FAMILY LAW NEWSLETTER

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Sixteen Years of Family Law

By Hon. Daniel R. Murphy

This will be the last issue of the OSB Family Law Newsletter under my editorial supervision. After sixteen years and 96 issues I am hanging it up.

I must acknowledge and thank Anna Zanolli and all the other wonderful people in the OSB Publications office who have put this newsletter together and sent it out to you over the years. I also wish to thank all the great authors who have submitted so many wonderful articles for our edification.

When I took over as editor in 2006, I had big shoes to fill. Conrad Hutterli had done a great job for 16 years before me. We continued publishing articles that I hoped would be informative and appealing.

During my stint we transitioned from a paper publication to an all-digital version. That saved the OSB some money and made things a bit easier.

From time to time I was able to entice a judge to write a "From the Bench" article to provide some judicial perspective. I hope and trust that was of value.

Family law has changed quite a bit in those 16 years. In the past three years since I retired from the bench I've been practicing family law and as a result have a new appreciation for what family law attorneys face every day and what clients expect. I have learned how stressful this work can be and how hard most practitioners work. Lawyers unfortunately too often get a bad rap but my experience with them, both as a judge and as an attorney, has been mostly a very good experience. Please take care of yourselves and continue the good work.

I will retire from law practice on September 1 and am already engaging in new activities. I will not be sitting in my porch rocker much.

I hope my successor gains even a part of the satisfaction and learning I have in this position. Family law will continue to change and this newsletter will hopefully continue to be a way to keep you updated on those changes.

Thank you all for being readers.

Daniel R. Murphy
Editor

How to Value a Survivor Benefit — an Unanswered Question in Oregon

By Clark Williams and Deb Lush

The question we will address is *how* to value a survivor benefit in a pension that is in pay status. There are two totally different methods, and there is no reported Oregon case that says which is correct.

The *Miller*[1] and *Forney*[2] cases recognize that, in a post-retirement divorce where one spouse is receiving a pension for life with a survivor benefit for the other spouse, the survivor benefit has its own value separate from the member's lifetime benefit. And so the survivor benefit should be separately valued and charged against the spouse in the division of assets. That is settled law.

But these two cases did not address how to value the survivor benefit. In each case, only one value was presented and so the court adopted that value as uncontroverted.

We would like to suggest that there are two ways to value a survivor benefit. The two methods are entirely inconsistent and can yield vastly different values.

The "traditional" method is to determine the likelihood that the spouse will survive the member and for how long, projecting whether and when survivor benefits will start to the spouse and discounting the value of those future payments to the present day as a lump sum. This method involves three speculative factors: (1) how long the member is expected to live; (2) the probability that the spouse will survive the member; and (3) if the spouse survives, how long the spouse will live after the member's death.

The second method is to determine the "cost" of the survivor benefit, i.e., the present value of the reduction in member's lifetime benefit to pay for the survivor benefit. For example, if the member could have elected a single life benefit (e.g., Option 1 in PERS) and if that option would have paid 10% more per month than the joint and survivor benefit that the member actually elected (e.g., Option 3 in PERS), then the present value of the "cost" of the survivor benefit is 10% of the present value of the member's current lifetime benefit. This analysis involves only one speculative factor, that being how long is the member is expected to live. The probability that the spouse will survive and for how long are not factors in this method.

The differences can be dramatic. You have to run the numbers in each case. But in our experience, if the member is in his/her 70s or 80s and is older than the spouse even by just a year or two, then it is likely that the "cost" method will yield a smaller value than the "traditional" method. Notably, to charge the "cost" value to spouse makes the member whole, as if the member had elected the maximum single life benefit at the outset. Any additional value under the "traditional" method represents a "subsidy" provided by the plan that the member will never see because the member must die first before the survivor benefit starts. So, arguably, charging the spouse for the "cost" is sufficient, and the extra value of the "traditional" method over the "cost" method should not be charged against the spouse. Arguably.

Again, there is no published case in Oregon addressing *how* to value as survivor benefit, to our knowledge. So this is an open question. Actuaries will normally use the traditional method. But we would like to suggest that the "cost" method might be the better, more equitable method for valuing the survivor benefit.

The "CC" Dilemma

By David Bean and Amber Bevacqua-Lynott

As lawyers, we must be particularly careful about how we communicate. At the same time, we need to be mindful of and accommodate how our clients prefer to communicate. This means all of us doing domestic relations work have come to become experts at texting and instant messaging as a means of keeping in touch with our clients. However, email generally remains the primary method of communicating—both with clients, other attorneys, and even the court. In fact, over the years, people have become so familiar with email that they have begun using it casually, even when handling sensitive legal matters. This is not a criticism but an inevitability—human nature often confuses familiarity with security. But email can cause procedural and even ethical problems if not used well. In this article, we address one particular pitfall concerning email and suggest a simple solution.

Increasingly, attorneys have been defaulting to sending a carbon copy of their email correspondence to their clients (also known as CC'ing their clients). Folks do this because it is an easy, efficient, and therefore cost-effective way to make sure their clients are informed and aware of communications with opposing counsel and the court. After all, a failure to keep our clients "in the loop" can lead to problems with the Bar. For example, RPC 1.4(a) requires that we apprise our clients of the status of their matter, and RPC 1.4(b) requires that we explain matters to the extent reasonably necessary to permit our clients to

1 208 Or.App. 619 (2006)

2 239 Or.App. 406 (2010)

make informed decisions regarding the representation. So, CC'ing our clients seems like a panacea for complying with our ethical duties, as well as fulfilling our customer service obligations. It seems like an all-around win. However, don't be fooled.

Privilege Issues

Although you may be complying with your ethical responsibilities to timely communicate with your clients by including them as email recipients, because others have also received these emails, you may be violating another ethical duty—to maintain information related to the representation of a client absent client consent—depending on the topics you address in your emails. *See* RPC 1.6. And, if your clients mistakenly or obliviously "reply to all" following their receipt of a communication (after all, if you sent it to everyone, it must be okay to respond that way) then you have likely facilitated their waiver of privilege. See ORS 40.280 (OEC Rule 511) (attorney-client privilege deemed waived if the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication). Moreover, such a response from your client has a higher likelihood of disclosure of mental impressions or strategy information that could significantly harm your client's legal position or the merits of their case.

Direct Communication Issues

When lawyers CC their clients in email exchanges, other email recipients may respond using the "reply all" function and directly communicate information not filtered or interpreted by you as your client's legal counsel. As you know, lawyers are prohibited by RPC 4.2 from communicating with represented parties, absent prior consent of a lawyer representing such other person, unless authorized by law.

You may say—who cares? If they do it often enough, they may face Bar discipline. See, e.g., In re Trigsted, 32 DB Rptr 208 (2018) (respondent undertook to represent two clients in separate alleged Federal Fair Debt Collection Practices Act claims against a collection company, and was subsequently notified that the company was represented by counsel; thereafter, in responses to emails from counsel on each of the claims, respondent replied to counsel, and copied agents and representatives of the company).

But things have changed in recent years. In light of the increased use of this function by lawyers (*i.e.*, perceived laziness), the Bar has been less likely to view these gaffs as communication with a represented party and more likely to view it as a waiver of the direct communication prohibition. After all, you are the one who initiated the communication with opposing counsel and included your

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Publication Deadlines

The following deadlines apply if a member wants an announcement or letter included in the newsletter.

Deadline	*Issue*
9-15-2022	October 2022
11-15-2022	December 2022
1-15-2023	February 2023
3-15-2022	April 2023
5-15-2022	June 2023
7-15-2023	August 2023

client. Therefore, you must have understood that "reply all" was a real possibility and consented to it. (e.g., there were no reported instances of discipline for violations of RPC 4.2 in 2020 or 2021 arising from responding to emails where the initiating attorney included their clients on the communication). *See also*, WSBA Advisory Op. 202201 (2022) ("reply all" where initiating attorney included his or her client may be allowed if consent can be implied by the facts and circumstances).

Professionalism Considerations

Lawyers frequently copy their clients when communicating to a group, such as a court clerk, opposing counsel, assistants, etc. We also see this when counsel communicates with experts, like evaluators and appraisers. What happens next? The recipient sees there are a number of people on the email, so they reply all. When that happens, one party receives the email, and the other does not. Family law litigants are often vulnerable, afraid, and sensitive. If only one party is receiving emails from the court or from an expert who is supposed to be neutral, the other party could view their exclusion as indicative of bias towards them. They might be thinking "why does the expert and court provide information to the opposing party, but not to me?" We, as professionals who assist people going through what is likely the most difficult time of their lives, ought to be careful, considerate, and conscientious to avoid placing parties in this precarious spot. Conceivably, it could derail a case. A party may refuse to continue working with a jointly retained expert if she perceives bias as a result of being left out of important communications, or worse, the exclusion could even create bias if the expert is only receiving input from one party. We should avoid setting up the court or other neutrals up to communicate only with one party and not the other, which can be accomplished by refraining from CC'ing clients.

Alternatives

One alternative to CC'ing clients is to blind carbon copy them instead. Also known as BCC, this method prevents the other recipients to your email from being able to directly communicate with your client by responding to your email correspondence. Unfortunately, problems can arise using BCC as well. As is the danger with CC'ing clients, unless warned and well-disciplined, clients will sometimes "reply all" to emails on which they were BCC'd. In such instances, your client will be sharing his or her thoughts, views, and concerns with others (*i.e.*, vitiating the attorney-client privilege).

Rather than either CC'ing or BCC'ing clients, lawyers should send emails to the recipients, then forward a copy of the sent email to their clients. This minimal "extra" step is well worth the time investment. In addition to preventing direct communication by the recipients to your client, or a waiver of privilege, this approach is advantageous because we are also likely to communicate more effectively with our client. Just copying a client as a means of informing her about the status of her case is inferior to sending a copy of the email with an explanation, or even asking the client if he or she has questions about the contents of the email. Although it requires a bit of additional effort, it is likely to pay extraordinary dividends in terms of client satisfaction, and it could prevent a host of problems including ethics and malpractice issues for the offending lawyers.

Email is a great tool in terms of effective client communication and competent lawyering. However, we must be diligent in not falling victim to its efficiencies. Use it for sharing information and handling tasks such as scheduling, but be cognizant of its limitations, and your own ethical obligations.

David Bean is a partner with Wyse Kadish LLP, and has focused almost exclusively on family law since he began practicing law in Oregon in 2001. He has enjoyed growing his mediation and Collaborative divorce practice over the last several years. David can be reached at dib@wysekadish.com.

Amber Bevacqua-Lynott is a Senior Counsel and Associate General Counsel at Buchalter, and is a member of Buchalter's Professional Responsibility Group. She works from the firm's Portland and San Diego offices, and focuses her practice primarily on legal ethics and professional licensing defense. Prior to joining Buchalter, she was an Assistant Disciplinary Counsel with the Oregon State Bar for more than 18 years, the last six of which she was the Chief Assistant and lead trial attorney. Amber can be reached at alynott@buchalter.com.

The Military Family Law Feature:

Ethical Ethel and the Disability Retirement

By Mark E. Sullivan

The other day I received a call from a desperate attorney in need of help with a military pension division issue. Let's call her "Ethical Ethel." She wanted to know about dividing the pension, accusations of fraud, the requirements of the Rules of Professional Conduct, and… well, why don't we just transcribe here what was said in the conversation?

Ethel: Thanks for picking up the phone, Mark! I'm confounded and confused about this new military divorce case I'm handling, and I thought you'd know the answers.

Mark: That's not likely, Ethel, but I'll try to help you. What seems to be the problem?

Acronyms and Abbreviations

Ethel: The problem? Make that PROBLEMS! Every time I turn around, something new and unexplainable pops up. I'm beginning to wish I'd never taken on this case in the first place. Right now the main issue is understanding what my client, Sergeant Jane Doe, is saying. All the acronyms and abbreviations are so confusing!

Mark: Well, Ethel, I agree with you on that point. Most military divorce and pension division cases are *long* on *shortened phrases*. You have to know the difference, for example, between PT and PTSD,[1] between TBI and TDY,[2] in order to have a handle on the issues in the case. Can you tell me a little more about what's troubling you in the Jane Doe case?

Ethel: Well, the attorneys have agreed to divide the military pension with Jane's husband, John, getting 40% of the military retired pay. He's also getting Survivor Benefit Plan coverage, to continue the flow of payments if she dies before him. I asked Jane last week to give me a status report on her retirement paperwork. When Jane called me this morning, she said that her PEB report was finished, the PEBLO had told her she'd be retired in about three months, her military rating was 40% and her VA rating was 100%. What's THAT all about? I feel like my hair's on fire!

A Disability Retirement

Mark: Let's take it slowly, Ethel. I think I can clear up some of the mysteries. The PEB is the Physical Evaluation Board. When a servicemember is getting a disability retirement under Chapter 61 of Title 10, U.S. Code, her case is reviewed by a PEB to determine whether she is unfit physically or mentally to perform her duties. If the answer is "yes," then she is processed for discharge. If, however, her military disability rating is 30% or more or if she has over 20 years of service, she will be retired from the military. The PEB Liaison Officer, or PEBLO, is appointed to guide her through the process.

Percentage Problems

Ethel: I see. What about that *percentage business*? What does that mean?

Mark: When an individual is discharged or retired due to disability, the military assigns him or her a rating, based on the degree to which she or he is unable to perform military duties. In this case, the military rating assigned is 40%.

Ethel: And the VA rating?

Mark: When a servicemember is determined by have a *service-connected disability*, then the Department of Veterans Affairs can pay that individual VA disability compensation, and in this case the rating for Jane Doe is 100%. The difference is due to what's being measured. Unlike the military rating, which measures inability to do one's military duties, the VA disability rating measures one's impairment in regard to obtaining and holding down a civilian job. That's why they are often different figures, since they measure different things.

Ethel: Let's talk dollars, Mark. What do these figures mean for my client?

Mark: The VA disability rating means that once she makes the election to receive payments, the disability compensation will be over $3000 a month, with the exact amount set according to the number of dependents she has.

Ethel: And the "military rating" – what's that all about?

Mark: When Jane is retired based on disability, it's called MDRP…

Ethel: ANOTHER one of those abbreviations, Mark!

Mark: Yes, Ethel, you're right. In this case, the abbreviation stands for military disability retired pay. Jane will receive MDRP that is calculated using two factors: her *percentage of disability* and her *years of service*. The PEBLO will help her calculate the amount of retired pay she would receive, determined on the basis of each of these factors. Whichever amount the servicemember chooses is what her retired pay will be, under 10 U.S.C. § 1401(a).

Ethel: I think I understand, but can you give me an example?

Examples to Illustrate

Mark: Sure. If the client were a colonel with thirty years of service and a 30% military rating, her retired pay would probably be higher using the years-of-service method instead of the percentage of disability method. And if your client were a sergeant with a 90% military rating and only 15 years of service, her retired pay might be higher using the percentage-of-disability method.

Ethel: How do these two methods figure into dividing the military pension?

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1 PT stands for physical training, while PTSD is Post-Traumatic Stress Disorder.

2 TBI is Traumatic Brain Injury, and TDY is temporary duty.

Mark: Here are the rules:

- If the *percentage-of-disability method* yields the higher amount (let's say $1,500 a month MDRP, compared to only $1,000 using the *percentage-of-disability* method), then the disability pension is not subject to division. That's according to 10 U.S.C. § 1408 (a)(4)(A)(iii).
- If, on the other hand, the *years-of-service method* produces the higher number (let's say that's $1,200 a month MDRP versus only $900 per month using the *percentage-of-disability method*), then only the *difference* between the two may be divided. In this case, the differential would be $300 a month as MDRP subject to division.

Strike Out the Settlement?

Ethel: Oh my gosh, Mark – that throws the entire military pension division settlement out the window! The other attorney and I have been operating under the assumption that there would be $1000 or more of military pension to divide. If the husband got 40%, that would be around $400 or more each month as his share of the military retired pay of Jane Doe. From what you've told me, he would be receiving 40% of a much smaller amount, or maybe the pension is not divisible at all!

Mark: That's right. Going forward at this point means that the result, which is unforeseeable at present by the other side, will be little or nothing for pension division. The husband will likely walk away empty-handed.

Ethel: But that's my concern, Mark. He won't walk away. He'll raise the roof with his attorney and with the court and with me. The other attorney will say she'll never trust me again, and she might file a grievance! Do I need to call the other attorney right away and report this new development?

Ethical Issues

Mark: Not so fast, Ethel. First of all, do you have your client's consent to reveal the information you just received? If not, you'll need to check with her, since the conversation the two of you had this morning contains privileged information that she conveyed to you. While we can both agree that this is a big, new development that will have a substantial impact on the division of the pension, you should be sure to get her approval before telling the other side. That requirement is found in your state's Rules of Professional Conduct.

Ethel: But what if I don't tell her and the case is settled as we've discussed – 40% of the pension allocated to husband plus SBP coverage? What will happen when he sends his pension paperwork to DFAS?[3]

Mark: I can tell you almost verbatim what the reply letter will say, if Jane's retired pay amount is calculated according to the percentage-of-disability method. The language I find on the DFAS letters that I've reviewed always says this: "We cannot honor the enclosed order since the retired pay to be divided is based on disability" or something similar. That means *no pension division*.

Ethel: If that happens, we'll be reaping the whirlwind, Mark. The other attorney will accuse me of deceiving her. Her client may file a grievance complaint at the state bar against me, and also against her. The husband may even file a malpractice lawsuit against her for incompetence in handling a military pension division matter. I'm sure that she'll attempt to attack the pension division order and try to get relief from the court.

Mark: Yes, she may attempt to move for an amendment under Rule 59 (if your state has the federal civil procedure rules), or she may attempt to have the court set it aside under Rule 60. Let me ask you this, Ethel – did the other attorney ever submit discovery, asking about the nature of the military retired pay that Jane Doe was to receive?

Ethel: No. And we were never required to make any statement on court forms, such as our Equitable Distribution Inventory, disclosing what type of pension it was and whether it was divisible or not.

Mark: Then in that case, it's clear that you've not led them astray with any filings or responses. They should not be able to claim fraud, since that would involve a material misrepresentation of fact that is calculated to deceive. You did no such thing if you did not tell them anything about the pension.

Ethel: I couldn't tell them, Mark - I didn't even know about it myself! We both just assumed that there would be *something to divide*.

Conversing with the Client

Mark: Well, at the very least, I think you should have a conversation with Jane about this. I would tell her what you now know about division (or lack of division) of the pension. Ask her to get for you a copy of the letter that she will be receiving from the Army Physical Disability

3 DFAS, the Defense Finance and Accounting Service, handles division of military retired pay for the Army, Navy, Air Force and Marine Corps. It's located in Cleveland, Ohio. Pension division for the Coast Guard and the commissioned officers of the Public Health Service and the National Oceanic and Atmospheric Administration is administered by the Coast Guard Pay & Personnel Center in Topeka, Kansas.

Agency (APDA). The APDA letter will describe for her the two methods of calculation of retired pay and will stated which one yields the higher amount. It will also provide an estimate of her retired pay under both methods.

Ethel: Anything else?

Mark: Yes, tell her that you cannot disclose these facts to the other side unless she approves and authorizes you to tell them. Explain that you anticipate major problems from the other side (as we've just discussed) once the husband applies for pension division and his application is rejected because – either in part or completely – the MDRP is not divisible. Tell her of the possible additional legal expenses which may result. Ask her to consider what you've said before she decides. In some cases, the client will go ahead and approve telling the other side, just to avoid an expensive court contest later on. And last, one very important point – make a record of what you're hearing from Jane and advising her to do. That might be very useful down the road when memories (yours and hers) have faded a bit. I usually keep a Client Notes Sheet to remind me of the four items which are recorded in every case: Facts, Issues, Goals and Tasks.

Bottom-Line Bullet Points

Ethel: So what's the worst that could happen if I provide that disclosure about non-divisible retired pay to the other side?

Mark: Well, I can think of several scenarios which might play out:

- If the court enters the 40% order you described, it will be subject to partial or complete rejection by DFAS; the court lacks the power to divide a military pension amount which is outside the definition of "disposable retired pay." DFAs will not honor the order, or else it will only garnish 40% of the differential, as we described above, between the *years-of-service* method and the *percentage-of-disability* method. The APDA letter will tell you the facts.
- If the court order contains an indemnification clause (i.e., a paragraph requiring the client to reimburse the husband for any loss he suffers due to disability payments), then you'll need to move to delete that clause and, if the order is entered without removal, you must appeal the order. An unappealed order means that your client could be compelled to divide the otherwise non-divisible pension through the doctrine of *res judicata*.
- If the other side realizes that most or all of the pension cannot be divided, they may shift the negotiations to spousal support to attempt to obtain the monetary equivalent of a pension division. MDRP is subject to a garnishment order for alimony or spousal support.
- And finally, there should be no impact on the SBP which was allocated to the husband. Even if there is no disposable retire pay left to divide, the order's terms for Survivor Benefit Plan coverage will still be honored. The former husband will receive 55% of the designated SBP base amount for the rest of his life if Jane Doe dies before he does. The only catch (and *there's always a catch!*) is that the payment would be suspended if he remarries before age 55.

Ethel: Whew! That's a lot to digest, Mark.

Conclusion

Mark: It is, and that's why good attorneys who handle military divorce cases are ethically required to associate competent co-counsel when the legal issues are complex, the subject matter is difficult, and they need help with the handling of the case. When in doubt, get a "wingman" to assist in translating the terms, writing the clauses for settlement, preparing the military pension division order, and working with the husband or wife in submitting the paperwork to DFAS. That way, everyone sleeps better at night!

Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina, and is the author of The Military Divorce Handbook (Am. Bar Assn., 3rd Ed. 2019) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law for over 30 years. He works with attorneys nationwide as a consultant on military divorce issues in drafting military pension division orders. He can be reached at 919-832-8507 and at mark.sullivan@ncfamilylaw.com.

CASENOTES

OREGON APPELLATE DECISIONS

August 2022 Edition, OSB Family Law Newsletter

Family Law Opinions: June and July 2022

Editor's Note: these are brief summaries only. Readers should read the full opinion. Each case has a hyperlink to the case on-line when available.

Supreme Court

There were no family law decisions during this period in the Supreme Court.

Oregon Court of Appeals

Custody

Jarod Stancliff and Heather Stancliff (James, P. J.) In this domestic relations case, father was awarded sole legal custody. On appeal, he contends that the trial court abused its discretion in denying his request to relocate with the children to Illinois. Mother did not file an appearance.

Held: The Court of Appeals concluded that the trial court failed to properly consider all the factors under ORS 107.137(1) in making its determination whether or not relocation was in the children's best interest. Specifically, the trial court's finding that there was no financial benefit if father relocated to Illinois was unsupported by the evidence in the record; also, the trial court impermissibly focused primarily on the geographic proximity of the parents to the exclusion of other factors under ORS 107.137(1). The court reversed and remanded for the trial court to reconsider father's proposed relocation parenting plan in consideration of all of the factors under ORS 107.137(1), and to determine what parenting plan serves the children's best interests. Reversed and remanded. COA 06.15.22

Full Case Opinions may be found here:

Supreme Court: *https://www.courts.oregon.gov/publications/sc/Pages/default.aspx*

Court of Appeals: *https://www.courts.oregon.gov/publications/coa/Pages/default.aspx*

Note on Opinions Reviewed:

The Editor tries to include all the Family Law related decisions of the Oregon Appellate Courts in these Notes. Some cases do not have holdings that have precedent significance however they are included to insure none are missed.

Seeking New Editor

After 96 issues and sixteen years, Hon. Daniel R. Murphy has notified Chair Murray Petitt that it is time to pass along his duties as editor of the OSB Family Law Section newsletter.

The section's newslettter editor is responsible for putting out six newsletters each year and receives a per newsletter stipend. Section members interested in serving as editor beginning with the October 2022 issue are encouraged to apply to Murray Petitt at mpetitt@thorp-purdy.com.

Family Law Newsletter Editors

The dates of the first and last issues by the previous editors are listed below:

Ira Gottlieb
November 1980 to March 1982

Hon. Kristina A. LaMar
July 1982 to January 1985

Richard Fowlks & Deanna Cereghine Fowlks
April 1985 to April 1988

Timothy Travis & Lynn M. Travis
October 1988 to Octobr 1989

Conral G. Hutterli
December 1989 to December 2005

Hon. Daniel R. Murphy
February 2006 to August 2022