting instructions to the jury would be required if the nickname was introduced at trial.[45]

As illustrated by *Farmer*, counsel for the government must be careful about references to a defendant's nickname to avoid violating Federal Rule of Evidence 404(a).[46] Unnecessary use of a defendant's nickname can also undermine an attorney's credibility. The court in *Farmer* noted that it is "the ethical obligation of the prosecutor" to ensure that character evidence is not introduced in court to establish guilt.[47] The court characterized the prosecutor's use of the defendant's nickname "no fewer than thirty times" during her rebuttal summation as "gratuitous," and further reasoned that "the government may have short-circuited the jury's fact-finding by repeatedly using Farmer's prejudicial nickname."[48]

B. Nicknames as a Property Right

Nomenclature can be an especially important tactical decision when a client's claim directly ties into the use of a nickname. In *McFarland v. Miller*, the widow of the actor who played the character of "Spanky" in the *Our Gang* movies sued a restaurant called "Spanky McFarland's." Among other claims, the plaintiff asserted that the restaurant violated McFarland's proprietary right of publicity in his name.[49]

The Third Circuit defined the right of publicity as "the right of an individual, especially a public figure or a celebrity, to control the commercial value and exploitation of his name and picture or likeness and to prevent others from unfairly appropriating this value for commercial benefit."[50] The court reversed the lower court's grant of defendant's motion for summary judgment after determining that, for purposes of this right, a name could include

44. *Id.* at *5–6.
45. *Id.* at *6.
46. United States v. Farmer, 583 F.3d 131, 146 (2d Cir. 2009).
47. *Id.* at 135.
48. *Id.* at 146–48.
49. McFarland v. Miller, 14 F.3d 912, 921 (3d Cir. 1994).
50. *Id.* at 918–19 (noting that "[a]t its heart, the value of the right of publicity is associational. People link the person with the items the person endorses and, if that person is famous, that link has value").

a "nickname."[51] The court determined that McFarland had an interest in the nickname "Spanky" if he could prove that he was inextricably linked to the movie character.[52] Plaintiff's lawyers emphasized that connection by referring to McFarland simply as "Spanky" throughout their brief.[53]

In *Ackerman v. Ferry*, the court held that the term "name" in a California statute governing the right to publicity included nicknames.[54] California Civil Code Section 3344 provided for liability when: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent."[55]

The plaintiff in *Ackerman* used the name "Dr. Acula" as a byline and pen name for over sixty years.[56] The court found that "[n]icknames and . . . pen names are names. To restrict the statute's meaning [of the statutory term 'name'] to certain kinds of names, we would be required to add modifiers to name, reading it, for example, as birth name or legally adopted name."[57]

Conversely, the court in *Champion v. Take Two Interactive Software, Inc.*, determined that Philip Champion, a basketball entertainer, did not have a claim against a video game developer for using his name in a product without prior written permission.[58] The defendant used an avatar in a product that wore a tank top with the nickname "Hot Sizzles" on it.[59] Plaintiff used the following evidence to show that "Hot Sizzle" was a nickname that was closely associated with him: (1) Printouts of a YouTube page; (2) a Google search of "Hot Sizzle;" and (3) a Wikipedia auto search.[60]

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51. *Id.* at 923.

52. *Id.*; *see also* Ali v. Playgirl, 447 F. Supp. 723, 727 (S.D.N.Y. 1978) (holding that Muhammed Ali had a right of publicity in the nickname "the Greatest"); Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 137 (Wis. 1979) (holding that the product name "Crazylegs Shaving Gel" infringed on the right of publicity of football player Elroy Hirsch, whose nickname was "Crazylegs").

53. *See generally* Brief of Appellant, George Spanky McFarland, *McFarland*, 14 F.3d 912 (No. 92-5177).

54. Ackerman v. Ferry, No. B143751, 2002 WL 31506931, at *19 (Cal. Ct. App. Nov. 12, 2002).

55. CAL. CIV. CODE § 3344 (West 2023).

56. *Ackerman*, 2002 WL 31506931, at *1.

57. *Id.* at *18.

58. Champion v. Take Two, 64 Misc. 3d 530, 533–34, 541 (N.Y. Sup. Ct. 2019).

59. *Id.* at 533.

60. *Id.* at 533–34.

The court reasoned that nicknames were not included in New York Civil Rights Law Sections 50, 51, which provided a cause of action for the use of a person's name, portrait, or picture without consent for advertising or trade purposes.[61] While the court recognized a limited exception for "stage, theatrical or fictitious names" that are publicly known and identify a person "virtually to the exclusion of his true name," the court held that plaintiff did not establish that he could meet this test.[62] The court noted that plaintiff's evidence only showed that he was sometimes referred to as "Hot Sizzle," but was more frequently referred to as "Hot Sauce."[63]

Based on the reasoning in *McFarland, Ackerman,* and *Champion,* counsel should consider the length of time and frequency of its use when determining whether a client has a proprietary right in a nickname. When arguing such claims, counsel should consistently use the nickname to refer to the client in both pleadings and proceedings.

As courts have determined that nicknames may have commercial value, transactional lawyers should consider including them in contracts. The case of *Jerusalem Ridge Bluegrass Music Foundation of Kentucky, Inc. v. Ohio Co. Industrial Foundation* arose from a licensing agreement between James Monroe, the executor of the estate of musician Bill Monroe, and the defendant.[64] The contract included the following provision: "Monroe grants to the [Ohio Company Industrial Foundation], the non-exclusive license to utilize the name 'Bill Monroe[,]' together with the nickname, likeness, right of publicity and biographical sketch."[65] This not only shows that a client's legal name must be considered in transactional matters, but also that a nickname can have significant monetary value.

As shown above, nicknames come with both benefits and drawbacks. Nicknames can humanize a client and can have commercial value and, thus, be a property right. However, nicknames can create undesirable connections as they are derived from an individual's associations and characteristics. Attorneys

61. *Id.* at 536.
62. *Id.* at 539.
63. *Id.* at 540.
64. The Jerusalem Ridge Bluegrass Music Found. of Ky., Inc. v. Oh. Co. Indus. Found., No. 2011–CA–001830–MR, 2013 WL 132662, at *1 (Ky. Ct. App. Jan. 11, 2013).
65. *Id.*

should consider all the ramifications of nicknames when using them in legal papers.

III. FIRST NAMES

Children are often referenced by first name. Thus, judicious use of a party's first name may make a plaintiff or defendant appear vulnerable and in need of protection, even if the client is no longer a minor in age.[66] For example, counsel for a college student complainant in a sexual harassment claim against a professor or administrator might decide to use the client's first name even if the client is over eighteen to emphasize his or her vulnerability, as well as the gap in power between plaintiff and defendant.

In William Faulkner's *The Sound and the Fury*, the thirty-three-year-old character, Benjy, is referred to by his first name to emphasize that he is developmentally disabled.[67] Notably, when his disability is diagnosed, his name is changed from "Maury," the traditional name given to Compson family male children, to "Benjamin."[68] His childlike nature and vulnerability is further underscored by the use of the diminutive form of Benjamin.

Advocates for a developmentally disabled defendant in a criminal case might opt to use the client's first name to generate the protectiveness society generally extends toward minors, and to underscore the unfairness of imposing adult criminal sentences on a client with the IQ and mental capacity of a child. As noted by the American Civil Liberties Union: "People with intellectual disabilities are at a higher risk of wrongful convictions and death sentences. They may be more likely to falsely confess to a crime because they want to please the authorities that are investigating the crime."[69] Not only do such clients arguably lack the mens rea necessary to establish guilt, but they are also less likely to fully understand the judicial process.[70] Moreover, studies have shown

66. *See* Stephen A. Newman, *Discussing Advocacy Skills in Traditional Doctrinal Courses*, 65 J. LEGAL EDUC. 207, 222 (2015).

67. WILLIAM FAULKNER, THE SOUND AND THE FURY *passim* (photo. reprt. 2022) (1929).

68. *Id.* at 44.

69. *Intellectual Disability and the Death Penalty*, AM. CIV. LIBERTIES UNION (Sept. 4, 2003), https://www.aclu.org/other/intellectual-disability-and-death-penalty.

70. *Id.*

that intellectually challenged inmates are particularly vulnerable to abuse in prison settings.[71]

The use of a client's first name in criminal cases involving parties with developmental challenges can also highlight evidence that a defendant was not a fully functioning adult and, thus, entitled to special consideration.[72] In *Hall v. Florida*, counsel argued that the Florida Supreme Court erred in affirming the imposition of the death penalty on a man with an IQ of 71.[73] In presenting his case to the Supreme Court, petitioner's attorneys in *Hall* presented the following evidence in their brief: "Hall learned how to 'walk and talk long after' his siblings did. Teachers repeatedly described him as 'mentally retarded,' and he failed in school. Hall never learned how to read and write or do basic arithmetic. He 'never really functioned as an adult.'"[74] The Supreme Court reversed the Florida decision and remanded the case.[75] The Court reasoned that defendants must be allowed "to present additional evidence of intellectual disability" given the inherent margin of error in IQ tests.[76]

Courts have also repeatedly noted that juveniles should be treated differently under the law in some instances because of their age and immaturity.[77] For example, in *Davis v. Monroe*, the Supreme Court recognized that children behave differently from adults and, consequently, schools are unlike the adult workplace for purposes of assessing sexual harassment claims.[78] Thus, counsel for minor clients who are charged with adult crimes should also consider using first names during court proceedings to differentiate the client from an adult.

The following hypothetical presents a scenario where counsel might opt to refer to defendant at trial by first name to emphasize

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71. *See, e.g.*, Jennifer Sarrett, *US Prisons Hold More Than 550,000 People with Intellectual Disabilities - They Face Exploitation, Harsh Treatment*, THE CONVERSATION (May 7, 2021, 8:44 AM), https://theconversation.com/us-prisons-hold-more-than-550-000-people-with-intellectual-disabilities-they-face-exploitation-harsh-treatment-158407.

72. *See, e.g.*, Reply Brief for Petitioner, Hall v. Florida, 572 U.S. 701 (2014) (No. 12-10882); *see also* Atkins v. Virginia, 536 U.S. 305, 321–22 (2022) (ruling that the execution of any person with "mental retardation" violated the Eighth Amendment's prohibition on cruel and unusual punishment).

73. *Hall*, 572 U.S. at 723.

74. Reply Brief for Petitioner, *supra* note 72, at 17.

75. *Hall*, 572 U.S. at 724.

76. *Id.* at 723.

77. *See, e.g.*, Davis v. Monroe, 526 U.S. 629, 651 (1999).

78. *Id.* (noting that "children may regularly interact in a manner that would be unacceptable among adults").

his youth. The defendant is charged with criminal sexual contact, which is defined under the statute at issue as an "intentional touching" of the victim's "intimate parts for the purpose of sexually degrading or humiliating the victim or sexually gratifying the actor."[79] The facts of the case are as follows: (1) defendant *A.B.* and victim *C.D.* were walking through a middle school hallway on their way from one class to another at the time of the incident; (2) both *A.B.* and *C.D.* were fourteen; (3) *A.B.* told *C.D.* he wanted her "pussy"; (4) *A.B.* then briefly touched *C.D.* between her legs; (5) *E.F.*, a classmate of both the defendant and the victim, was present at the time and thought *A.B.* was "horsing around"; (6) *E.F.* testified that he had seen other students "joking around" in a similar manner.

One strategy in this instance might be to paint the defendant's conduct as an example of adolescent misbehavior, as opposed to criminal conduct. Referring to the defendant during court proceedings by his first name is a way of underscoring his immaturity, particularly given the context of a classmate's characterization of such misconduct as "horsing around."

IV. GENDER PREFIXES

The semantic power of prefixes is reflected in the long and complicated history of "Mrs.," "Miss," and "Ms."[80] Changes in the language used to describe women were, at least in part, "about negotiating social status and power dynamics."[81] The term "Miss" was originally used for girls, correlative to the way Master was used for boys.[82] However, prior to the mid-18th century, referring to an adult woman as "Miss" implied that she was a prostitute.[83] Moreover, until the mid-19th century, the use of any prefix before a woman's name was largely a way of conferring status; women on

79. *See, e.g.*, N.J. STAT. ANN. § 2C:14-1(d) (West 2012).

80. *See, e.g.*, Alexandra Buxton, *When "Mistress" Meant "Mrs." and "Miss" Meant Prostitute*, THE NEW REPUBLIC (Sept. 12, 2014), https://newrepublic.com/article/119432/history-female-titles- mistress-miss-mrs-or-ms; Dennis Baron, *What's in a Name? For "Ms.," a Long History*, MS. MAG. (Aug. 27, 2010), https://msmagazine.com/2010/08/27/whats-in-a-name-for-ms-a-long-history/#:~:text=It%20turns%20out%20that%20Ms,was%20also%20sometimes%20spelled%20Mis.; Chi Luu, *From the Mixed-Up History of Mrs., Miss, and Ms.*, JSTOR Daily (Nov. 8, 2017), https://daily.jstor.org/from-the-mixed-up-history-of-mrs-miss-and-ms/.

81. Luu, *supra* note 80.

82. Buxton, *supra* note 80.

83. *Id.*

the bottom rungs of society were generally referred to simply by name.[84]

In the 18th century, "Mrs." was used to identify businesswomen or female household heads, i.e., women "with capital"; thus, "Mrs." was a marker of social status, not marital status.[85] The head housekeeper on an estate might be referred to as "Mrs. Smith," regardless of whether she had ever married, while the scullery maid was called by her first name.[86] A well-known example of this custom is represented by the character of Mrs. Bridges, the head cook for the upper class Bellamy family in the TV series *Upstairs, Downstairs*.[87] As Mrs. Bridges was never married, the "Mrs." was used to confer status. Thus, "Mrs." was equivalent to "Mr." as a term to describe "a person who governed servants," had capital, or was established in trade.[88] "Mrs." did not signify a married woman until around 1900.[89]

Notably, there has never been a prefix distinction between married men and bachelors. This absence, coupled with the social opprobrium attached to "spinsterhood," was a linguistic reflection of gender inequalities that had economic, social, and even safety ramifications.[90] Once "Mrs." morphed into a title that conveyed marital status, it was used to define a woman primarily as a wife and "no longer her own person."[91] For example, in Virginia Woolf's novel, *Mrs. Dalloway*, the titular character's maiden name, Clarissa Parry, is almost never used.[92] This authorial choice underscores how completely the character has subsumed her younger self into the role of a society hostess promoting her husband's political career.

With the rise of the feminist movement in the twentieth century, the search was on for a prefix that did not divide women into "marrieds" and "singles."[93] In 1901, an early proponent of the use of "Ms." for all women wrote that "[w]hat is needed is a more

84. *Id.*
85. *Id.*
86. *Id.*
87. *Kate Bridges*, SOAP OPERA WIKI, https://soaps.fandom.com/wiki/Kate_Bridges (last visited Aug. 16, 2024) (noting that Kate Bridges was referred to as "Mrs. Bridges" as a courtesy and measure of status).
88. Buxton, *supra* note 80.
89. *Id.*
90. Luu, *supra* note 80.
91. *Id.*
92. VIRGINIA WOOLF, MRS. DALLOWAY 3 (1925).
93. Baron, *supra* note 80.

comprehensive term which does homage to the sex without expressing any views as to their domestic situation."[94] In a 1914 *New York Times* article, a writer suggested that women use the term "Miss" both before and after marriage because whether "a woman was single or married or had children or none, husband or none, was her concern and no one else's."[95]

It was not until the 1960s and 70s, however, that "Ms." began to make real "headway" as a uniform style of address for all women, regardless of marital status.[96] However, there are cultures where there is no equivalent to "Ms."[97] Even in the United States, the purpose of adopting "Ms." has been diluted by those who use it solely to refer to single women, instead of employing it as a uniform prefix.[98]

While identifying a woman as "Mrs." followed by her husband's name is now generally considered "old-fashioned,"[99] the connotations of the prefix might be something an advocate can use to a client's advantage as the term arguably "defines [a woman] as a wife first and foremost."[100] For example, an advocate might opt to refer to a client in a divorce case as "Mrs. John Smith" to emphasize economic dependence on a spouse and underscore equity arguments for alimony.[101]

Whether a woman is referenced as someone's wife or "Mrs.," or uses a man's last name can be critical evidence in cases where a client is trying to establish a common law marriage.[102] For example, in *Buford v. Buford*, the court affirmed that the plaintiff and defendant had a common law marriage; the court noted, among other evidence, that the plaintiff testified that she

94. *Id.*

95. *Id.*

96. *Id.* Notably, *The New York Times* did not begin using this prefix until 1986. *Id.*

97. Buxton, *supra* note 80 (noting that, in 2012, the mayor of a town in France sought to erase distinctions between married and single women by banning the use of "mademoiselle" in favor of a uniform use of "madame," which formerly applied only to married women).

98. Baron, *supra* note 80 (noting that a "growing number of English speakers . . . are pairing Ms. with Mrs. to signal unmarried/married much like the Miss/Mrs. pair it was supposed to replace").

99. Luu, *supra* note 80.

100. *Id.*

101. *See, e.g.*, Jennings v. Hurt, 160 A.D.2d 576, 577 (N.Y. App. Div. 1990) (considering evidence that the defendant referred to the plaintiff as his "wife" in determining whether the two had a common law marriage and if he owed her part of his assets).

102. *See, e.g.*, McMaster v. Small, No. 14–13–00069–CV, 2014 WL 950471, at *4–5 (Tex. App. Mar. 11, 2014); Anderson v. Astrue, No. 08-19 Erie, 2008 WL 5263345, at *4–5 (W.D. Pa. Dec. 16, 2008).

consistently used the defendant's last name for a period of at least seven years.[103]

The importance of the use of the terms "husband" and "wife" in common law marriage claims is illustrated by *Kosloff v. Bowen,* where the plaintiff sought widow's insurance benefits.[104] On appeal, the court confirmed summary judgment for the defendant on the grounds that the decedent did not consistently refer to the plaintiff as his "wife," and that several witnesses testified "that neither the plaintiff nor the decedent referred to each other as husband and wife."[105]

The plaintiff in *Anderson v. Astrue* also filed suit after her application for widow's insurance was denied.[106] The defendant argued that the plaintiff was not entitled to this benefit as she and the decedent, Roland Anderson, had been married for only seven months at the time of his death on December 12, 1994.[107] Plaintiff argued that she and the decedent had been in a common law marriage for at least two years before he died.[108] Plaintiff's evidence included the following facts: (1) beginning in 1992, she and the decedent "presented themselves to the community as husband and wife"; (2) "she referred to herself as 'Mrs. Anderson'"; and (3) vendor invoices and work orders submitted to the plaintiff before 1994 included the names: Beverly Anderson, Mrs. Roland Anderson and/or Mrs. Anderson.[109] The defendant countered, inter alia, that the plaintiff continued to sign documents in her former name until May 14, 1994.[110]

Under Pennsylvania law, at the time of the lawsuit, "a rebuttable presumption of common law marriage can be established by proof of constant cohabitation and a reputation of marriage that is 'not partial or divided but is broad and general.'"[111] The court ultimately affirmed the administrative law

103. Buford v. Buford, 874 So. 2d 562, 567 (Ala. Civ. App. 2003).

104. No. 88–0929, 1990 WL 72950, at *1 (E.D. Pa. May 24, 1990).

105. *Id.* at *3.

106. *Anderson*, 2008 WL 5263345, at *1.

107. *Id.* at *1, *3. Under Title II of the Social Security Act, a surviving spouse only qualified for widow's insurance benefits if she was married to the decedent for at least nine months prior to the death. *Id.* (citing 42 U.S.C. § 416(c)(1); 20 C.F.R. § 404.335(a)(1)).

108. *Id.* at *1.

109. *Id.* at *2–3.

110. *Id.* at *2 (noting that the defendant also submitted evidence that the plaintiff and the deceased did not file a tax return as a married couple until 1994).

111. *Id.* at *4 (quoting Staudenmayer v. Staudenmayer, 714 A.2d 1016, 1020–21 (Pa. 1998)).

judge's determination that the plaintiff had only been married to the decedent for seven months.[112] The decision was based in large part on the plaintiff's continued use of her previous name on her tax returns and bank statements prior to 1994.[113] The court rejected the vendor invoice evidence as the plaintiff and decedent "did not control what the vendors did."[114]

Nomenclature also played a part in the case of *McMaster v. Small*, where plaintiff sued defendant for divorce, alleging that they had been in a common law marriage.[115] The case had a complicated procedural history; on appeal, the court reversed the jury's finding for the plaintiff and remanded the case for trial.[116] On remand, the trial court granted the defendant's motion for summary judgment on the grounds of "no evidence."[117] On appeal from the trial court's decision, the appellate court reversed, finding there was enough evidence for a new trial.[118] Under Texas law, at the time of the trial, to prove a common law marriage a claimant had to show that the parties: "(1) agreed to be married; (2) lived together as husband and wife in Texas; and (3) . . . represented to others [in Texas] that they were married."[119] The key issue in the case was the third element, which was referred to as "holding out to the public."[120] The court reasoned that the element was satisfied if the "couple 'consistently conducted themselves as husband and wife in the public eye or that the community viewed them as married.'"[121]

The following facts were part of the evidence presented by the plaintiff: (1) The defendant introduced the plaintiff to people as his "wife"; (2) the couple's housekeeper testified that she heard the defendant refer to the plaintiff as his "wife" both in public and at home; (3) the couple were known to friends as "husband and wife"; (4) the defendant referred to the plaintiff as "Mrs. Small"; (5) the defendant's son testified that the defendant instructed people to contact "his wife" about bills, and that the defendant introduced

112. *Id.* at *1, *5.
113. *Id.* at *4.
114. *Id.*
115. No. 14–13–00069–CV, 2014 WL 950471 *passim* (Tex. App. Mar. 11, 2014).
116. *Id.* at *1.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* (citing Small v. McMaster, 352 S.W.3d 280, 285 (Tex. App. 2011)).

plaintiff to others as "his wife"; and (6) another witness testified that plaintiff referred to herself as "Mrs. Small" in defendant's presence and he did not correct her.[122] The court held that the evidence established an issue that had to be resolved at trial.[123]

The court in *Jennings v. Hurt*, however, denied plaintiff's motion for leave to amend her complaint to add allegations that she and the defendant were in a common law marriage under South Carolina law.[124] The primary evidence presented by the plaintiff was that while she and the defendant were in South Carolina, the defendant phoned an obstetrician and asked to speak with him about "his wife."[125] However, the witness who testified about the call could not remember if it occurred during the time period at issue.[126] In denying the motion, the court noted that "almost all" of the witnesses testified that the defendant referred to the plaintiff as his "friend," not his "spouse."[127]

Consistency in presentation was also an issue in *Winfield v. Renfro*.[128] The plaintiff in *Winfield* claimed she had a common law marriage with the defendant and sought a divorce.[129] On appeal, the court reversed the lower court's grant of a divorce and determined that the evidence was not sufficient to establish that the couple had presented themselves to the public as married.[130] The court noted, inter alia, that only the plaintiff had publicly asserted that the couple was married.[131] Moreover, the single instance where Winfield "may have acquiesced to being identified as married to Renfro" occurred in the Bahamas, while Texas law required representations in Texas.[132]

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122. *Id.* at *2–3.

123. *Id.* at *5; *see also* Beals v. Beals, 416 S.E. 2d 301, 302–03 (Ga. Ct. App. 1992) (affirming plaintiff's appointment as administrator of decedent's estate after finding that there was enough evidence that the two had a common law marriage; the court noted, inter alia, that the plaintiff referred to herself as "Mrs. Beals" and the deceased introduced her to people as his "wife").

124. 160 A.D.2d 576, 576 (N.Y. App. Div. 1990).

125. *The Accidental Husband?*, CHI. TRIB., https://www.chicagotribune.com/1989/06/25/the-accidental-husband/ (Aug. 8, 2021, 6:47 PM).

126. *Id.*

127. *Jennings*, 160 A.D.2d at 577.

128. *See* Winfield v. Renfro, 821 S.W.2d 640, 643 (Tex. App. 1991).

129. *Id.* at 643.

130. *Id.* at 651.

131. *Id.*

132. *Id.* at 644; *see also* Riley v. Riley, No. 14–11–00346–CV, 2012 WL 2550957, at *4 (Tex. App. July 3, 2012) (noting that there must be multiple instances of a couple representing themselves as married to satisfy the "holding out" requirement of Texas law).

Counsel representing a party claiming a common law marriage should also consider other family terms in presenting a case. For example, in *Bailey v. Thompson*, the court noted that the defendant was repeatedly introduced by plaintiff's daughter as her "stepfather" and the defendant never objected to this appellation.[133] Moreover, on at least one occasion, defendant introduced himself as the daughter's stepfather.[134] Based on this, and other evidence, the court affirmed the trial court's determination that the plaintiff and defendant had a common law marriage.[135]

Historically, gender prefixes have been used to reinforce archaic gender roles. Attorneys can take advantages of these deeply rooted associations in cases where they will benefit a client, such as common law marriage claims. However, in instances where these associations can demean a client, attorneys should be careful to avoid them.

V. TITLES AND HONORIFICS

In both life and literature, titles are used to convey power, status, and/or expertise.[136] Indeed, absent the proper credentials and accompanying title, it is impossible to be a practicing lawyer or doctor in the United States.[137] Thus, a refusal to use a person's title is a means of denigrating him/her/them.[138]

A. The Power of Titles

As noted above, titles can bestow status and authenticity.[139] It is no accident that Dracula, the eponymous villain of Bram Stoker's novel, is a Count.[140] Similarly, his archenemy Van Helsing uses multiple degrees to establish his bona fides as an expert in,

133. Bailey v. Thompson, No. 14–11–00499–CV, 2012 WL 4883219, at *3 (Tex. App. Oct. 16, 2012).

134. *Id.* at *11.

135. *Id.* at *1.

136. McNamarah, *supra* note 25, at 2238.

137. Ilana Kowarski & Sarah Wood, *How to Become a Lawyer: A Step-by-Step Guide*, U.S. NEWS & WORLD REP. (June 20, 2023, 9:33 AM), https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/how-to-become-a-lawyer-a-step-by-step-guide; *9 Steps to Become a Physician*, INDEED, https://www.indeed.com/career-advice/career-development/how-to-become-a-physician (Apr. 22, 2024).

138. *See infra* pt. V.A.; *see also* McNamarah, *supra* note 25, at 2239.

139. McNamarah, *supra* note 25, at 2238.

140. BRAM STOKER, DRACULA 8 (1996).

among other things, "obscure diseases"; for example, in his correspondence, he adds the following after his name: "MD, DPh, D.Lit, ETC, ETC . . . ."[141]

The importance of name and titles is a recurring theme in Honoré de Balzac's novella, *Colonel Chabert*.[142] The title character is a soldier in the Napoleonic wars who is presumed dead after being wounded in battle.[143] When he returns home, he discovers his wife has remarried and wishes he would disappear.[144] After he agrees to renounce his identity, she acknowledges the importance of his military title in the following speech:

> "How could I accept such a sacrifice?" replied the Countess. "Some men die to save the honor of their mistress, but they only give their lives once. You would be giving your life every day! No, no, it's impossible. If it were only a question of your life, that would be nothing. But to testify in writing that you are not Colonel Chabert; to admit that you are an imposter; to give your honor while telling a lie every hour of the day . . ."[145]

As shown by this passage from *Colonel Chabert*, honorifics not only signal favored status or position, they establish social positioning.[146] Thus, given the association of titles with power and status, counsel might opt to emphasize an adversary's title to underscore a client's vulnerability. For example, in a police brutality case, counsel might choose to use a defendant's title to highlight the power afforded law enforcement officers in stop and search and/or arrest scenarios.[147] Similarly, in a workplace sexual harassment case, reference to a defendant's title emphasizes the gap in authority and power between an employer and an employee.[148]

In addition, titles, like nicknames, can be a substantive element of a case. Consider the following scenario: *A.B.* is the Director of an institute that has exclusive excavation rights at

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141. *Id.* at 112–13.
142. *See generally* HONORÉ DE BALZAC, COLONEL CHABERT (Carol Cosman trans., 1997).
143. *Id.* at 18.
144. *Id.* at 12, 64.
145. *Id.* at 86.
146. McNamarah, *supra* note 25, at 2238–39.
147. *See* Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader,* 89 OR. L. REV. 305, 327 (2010) (noting how descriptive details are used to evoke emotional responses, such as surprise or anger, in a reader).
148. *Id.*

certain archaeological sites. *A.B.* is suing the institute over the right to assign initial publication of findings at these sites. Part of *A.B.*'s argument is that the last five directors had this right. Since *A.B.*'s status as director is part of his argument, his counsel should consider using that title consistently throughout the proceedings.

B. The Power of Withholding Titles

Just as honorifics can convey status, a refusal to use a person's title can convey a lack respect.[149] In *United States v. Choi*, thirteen gay, former servicemen were arrested during a protest of the military's "Don't Ask, Don't Tell" policy, which provided, among other things, that servicemen and women could not openly discuss their sexual orientation.[150] During the proceedings that arose from the arrests, the Assistant U.S. Attorney repeatedly failed to use the military titles of the servicemen and referred to them as "Mr."[151] The Attorney General's refusal to acknowledge the rank of the witnesses, even after they requested to be addressed by their titles, reflected an attempt to denigrate them,[152] and led to the following exchange with the bench:

> *The Court:* All right. They've been established. Ms. George, do you--please explain something to me: Do you have an objection to referring to these gentlemen as the rank they achieved in the United States army?
> *Ms. George:* They're not in the military, Your Honor. Yes, I do.
> *The Court:* I appreciate that. But I would like to think after I retire, people still will call me [J]udge. So, the title that one captures at one point in his life usually follows him. I call retired judges Judge all the time and so do you. What's the difference?
> *Ms. George:* Is the Court ordering me to refer to him as -
> *The Court:* I would appreciate it if you would.[153]

149. McNamarah, *supra* note 25, at 2239.
150. United States v. Choi, 818 F. Supp. 2d 79, 82 (D.D.C. 2011). The "Don't Ask, Don't Tell" policy was repealed on September 20, 2011. Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111–321, 124 Stat. 3515 (2011).
151. McNamarah, *supra* note 25, at 2250.
152. *Id.*
153. Transcript of Bench Trial, P.M. Session - Day 2 at 16, 24, 69–70, *Choi*, 818 F. Supp. 2d 79 (No. 10-739M-11); *see also* McNamarah, *supra* note 25, at 2250–51.

This colloquy suggests that counsel's refusal to use the servicemen's earned titles undermined her credibility with the court. Thus, this excerpt raises another key consideration for a practitioner with respect to naming decisions.[154] While it is important for an advocate to use language that supports a client's argument, counsel must also maintain their own credibility.[155]

The risk of losing credibility is particularly acute where a speaker refuses to use an honorific when addressing a minority, just as withholding titles has long been a means of denigrating people of color and sexual minorities.[156] For example, in *Hamilton v. Alabama*, the Supreme Court reversed a decision by the Supreme Court of Alabama that affirmed a contempt conviction.[157] The conviction arose from the following cross-examination of an African American witness:

> 'Q What is your name, please?
> 'A Miss Mary Hamilton.
> 'Q Mary, I believe—you were arrested—who were you arrested by?
> 'A My name is Miss Hamilton. Please address me correctly.
> 'Q Who were you arrested by, Mary?
> 'A I will not answer a question——
> 'BY ATTORNEY AMAKER: The witness's name is Miss Hamilton.
> 'A —your question until I am addressed correctly.
> 'THE COURT: Answer the question.
> 'THE WITNESS: I will not answer them unless I am addressed correctly.
> 'THE COURT: You are in contempt of court——[158]

As noted in the petition for certiorari, the white prosecutor's refusal to call the witness "Miss Hamilton" was "one of the most distinct" signifiers of racism.[159]

In a related vein, studies have shown that women "are significantly less likely to be addressed by professional title than

154. *See* Transcript of Bench Trial, *supra* note 153, at 16, 24, 69–70.
155. *See*, *e.g.*, ROBBINS ET AL., *supra* note 14, at 245–46.
156. McNamarah, *supra* note 25, at 2241.
157. Hamilton v. Alabama, 376 U.S. 650, 650 (1964).
158. *Ex Parte* Hamilton, 275 Ala. 574, 574–75 (Ala. 1963); *see also* McNamarah, *supra* note 25, at 2241.
159. *Hamilton,* 275 Ala. at 574–75; *see also* McNamarah, *supra* note 25, at 2241.

are men."[160] A 2017 study determined that when "men introduced female doctors at a professional event, they used their titles 50 percent of the time – but when men introduced fellow male doctors, they used their titles over 70 percent of the time."[161] Similarly, a hospital recently mandated that nurses with a doctoral degree would no longer be allowed to use their "Dr." title at work; notably, the nursing profession has traditionally been associated with women.[162] The justification for this policy is that the use of the honorific "Dr." by a nurse could confuse patients.[163] However, this rationale is belied by the fact that the policy applied only to nurses and not to other professionals with doctoral degrees who worked in the building.[164]

The recent controversy over Dr. Jill Biden's use of the title "Dr." also reflects the gender bias often at the root of withholding titles from women.[165] The Biden incident arose from an op-ed by Joseph Epstein that was published in *The Wall Street Journal*; the piece advised Dr. Biden to "drop the 'Dr.'" as it would be "fraudulent" to use the honorific because "no one should call himself 'Dr.' unless he has first delivered a child."[166] As an initial matter, the writer's use of the male pronoun to describe individuals he considered entitled to use the honorific did not go unnoticed.[167] Thus, in his first paragraph, the author's naming choice

160. McNamarah, *supra* note 25, at 2245–466; *see also, e.g.*, Kimberly A. Lonsway et al., *Understanding the Judicial Role in Addressing Gender Bias: A View from the Eighth Circuit Federal Court System*, 27 LAW & SOC. INQUIRY 205, 220–21 (2002); Andrea Stepnick & James D. Orcutt, *Conflicting Testimony: Judges' and Attorneys' Perceptions of Gender Bias in Legal Settings*, 34 SEX ROLES 567, 568–72 (1996).

161. Kara Alaimo, *Attack on Jill Biden's 'Dr.' Title Is No Surprise for Women Scholars—And Proof That She Needs to Use It*, CNN (Dec. 14, 2020, 6:26 AM), https://www.cnn.com/2020/12/14/opinions/jill-biden-doctor-wall-street-journal-alaimo/index.html.

162. Shannon Idzik, *Condescension Over Use of 'Dr.' Title 'Reeks of Misogyny and Paternalism'*, THE BALT. SUN (Jan. 22, 2021), https://www.baltimoresun.com/2021/01/22/condescension-over-use-of-dr-title-reeks-of-misogyny-and-paternalism-commentary/.

163. *Id.*

164. *Id.*

165. *See, e.g.*, Alaimo, *supra* note 161; Michael Levenson, *An Opinion Writer Argued Jill Biden Should Drop the "Dr." (Few Were Swayed)*, N.Y. TIMES (Dec. 12, 2020), https://www.nytimes.com/2020/12/12/us/jill-biden-doctor-wsj.html (quoting Douglas Emhoff, the husband of Vice-President, Kamala Harris, for the proposition that a similar article "would never have been written about a man"); Idzik, *supra* note 162.

166. Alaimo, *supra* note 161.

167. *Id.*

undermined his credibility and exposed the sexist tenor of his piece.[168]

To add insult to injury, Epstein subsequently referred to Dr. Biden as "kiddo."[169] The word "kiddo" has been defined as an informal, often slightly condescending way to "address a child or a person who's younger than the speaker."[170] Epstein's use of this term reflects another way language is often used to demean women, namely by using informal address or endearments like "sweetie" that "verbally impose unwanted familiarity" or reduce an adult to child status.[171]

Other naming practices that "unevenly extinguish women's names and identities" include identifying them by their husband's last name.[172] By way of example, in 1988, a district court judge insisted on addressing a female attorney by her married name after she had asked the court to use her maiden name.[173] When she objected, the judge misstated Pennsylvania law by telling her she was "legally required to use her husband's last name unless she had court permission to do otherwise."[174] The judge's refusal to acknowledge counsel's own naming choice reflected his own biases and animus, which undermined his credibility as an impartial authority to the point of requiring him to make a public apology.[175]

A number of courts have recently attempted to correct for historical biases that are reflected in forms of address.[176] For example, Directive 07-22 (the "Directive") issued by the New Jersey Supreme Court on July 19, 2022 noted the need for gender

168. *See id.*

169. Levenson, *supra* note 165.

170. *Kiddo*, DICTIONARY.COM, http://www.dictionary.com/browse/kiddo (last visited Aug. 14, 2024).

171. McNamarah, *supra* note 25, at 2247.

172. *Id.* at 2246–47.

173. *U.S. Judge Won't Allow Lawyer 'to Use That Ms.',* N.Y. TIMES (July 14, 1988), https://www.nytimes.com/1988/07/14/us/us-judge-won-t-allow-lawyer-to-use-that-ms.html?searchResultPosition=1; *Federal Judge Apologizes in Fight Over Use of 'Ms.',* N.Y. TIMES (July 15, 1988), https://www.nytimes.com/1988/07/15/us/federal-judge-apologizes-in-fight-over-use-of-ms.html?searchResultPosition=1.

174. *U.S. Judge Won't Allow Lawyer 'to Use That Ms.'*, *supra* note 173; *Federal Judge Apologizes in Fight Over Use of 'Ms.'*, *supra* note 173.

175. *U.S. Judge Won't Allow Lawyer 'to Use That Ms.'*, *supra* note 173; *Federal Judge Apologizes in Fight Over Use of 'Ms.'*, *supra* note 173.

176. Heidi K. Brown, *Get with the Pronoun*, 17 LEGAL COMMC'N. & RHETORIC 61, 93 (2020) (noting that "[j]udges have directly discussed pronouns in their court orders, under-scoring intent in word choice and respecting litigants' personal pronoun usage").

inclusivity with respect to the use of titles in the court system.[177] The Directive further provided that titles, such as "Attorney," should be used instead of gendered honorifics, such as "Ms.," and that, where possible, "[l]anguage that is deeply rooted in biased historical usages should be avoided."[178]

Titles and honorifics come with significant weight as they connote knowledge and power. Thus, reinforcing a client's title can reinforce a client's entitlement to employment benefits or endow the client with greater credibility. However, overuse of a title in a courtroom can also work against the client, particularly if an abuse of position or failure to live up to professional standards is at issue. Thus, advocates need to carefully consider when to emphasize a client's title.

VI. PRONOUNS

As pronouns are markers of gender identity, they serve both rhetorical and grammatical functions.[179] Thus, pronouns are a key part of any individual's story as they reflect how that person perceives themself and how they wish to interact with others.[180]

In Virginia Woolf's novel, *Orlando*, the title character is transformed from a male to a female after waking from a long and mysterious sleep.[181] Woolf describes the change as follows:

> Orlando had become a woman . . . The change of sex, though it altered their future, did nothing whatever to alter their identity. Their faces remained, as their portraits prove, practically the same. His memory – but in future we must for convention's sake, say 'her' for 'his' and 'she' for 'he' – her memory then, went back through all the events of her past life without encountering any obstacle
>
> . . .
>
> Many people, taking this into account, and holding that such a change of sex is against nature, have been at great pains to prove (1) that Orlando had always been a woman, (2) that Orlando is at this moment a man. Let biologists and

177. Glenn A. Grant, *Directive 07-22: New Jersey Judiciary Policy on Accessible & Inclusive Communications*, N.J. CTS. (July 19, 2022), https://www.njcourts.gov/sites/default/files/notices/2022/07/n220727a.pdf.

178. *Id.*

179. Davis, *supra* note 13.

180. *Id.*

181. VIRGINIA WOOLF, ORLANDO 137–38 (1928).

> psychologists determine. It is enough for us to state the simple fact; Orlando was a man till the age of thirty; when he became a woman and has remained so ever since.[182]

In her acknowledgement of gender fluidity and the need to adapt pronoun usage accordingly, Woolf was decades ahead of her time. However, in recent years, both society and the legal system have increasingly recognized the importance of using a party's preferred pronoun.[183] In *Taking Offense v. State,* the court acknowledged that willful and repeated reference to someone with language other than that person's self-identified name or pronoun was "harassing and discriminatory speech."[184]

The court in *Grimm v. Gloucester County School Board* used plaintiff's preferred pronouns throughout its opinion; this choice was consistent with the court's determination that "[j]ust like being cisgender, being transgender is natural and is not a choice."[185] The court also noted that, under the standards of care developed by the World Professional Association for Transgender Health, the use of appropriate pronouns is a key part of the transition process.[186]

The plaintiff in *Grimm* sued defendant school after it refused to let him use the boy's bathroom and then refused to change his name on school transcript forms even though he had legally changed his name to Gavin.[187] In affirming the lower court's holding that the school violated plaintiff's rights in violation of Title IX, the court noted the following evidence: the plaintiff had legally changed his first name to Gavin and used male pronouns to describe himself.[188]

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182. *Id.* at 138–39.

183. *See, e.g.*, Nelson v. City of Madison Heights, 845 F.3d 695, 697–98 n.1 (6th Cir. 2017) (noting that the decedent in a state created danger claim was a transgender woman, the court referred to her by female pronouns); Cuoco v. Moritsugu, 222 F.3d 99, 103 n.1 (2d Cir. 2000) (noting that the complainant was a pre-operative male to female transsexual, the court referred to her by female pronouns).

184. Taking Offense v. State, 281 Cal. Rptr. 3d 298, 315 (Cal. 3d Ct. App. 2021), *review granted*, 498 P.3d 90 (Cal. 2021).

185. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.2d 586, 594 (4th Cir. 2020).

186. *Id.* at 596.

187. *Id.* at 601.

188. *Id.* at 598; *see also* B.E. v. Vigo Cnty. Sch. Corp., 608 F. Supp. 3d 725, 725–27 (S.D. Ind. 2022) (granting plaintiffs' motion for a preliminary injunction to use the boys' bathroom at school; the court noted that the plaintiffs had legally changed both their names and gender identification on their birth certificates).

Nomenclature also played a role in the *Grimm* court's decision that transgender individuals constituted a "quasi-suspect" class.[189] The court noted that a history of discrimination is one of the factors for determining whether a group constitutes a suspect or quasi-suspect class whose constitutional right's claims are entitled to heightened scrutiny.[190] The court then highlighted studies recognizing "the 'extreme bias against gender nonconformity' and the 'particularly violent' crimes perpetrated against transgender persons."[191] Later in the opinion, the court noted the "vitriolic" language used against Gavin.[192] At a school board meeting convened to discuss his use of the boy's bathroom, he was called, inter alia, "a 'freak.'"[193]

As illustrated by the decisions above, pronouns work "through 'identification'—they persuade through making connections."[194] Thus, as pronouns can be a crucial means of shoring up legal arguments in cases seeking rights for transgender clients, advocates for transgender people should consistently opt for the use of the client's pronoun and prefix of choice.[195]

In *Whitaker v. Kenosha Unified School Dist*rict, plaintiff, a transgender boy, sued the school district for violating Title IX and the Fourteenth Amendment's Equal Protection clause.[196] Inter alia, school officials denied plaintiff access to the boy's bathroom and refused to refer to him by male pronouns, despite repeated requests to do so.[197] Counsel for plaintiff referred to him by male pronouns throughout the brief, as did the Seventh Circuit in its opinion affirming the lower court's grant of a preliminary injunction mandating that the school allow plaintiff to use the boy's bathroom.[198] Similarly, counsel for plaintiff in *Grimm*

189. *Grimm*, 972 F.2d at 611.

190. *Id.*

191. *Id.* at 612 (quoting Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. Rev. 507, 555 (2016)).

192. *Id.* at 615.

193. *Id.*

194. Davis, *supra* note 13.

195. *See, e.g.*, Brief of Plaintiff-Appellee Gavin Grimm, *Grimm*, 972 F.2d 586 (No. 19-1952); Brief of Plaintiff-Appellee, Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034 (7th Cir. 2017) (No. 16-3522) [hereinafter Brief of Plaintiff-Appellee *Whitaker*].

196. *Whitaker*, 858 F.3d at 1040–42.

197. *Id.*

198. *Id. See, e.g.*, Brief of Plaintiff-Appellee *Whitaker*, *supra* note 195; *see also* Brown, *supra* note 176, at 94 (noting that "[j]udges have directly discussed pronouns in their court orders, under-scoring intent in word choice and respecting litigants' personal pronoun usage").

referred to their client by male pronouns and the male name Gavin.[199]

Even in cases where sexual identity was not at issue, courts have increasingly complied with a party or witnesses' preferred name and pronoun.[200] *Tardif v. City of New York* arose from Section 1983 claims by protesters against police for, inter alia, the use of excessive force, deliberate indifference to serious medical needs, and assault and battery.[201] Subsequent to the events at issue, two of the witnesses had changed their names from James Amico to Mari Tade Storm Summers and from Tony Zilka to Mandy Quinn.[202] Plaintiff moved to have the two witnesses addressed with their chosen names and female pronouns.[203] As the defendant agreed to the request, the motion was declared moot.[204] The court took pains to add that the parties should limit any use of the witnesses prior names "to those that are necessary to avoid confusion."[205]

As with past civil rights issues, the move toward granting rights to transgender individuals, including respecting their name and pronoun choices, has been met with resistance and backlash.[206] In *United States v. Varner*, the court rejected a transgender inmate's request that the name on his judgment of committal be changed from "Norman Keith Varner" to "Katherine Nicole Jett"; the court also rejected the plaintiff's request to be addressed by female pronouns.[207] The court reasoned that "no

199. *See generally* Brief of Plaintiff-Appellee Gavin Grimm, *supra* note 195.

200. *See, e.g.*, Tardif v. City of New York, 344 F. Supp. 3d 579, 606–07 (S.D.N.Y. 2018).

201. *Id.* at 589.

202. *Id.* at 606–07.

203. *Id.*

204. *Id.*

205. *Id.* at 607.

206. *See, e.g.*, Chelsey Cox, *As Arkansas Bans Treatments for Transgender Youth, 15 Other States Consider Similar Bills*, USA TODAY (Apr. 8, 2021, 7:41 PM), https://www.usatoday.com/story/news/politics/2021/04/08/states-consider-bills-medical-treatments-transgender-youth/7129101002/ (reporting the passage of a bill in Arkansas that banned medical treatments for transgender minors and noting that other states were considering similar measures; the article also noted that a proposed bill in North Carolina defined the "sex of a person as 'genetically encoded into a person at the moment of conception, and it cannot be changed'"); Priya Krishnakumar, *This Record-Breaking Year for Anti-Transgender Legislation Would Affect Minors the Most*, CNN (Apr. 15, 2021, 9:46 AM), https://www.cnn.com/2021/04/15/politics/anti-transgender-legislation-2021/index.html (reporting that "[t]hirty-three states have introduced more than 100 bills that aim to curb the rights of transgender people across the country, with advocacy groups calling 2021 a record-breaking year for such legislation").

207. United States v. Varner, 948 F.3d 250, 252–53 (5th Cir. 2020).

authority supports the proposition that we may require litigants, judges, court personnel, or anyone else to refer to gender-dysphoric litigants with pronouns matching their subjective gender identity."[208] The judge's language reflects his biases.[209] Inter alia, the record did not show that Varner was gender dysphoric; thus, the use of that term ignores the fact that "there are many well-adjusted transgender women who do not have gender dysphoria under the DSM-V."[210] Moreover, the court's use of the modifier "subjective" to describe Varner's gender identity also reflects an underlying animus.

The majority opinion in *Varner* was countered by a dissent that noted "many courts and judges adhere" to requests to use a party's preferred pronoun "out of respect for the litigant's dignity."[211] In addition to an "emphatic" dissent, the Fifth Circuit's refusal to use a party's preferred pronoun in *Varner* generated negative press.[212] Commentators opined that, inter alia, the judge's refusal to use the plaintiff's preferred pronouns "undercuts the appearance of impartiality" required of judges under the Model Code of Judicial Conduct.[213]

For lawyers, a refusal to use a person's preferred pronouns not only risks a loss of credibility, but possible sanctions.[214] In *Imani v. City of Baton Rouge*, counsel for plaintiff argued that "[t]here is a growing understanding in our legal system that a person should be referred to by the pronoun that they use."[215] Noting that, in

208. *Id.* at 254–55.

209. *See* William J. Rold, *Fifth Circuit Issues Hostile Opinion on Transgender Prisoner's Name Change, Drawing "Emphatic" Dissent*, LGBT L. NOTES, Feb. 2020, at 6.

210. *Id.*

211. *Varner*, 948 F.3d at 260.

212. *See, e.g.*, Rold, *supra* note 209, at 5; Brown, *supra* note 176, at 39; Ruth Marcus, *We're at War Over Gender Pronouns. Can't We All Just Show Some Respect?*, WASH. POST (Jan. 19, 2020, 7:59 PM), https://www.washingtonpost.com/opinions/a-judge-said-calling-a-transgender-woman-her-would-show-bias-oh-please/2020/01/19/7d3a9f3c-3965-11ea-bb7b-265f4554af6d_story.html (arguing that "federal judges endowed with enormous power and lifetime tenure – should be able to summon the grace to grant [a party's] simple request to be described" by her preferred pronoun).

213. McNamarah, *supra* note 25, at 2320 (noting that the Canon 2 of the Model Code of Judicial Conduct mandates that judges perform their duties "without bias or prejudice").

214. *See, e.g.*, Plaintiffs' Opposition to Louisiana State Police Defendants' Motion to Strike Plaintiffs' Complaint, Imani v. City of Baton Rouge, 614 F. Supp. 3d 306 (M.D. La. 2022) (No. 17-cv-00439) [hereinafter Plaintiffs' Opposition *Imani*] (opposing defendants' move to strike portions of the Complaint that laid out plaintiffs' pronoun preferences); Davis, *supra* note 13 (quoting MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2024) (mandating that attorneys must avoid "harmful . . . verbal conduct that manifests bias or prejudice towards others")).

215. Plaintiffs' Opposition *Imani*, *supra* note 214, at 9.

2017, the Clerk of the U.S. Supreme Court sent "two letters rebuking litigants who refused to use the established pronoun of a party in a case caption," counsel further stated that "[t]hose groups who pointedly refuse to use a persons' pronoun have increasingly been subject to censure."[216] Thus, practitioners must seek to harness the rhetorical power of pronouns, as advocates using proper pronouns can have heightened persuasive impact, maintain credibility with the court, and avoid sanctions.

Given the rhetorical power of pronouns, advocates for transgender clients must be careful to use the client's preferred pronouns at all times. Moreover, failure to use those pronouns with respect to an adversary can result in both a failure to maintain credibility with the court, as well as sanctions.

VII. CONCLUSION

Just as fiction writers deliberate over name choice to create an impression about characters, advocates should also carefully consider how they identify clients in legal documents. While attorneys do not have the luxury of making up evocative names, they can decide whether to refer to a client by first name, last name, nickname, or legal status. In so doing, they should bear in mind the effect these choices may have in terms of generating empathy for their client and/or antipathy toward an adversary.

Naming choices in briefs is an important means of shoring up substantive arguments about status and rights. As "language not only reflects the way writers think; it also shapes the thinking of listeners or readers and influences their behavior."[217] Therefore, consistently referring to parties by their preferred pronouns may accustom a judge or jury to considering parties as female or male.[218] Similarly, consistently referring to parties by title can help persuade a judge or jury that they are entitled to the rights and privileges typically accorded that status.[219] In addition, where name or status is a substantive part of the claim, such as in common law marriage suits or right of publicity actions, counsel

216. *Id.*
217. Nouhad Hayek, *Guidelines on Gender-Sensitive Language*, ESCWA, https://www.unescwa.org/sites/default/files/services/doc/guidelines_gender-sensitive_language_e-a.pdf. (last visited July 1, 2024).
218. *See* Davis, *supra* note 13.
219. *Id.*

should gather as much evidence as possible to substantiate the party's use of that name or title.

Conversely, refusing to address a party or witness by a preferred pronoun or earned title can undermine an advocate's credibility by making counsel appear mean spirited or by revealing a personal animus or bias.[220] An attorney's decision to disrespect the identification choice of a party or witness sends a negative message about counsel's attitude toward his or her "professional role as an officer of the court who is responsible for the fair administration of the judicial system, a system that must treat all participants without bias or discrimination."[221] Thus, a deliberate refusal to use the preferred name or pronoun of a party or witness could subject an attorney to possible sanctions.[222]

In sum, how an attorney refers to a party is a key persuasive technique that influences the way a trier of fact views a client or adversary. As noted above, use of a client's first name can convey vulnerability, while use of a client's title can confer status. Thus, as names generate emotional responses, attorneys should carefully consider naming choices when drafting briefs.

220. *See, e.g.*, *id.*

221. *Id.*

222. *Id.* (quoting MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2024) (mandating that attorneys must avoid "harmful . . . verbal conduct that manifests bias or prejudice towards others")).