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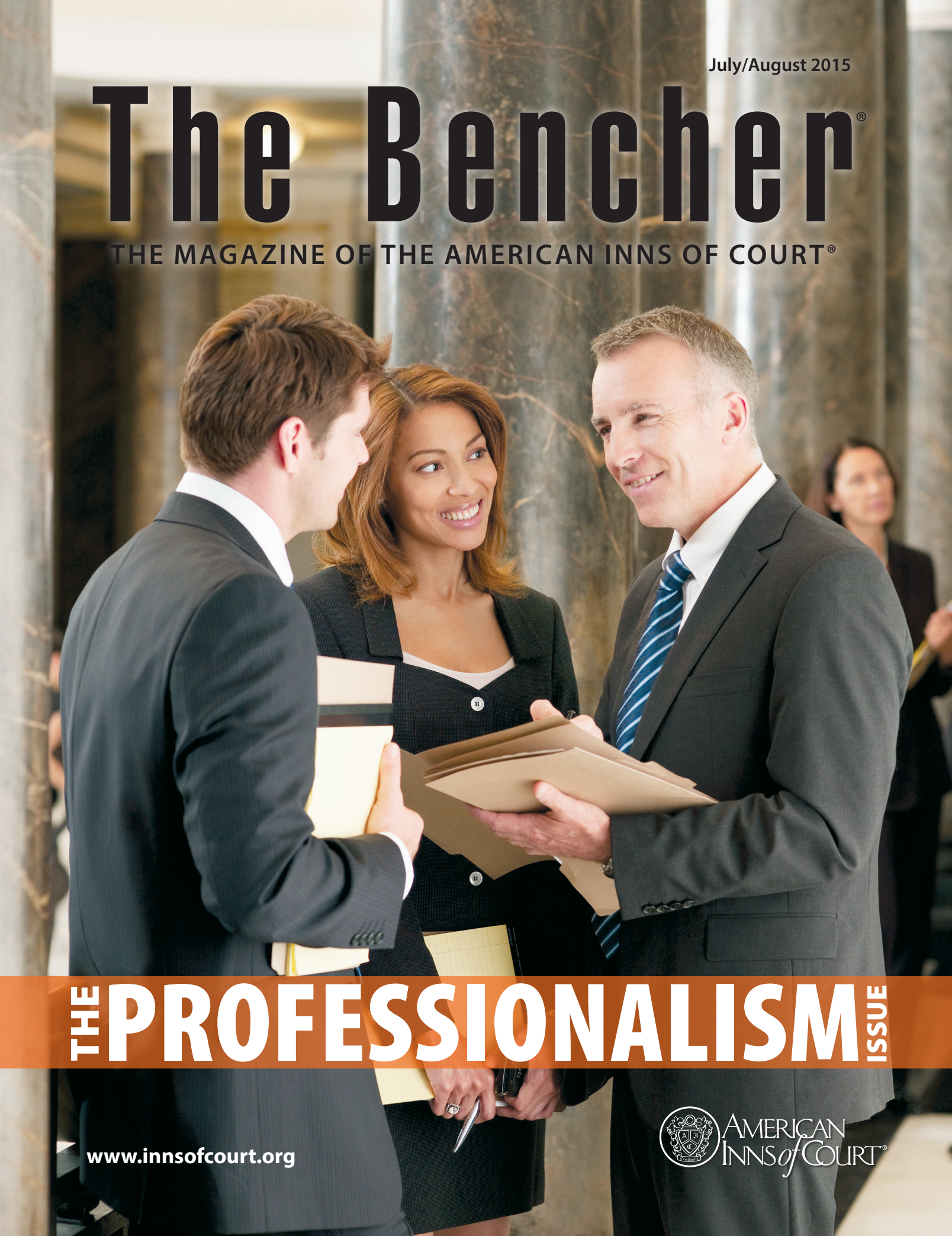

THE PROFESSIONALISM ISSUE

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Fallacy and the Professional

By Michael Cavendish, Esquire

Fallacies abound. Each time a court convenes oral argument, arguments, both carefully planned and spontaneous, emerge to be weighed, counted, criticized, accepted, and even envied. Inevitably, some of these arguments will embody common fallacies—misleading or logically defective premises that sound seductive to the untrained ear, but that under examination should be discarded, or at least, discounted.

Arguing in fallacy turns up the emotional heat and charge in a courtroom, especially when the advocate opposing a fallacious argument senses it is defective but lacks the vocabulary to clearly express why. Frustration, stammering, and the use of throwaway rejoinders about how an argument is wrong, defective, irresponsible, or nonsensical are clear indications that a lawyer is encountering a possible fallacy but is struggling to offer the concise and complete antidote: naming the fallacy for what it is.

Few law students study rhetoric or classical argumentation. Some CLE courses cover the basics of argument, the anatomy of making and refuting points, according to principles of argument building set down in writing as early as Aristotle. So it is no surprise that when a lawyer encounters a classically fallacious argument, he or she lacks the verbal template to sift the "bad" argument built on fallacy from the "good" one.

Fallacious arguments are so common and are such a part of the human condition that Roman rhetoricians named them as they occurred, over and over again, in the senate, the forum, and the drawing rooms of that ancient empire. To the Romans, what we call a "sweeping generalization" was *dicto simpliciter*. "Two wrongs don't make a right" was, in Roman Latin, *tu quoque*. The Romans named fallacious arguments, and in the act of doing so, they gave advocates the power to divest fallacies of their greatest strength: their concealment within a word-haze of plausible logic.

It wasn't in an early American or English criminal court that a wily defense counsel asked the star witness the opening question, "Sir, when did you stop beating your wife?" This fallacious tactic, which unfairly asks a witness to discuss a conclusion premised on an unproven and controversial or prejudicial assumption, is today called "begging the question," but it was the Romans who first howled at this tactic, naming it *petitio principii*, so often was it attempted by some bright, ruthless, and toga-clad sharp.

Naming and describing fallacious arguments is important to the legal world, especially to oral argument. Pick up a good contemporary book on fallacies—for example, Christopher W. Tindale's

Fallacies and Argument Appraisal (Cambridge University Press, 2007)—and as you browse the taxonomy, you will recall specific arguments at hearings long concluded. "Oh ho! That's what that was! That was the name for that argument 'ol Steamwallis gave me. It was a *post hoc* attribution of a causal relationship where no causal connection existed. Why, the next time he tries that…"

Familiar with common fallacies, their faulty structures, and their identifying names, you can now refute a fallacious argument without frustration and its accompanying lowering of professionalism, and without the wasting time fussing over whether a fallacy is present, and if so, where and why.

Understanding fallacies and their names, after one lawyer argues, "Mr. Leopard, the company president, has been managing the business for 25 years, so there must have been a solid business reason why he closed the bank account that day and moved the company funds to a new one," the other lawyer can concisely respond, "That, Your Honor, is what rhetoricians have labeled an 'argument from authority,' an argument we are asked to accept because of the assumed reputation of the subject. It is a known fallacy, and it has been recognized as a fallacy for the last several thousand years."

Without the taxonomic name at hand, a concise and exposing argument is not available, leaving the frustrated opponent to begin a rebuttal with "Just because someone has been in business a long time doesn't make them infallible," an argument soon sapped by the fallacy-boosting retort, "It makes them a lot less fallible than someone who doesn't have that 25 years of experience and judgment, judge." Back and forth these half-arguments can continue, endlessly and unconvincingly, and what gets left behind is the original, unanswered premise: "What other proof of good rationale for the closing of the company's bank account is there?"

Familiarity with fallacy also helps lawyers craft their own sound arguments. We can pick up the average written full-length appellate opinion and discern that legal arguments rife with "straw men," "false dilemmas," or "emotional appeals" usually meet with a bitter end. We should, once we recognize a nascent fallacy developing in our own strategic notes, abandon it and seek a correctly structured, logic-filled, less exasperating, more professional, and ultimately more persuasive alternative.

We must learn or re-learn the names of the common fallacies if we want to rid oral arguments of their ill effects. We can start with a book like that by Tindale, or we can turn to the internet. The University of Tennessee-Martin maintains a good listing of common fallacies within its online resource "The Internet Encyclopedia of Philosophy," available to view at *http://www.iep.utm.edu/fallacy*.

Skeptical? Then try this exercise. Look up a type of fallacious argument in one of these taxonomic listings, grab a legal pad and pen, and write out the best counterargument you can quickly think of for the fallacy presented. Notice how many lines you use, and whether with each line you are actually closing the argument on the fallacy and urging on the hypothetical proponent with the imperative "What else have you got?"; or whether the jotted thoughts actually open new rifts of ambiguity and argument that could be exploited by an opponent wishing to keep the fallacy plausible and in play.

The power to name a common fallacy, the power to give the classical, one-sentence description of its great flaw, is the power to reveal what is missing from the proponent's argument, the absence in evidence or reasoning that the fallacy is supposed to conceal.

The exercise of this same power creates the wondrous effect of further civilizing and professionalizing the debate on law that is the oral argument in court. Imagine the pointless heated conversation two surgeons might go through if they didn't have a name for a vital type of suture one needed the other to tie to a ruptured organ as they operated. And surgeons cooperate. They aren't each set against one another in an adversarial system.

Taxonomic labels bring understanding and recognition of known structures or qualities. They bring concise and professional modes of verbal expression to the difficult points in an argument where an incomplete or ill-fitting premise must be evaluated and then discarded so that the advocates can move on to better bases for the court's decision.

In oral argument, the legal advocate in oral argument has many mental and rhetorical tools. Fluency with fallacious arguments, with their timeless names, and with their architecture are among the most vital and most professionalizing. It might seem antiquated to study the old rhetorical trick of cum hoc, *ergo propter hoc*, which translates as "with this, therefore because of this," but on the day that your opponent intentionally confuses coincidence with correlation and cause, you'll be a more powerful advocate, and more professional, as you elucidate the name of your wily opponent's age-old game. ◆

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