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2014 Ethics in Litigation Update, Part 1

TELESEMINAR
THURSDAY, 6/5/14
2014 Ethics in Litigations Update, Part 2

LOMBARD
THURSDAY, 6/5/14
Real Estate Transactions - Beyond the Ordinary and Mundane and Interactive Ethics and Professionalism Panel Discussions

CHICAGO
FRIDAY, 6/6/14
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The Do's & Don'ts of the BAIID Machine

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2014 Estate and Trust Planning Update, Part 2

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TUESDAY, 6/24/14
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TELESEMINAR
WEDNESDAY, 6/25/14
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Buying and Selling Commercial Real Estate, Part 2

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COLUMNS

PRACTICE NEWS

ARTICLES

Is there a reasonable expectation of privacy in public conversations?

As the attorney for DeForest Clark [in *People v. Clark*, one of the cases in which the supreme court overturned Illinois' eavesdropping statute], I can perceive great difficulties if the legislature attempts to prohibit the recording of any speech where there is no reasonable expectation of privacy. (See *What next for Illinois eavesdropping law?* May 2014 LawPulse.) If a conversation takes place in a public place, there may not be a requirement that *any* party's consent is required, unless one can establish that it was reasonable to expect that such a conversation would be private – a difficult proposition.

With the ubiquitous use of cameras in virtually every corner of society, can microphones be far behind? Thus, it will soon no longer be "reasonable" to expect that what is exposed in public can be required to remain private as such. Any speech which is *capable* of being overheard in a store, library, street or other facility where the public is free to enter, will subject the speaker to being overheard if he/she makes an utterance.

Donald Ramsell, Wheaton

PI economics: bond yields and the interest rate

I disagree with Mr. Gilbert's unexpressed assumptions regarding bond yields as expressing the rate of inflation. (See Scott Gilbert, *Choosing an Economist for Your Personal Injury Case*, May 2014 IBJ.)

Mr. Gilbert states: "The disagreement about discount rates may seem more surprising. Discount rates are simply interest rates – yields – for various government bonds/bills/notes at the time of trial. These yields are public information. But yields on short-term and long-term bonds can vary significantly, with a one-year bond typically having a yield lower than a 30-year bond."

This is premised upon (1) the implicit assumption that there is absolutely ZERO risk of default on US Government obligations; and (2) that the long term yields (and henceforth rates of inflation/or deflation of buying power per nominal unit of currency) will remain predict-

Readers are invited to send comments to mmathewson@isba.org or, better yet, to append comments to articles at www.isba.org/ibj. We reserve the right to edit for length, grammar, and style.

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able and constant. As we have recently seen due to government shut downs and the reevaluation of the US government bond ratings, these assumptions may be flawed.

He does not discuss the fact that these risks are in part the reason for the differing yields between short-term versus long term obligations. When an expert or jury uses the long term yields (higher percentage rates equaling more substantial discounts in the present value of the judgment) they force these risks upon the defendant's victims requiring them and not the defendant to bear the risk of these losses. This is both contrary to the law in Illinois and fair play and common sense.

The plaintiff is already injured by the defendant. The plaintiff has suffered their losses at the time of the injury although they are not compensated for these losses until after a judgment is entered and they are not compensated for the time value and opportunity losses that occur prior to the judgment (i.e., prejudgment interest on the award). The logic behind requiring "present value" of damages is to ensure that the plaintiff receives the funds in present value for the losses that he will incur in the future.

When one takes the position asserted by Mr. Gilbert, they reduce the damages paid by the tortfeasor while forcing the plaintiff to take on the risks of default and changing rates of inflation. Nowhere in the law of Illinois is it stated that the defendants should be able to benefit while shifting these risks onto their victims. In fact there is no logical reason that someone could argue that this is either fair or just compensation to victims to require them to bear the burden (in terms of a lower present value) of these risks.

Mark Rouleau, Rockford

THE AUTHOR RESPONDS: I appreciate your timely comments on my recently published article! In economics disagreement is par for the course, and also a necessary part of the evolution of ideas.

In terms of your first comment, the quoted text from the article does not refer to inflation, not can I discern from the text any unexpressed assumptions about inflation. Without something more to go on, I'm unable to offer much by way of response. Too, the text says that government bonds exist, with various yields, but this does not rely on an implicit assumption of "zero risk of default" (quoted text is from the reader's comment).

You also remark that I do not explain differences between short-term and long-term Treasury yields: that's right, as I didn't need a theory for that to get the intended points across.

Your final point is (I think) that risk concerning future inflation and bond default can only be fairly controlled by using a short-term yield when discounting (all) future losses. It seems that your foundation for this point is more about fairness in the sense of law (you use some pretty strong language...) rather than some economic notion of fairness. For this reason I (an economist, and not a legal scholar) can say little except that in the field of economics I can find no way to convert your point into a supportable (economic) statement.

 By Paula H. Holderman

The Year in Review

A look at the projects, programs, and other accomplishments that made up the 2013-14 bar year.

A year ago, I wrote my first president's column and outlined my plans for the coming ISBA year. Suddenly, the future is now. The focus of my year boiled down to membership and ensuring ISBA's relevancy to the profession.

We started in March 2013 with Board strategic planning and then followed through from many angles, all toward the ultimate goal of increasing membership in the ISBA. We concentrated on new attorneys, small firm and solo practitioners, and women and minority lawyers. Allow me to recap some of the progress we made this year.

First, not only did we stem the small but steady decline in membership over the last decade, we actually saw our membership grow by 500! A number of factors sparked this remarkable turnaround, including our bold move to offer free online CLE to members and our targeted marketing efforts showcasing the tangible value of our "big three" benefits: free CLE, free Fastcase, and free E-Clips.

Second, we could not have embarked on this offering without the sponsorship of the ISBA Mutual Insurance Company. I can't say enough about our true partnership this year. Last year the ISBA made thoughtful but significant budget reductions to accommodate the revenue decline expected from moving to free CLE. With the Mutual sponsorship and diligent adherence to the budget, I can proudly report that the ISBA is currently operating in the black.

Third, after learning that young people, including young lawyers, are no longer joining organizations in the same numbers as did prior generations, we established a New Lawyer Task Force chaired by Marron Mahoney and Brian Monico. Their earliest report noted the need for better communication about already existing ISBA programs and benefits to law students and newer lawyers.

They created a new microsite within the ISBA website devoted to young lawyers. Together with YLD, they held a reverse mentoring event pairing younger lawyers with senior lawyers to learn technology. In May, they organized a networking event based on the "speed dating" concept where law students circulated through "dates" with more senior ISBA members. Speed networking was followed by an old-fashioned reception with members of the Board of Governors in the new member-friendly space at the Chicago office.

The YLD stayed very busy with their annual events, including A Day at the Races (which sported many young families this year), the Cubby Bear Holiday Party, the Bean Bag Tournament, and the Spring Soiree. In addition to these fun and fund-raising events, YLD also presented a professional development series of practical programs. I, along with YLD members, also attended area law school events to spread the word about ISBA benefits to new lawyers. A special thanks to YLD Chair Jean Kenol for his leadership.

Fourth, I concentrated on promoting the ISBA to women and minority lawyers as well as promoting the many women and minority lawyers in our organization. I was not alone in this endeavor, and I thank the standing committees on Women and the Law and Racial and Ethnic Minorities and the Law, and the Diversity Leadership Council.

We started the summer with two Law and Leadership Institute programs in Carbondale and Chicago. The LLI provided legal immersion programs for diverse high school students and was entirely funded through the ISBA and its members and groups.

In August, the ISBA partnered with the 7th Circuit Bar Association to hold the hugely successful "30 Female Blackstones" program commemorating the 120th anniversary of the first national meeting of women lawyers at the 1893 Columbian World Exposition in Chicago.

At the ISBA Midyear Meeting in December, we held a sold out diversity reception featuring a gigantic group photo reflecting the diversity of our membership. The following day at the Assembly Meeting, we reported on the ISBA "diversity scorecard" which saw increases in the diversity of our officers (most diverse in our history), Board of Governors, Assembly, and overall membership.

Our targeted marketing efforts showcased the tangible value of our "big three" benefits: free CLE, free Fastcase, and free E-Clips.

In March, the *Chicago Daily Law Bulletin* published my article on early women legal pioneers for National Women's History Month. We followed that with two spectacular events in Chicago and DeKalb. The Celebrating Women in the Profession luncheon at the Union League Club featured nationally recognized Prof. Joan Williams of UC Hastings College of Law discussing her book *What Works for Women at Work* to a buzzing crowd of more than 200 women and men. Several bars cosponsored with us.

Just a week later, the ISBA Women and the Law and Racial and Ethnic Minorities and the Law Standing Committees gathered a star-studded panel of women justices and lawyers to discuss their personal journey overcoming ob-

stacles to leadership. Many NIU law students – our future members – were on hand for a moving Myra Bradwell reenactment and the luminous panel discussion. Kudos to WTL chair Mary Petruchius and both standing committees.

I was graciously invited to numerous ethnic and gender bar association events, which I attended and often spoke at, including the Korean American Bar, the Indian American Bar, the Cook County Bar, the Black Women Lawyers, the CBA Alliance for Women, the WBAI, the DuPage Association of Women Lawyers, and the Lake County Women's Bar.

Fifth, we began the process of realigning our staff structure for maximum efficiency and membership benefit. We interviewed staff, staff officers, board members, ISBA officers, and other members to learn what services matter most and how we can best deliver those services within our budget. We learned some new perspectives and we confirmed some traditional values.

As part of that process, we conducted a communication survey to learn the current ways members receive information. We also embarked on a satisfaction and compensation survey to see how our members are faring at work and in life. We last did this type of survey in 2005, so it seemed timely to take a current snapshot of our membership.

Sixth, the ISBA was active on the advocacy front. We wrote letters to the editor, lobbied legislatures, and testified at hearings on many issues affecting Illinois lawyers, including the unauthorized practice of law, the rewrite of the Illinois family law statutes, sequestration and federal budget cuts effecting our courts, national proposed change in accounting methods affecting law firms, increased funding for Legal Services Corporation, judicial retention streamlining, and changes to Illinois Supreme Court rules to provide more efficient and cost effective e-discovery.

The ISBA produced more than two-dozen "Two Minutes with the President" videos, providing important information to ISBA members about people, community events, and changes in the law. We also produced a significant cable TV program on the rule of law featuring ABA and ISBA presidents as well as nationally recognized judges.

Seventh, we partnered with other bar entities, including the CBA, Illinois Judges Association, 7th Circuit Bar, Illinois Bar Foundation, and the ABA, on CLE programs, bar activities, and social events to benefit lawyers in our state. I was personally gratified to work with many bar leaders and dignitaries, including dear friends like Tim Eaton, Justice Mary Schostock, Judge Deb Walker, Bob Clifford, and Julie Bauer.

And I can't write my last column without thanking the entire Illinois Supreme Court for their support of lawyers in Illinois. Particularly, in this "year of the woman," I need to thank Chief Justice Rita Garman, Justice Anne Burke, Justice Mary Jane Theis, and 7th Circuit Chief Judge Diane Wood for their unflagging support of anything I asked them to do.

Last, I appointed two governance committees, one from the Board and one from the Assembly, to challenge our notions of the status quo of the ISBA governing bodies. Does having a 204 member Assembly, a 27 member Board of Governors, and three vice-presidents serve the best interests of our association in 2014? Do those large numbers allow us to respond to issues in a nimble fashion? Does the cost of supporting that structure use our member dues to best advantage? We may not have the ultimate answers to those questions, but it's essential to the ongoing relevancy of our organization that we continue to challenge ourselves, ask tough questions, and adapt to evolving conditions.

With that recap, I take my leave as ISBA President. It has been an incredible year, and I thank all of you for allowing me this opportunity to take a lot and give back a little. Special thanks to my husband (a/k/a "the Empress's driver"), Judge Jim Holderman, for his amazing support throughout this adventure. I send my very best wishes for success to incoming ISBA President Rick Felice and his fellow vice-presidents Umberto Davi, Vince Cornelius, and Russ Hartigan. Enjoy the ride, guys. ■

Condo unit owners can't withhold payment

Condo unit owners may not withhold assessments even if the condo association fails to make repairs and perform maintenance, a divided Illinois Supreme Court rules.

The owner of a condo unit may not withhold monthly assessments and other expenses in response to an alleged failure by her condominium association to maintain common elements and make repairs, a divided Illinois Supreme Court ruled recently.

In a four to three decision, the majority of the justices rejected a theory that condo unit owners should have the same rights as tenants in a leasehold agreement. The issue arose when a Lake County resident/owner of the Spanish Court Two Condominium Association, who had failed to pay her fees for six months, tried to defend herself against the association's attempt to take possession of her unit. She argued that a leaky roof just above her unit had caused extensive water damage, her faulty toilet was not repaired, and that general upkeep of the common areas of the building was not maintained, and thus she was entitled to withhold payment.

Not a purely contractual relationship

An appellate court panel in 2012 ruled in the condo owner's favor, which evoked a strong reaction from associations and management companies. "Everyone was up in arms," said Chicago real estate attorney William Anaya of Arnstein & Lehr, LLP, who represents such groups. "If there was a right to nullify [i.e., defend against an association's attempt to take ownership for unpaid assessments by arguing that the association did not meet its end of the bargain], your assessments would double." Although many condo owners did not know about the appellate court ruling, some condo lawyers said they saw a slight uptick in unit owners using a similar defense to forcible entry and detainer actions, Anaya said.

The Illinois Condominium Act and associations' individual bylaws require unit owners to pay monthly assessments, special assessments, and fees and authorize associations to take action to possess the unit of the defaulting owner. Also, the Illinois forcible entry statute, 735 ILCS 5/9-106, allows an association (or a landlord) to take possession of a unit if its owner has fallen behind on payments.

The majority of the justices in the 4-3 ruling said a landlord/tenant scenario is contractual and distinguishable from a community living situation. Condo boards and associations could face serious financial difficulties if they had no recourse to collect unpaid assessments, the court observed.

"The Condominium Act establishes that: 'It shall be the duty of each owner *** to pay his proportionate share of the common expenses,'" Justice Theis noted in an opinion that Justices Garman, Thomas, and Karmeier joined. For its part, associations, through their boards of managers, must provide for the operation, care, upkeep, maintenance, replacement, and improvement of the common elements, Theis observed.

These duties and obligations, while they exist in condo declarations and association bylaws, are also imposed by statute, she noted. "Accordingly, a unit owner's obligation to pay assessments is not akin to a tenant's purely contractual obligation to pay rent, which may be excused or nullified because the other party failed to perform."

That is not to say that a condo unit owner may not take other action against her association, for example, by seeking a declaratory injunction, explained Chicago condominium attorney Howard Dakoff of Levenfeld Pearlstein, LLC. "An owner may still file a breach of fiduciary duty claim against the board of directors, seeking damages and a mandatory injunction," he said.

The owner may not, however, file a counterclaim or nullification action in response to a forcible entry and detainer action by the association seeking possession of the unit for unpaid assessments.

Dissent: an 'expensive and time-consuming burden' for unit owners

Part of the controversy that gave rise to this decision has to do with language in the forcible entry and detainer statute, which says: "No matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise."

The General Assembly did not define "germane" and the majority said it was not going to apply it in this case. The dissenting justices took the opposite position, arguing that because the legislation is vague on the concept of germaneness, the court could find that the unit owner's defense in this case was germane. The dissent also added that the matter must then be left to the legislature to clarify the statute.

"It is true that the form of condominium ownership only works if each unit owner faithfully pays his or her share of the common expenses," Justice Freeman, writing for himself and Justices Kilbride and Burke, said in dissent. "It is equally true that condominium ownership only works if the association likewise fulfills its obligations.

"Not permitting a unit owner to raise

Janan Hanna is a Chicago freelance writer and a licensed attorney. A former staff writer for the Chicago Tribune, she writes for numerous news organizations.

a nullification defense in a forcible action denies a voice to an ever growing segment of the population who purchase condominium property," the dissenters continued. "True, unit owners can continue to pay assessments and bring a lawsuit against the association for its failure to repair or maintain; however, that puts an expensive and time-consuming burden on the unit owner rather than litigating the matter in the forcible proceeding that is already before the court, as is done in a landlord-tenant situation."

The dissenting justices also noted that Illinois is the only state in the country that allows for forcible entry and detainer for unpaid assessments. In Illinois, an action for possession of a unit can occur within 180 days if a unit owner is in default.

Nevertheless, the majority "made a statement of public policy that is right," said Anaya. "Whenever the General Assembly uses a funny word like 'germane' we don't know what it means. What the court said is the General Assembly could put more definitiveness [into the language of the statute] if it wants to." ■

College Football | Continued from page 268

is that they're really attacking the wrong target with the wrong strategy."

He noted that only 17 private university teams are subject to the NLRB, while 100 or so other Division 1 public university teams are subject to state labor laws. If the NLRB rules in favor of the players, how might the recruitment of high-school players be affected? Could the tenders change substantially? Will schools offering four-year scholarships, as Northwestern now does, switch to one-year tenders?

Regional Director Ohr could have made the argument that the players are temporary employees who are getting a superb education at one of the nation's most prestigious university's, Franczek said. "He could have just as easily written an equally convincing decision going on the other side of the equation."

Ohr distinguished his ruling in this case from a case involving graduate assistants at Brown University who tried to organize. In that case, the assistants lost because the NLRB held they were being supervised by faculty members and were getting an education and stipend in exchange for their teaching duties. Academic faculty members are not overseeing the athletic duties that the players perform, Ohr noted. Will schools reclassify coaches as faculty members, Franczek and Ketterman wondered?

The long litigation road ahead

Procedurally, a number of things would have to happen before Northwestern or any private team could engage in collective bargaining. First, the NLRB in Washington would have to uphold Ohr's ruling. If they do, the ballots cast by the Northwestern players will be counted and if the yea votes outnumber the nay votes, Northwestern would, in theory, have to begin negotiating with the team members.

But expect the university to appeal, taking its case to either the U.S. Court of Appeals for the D.C. Circuit or the federal seventh circuit in Chicago. If the appellate court rules that student athletes are employees, Northwestern could still appeal to the U.S. Supreme Court.

"More likely than not, every football player will have graduated and a whole new set of football players that had no input into whether or not they want a union will be in place," Franczek said. ■

Unionized college football – is a Wildcat strike on the way?

What might the NLRB ruling in favor of Northwestern football players seeking to unionize mean for the players – and for collegiate sports? Lawyers for labor and management opine.

As unpredictable and unprecedented as it was that some players on Northwestern University's football team decided they needed a union to secure better benefits for themselves, the decision in March by the regional director of the National Labor Relations Board ("NLRB") in support of those efforts was even more surprising.

Labor lawyers (not to mention members of the public), irrespective of their opinion on the matter, never imagined that members of a collegiate sports team, receiving valuable four-year scholarships, would be deemed "employees," as the NLRB's regional director in Chicago, Peter Sung Ohr, characterized the players. Northwestern appealed that decision to the five-member NLRB panel in Washington, D.C., which has agreed to hear the case. Meanwhile, on April 25, eligible team members cast yea or nay votes on whether they wanted to be represented by the United Steelworker's union, but those ballots will not be counted until the appeal is decided.

Experts expect the Washington panel to uphold the regional director's decision. Still, it will take years of legal wrangling before a final decision is made. Whether the recent events are a bellwether of change in the way private college sports teams are run is of course the obvious question. But the issues are attention grabbing.

"When I first heard about this [effort], I laughed and thought someone is getting their 15 minutes of fame and then it will flame out," said Chicago labor lawyer Travis Ketterman, who represents construction worker unions. "Four months ago, not in my wildest dreams did I think we'd be having this conversation." He's pleased, though, that this very public discussion about unions is taking place, noting that workers might begin thinking about their need for union protection.

Understanding the complicated nitty-gritty of what a unionized team would look like is daunting, but Ketterman believes Ohr got it right on the fundamental issue; that the amount of control Northwestern and other Big Ten private teams have over their players is immense. Among the requirements and rules imposed on players outlined in Ohr's decision are restrictions on classes they can take if they conflict with practice time, which averages about 50 hours a week; when, where, and how much they can eat; where they can live; how they must behave in public; and even their use of social media, including a requirement that they accept friend requests from coaches.

Strict disciplinary action is taken against players who violate the rules. But many of the rules were put in place by the National Collegiate Athletic Association ("NCAA"), a fact that prompted some to suggest that the players' issues should be taken up with the NCAA.

There is a lawsuit pending against the NCAA by players seeking a piece of the billions of dollars the association has made from college football and basketball in the power conferences. The players in the suit are also seeking permission to use their likeness and image for profit.

Workers' comp for players?

Some scoff at the idea that the players need a union. After all, they receive scholarships at Northwestern of approximately $70,000 a year to cover tuition, room, and board. But, Ohr notes that "[m]onetarily, the Employer's football program generated revenues of approximately $235 million during the nine year period between 2003-2012 through its participation in the NCAA Division I and Big Ten Conference that were generated through ticket sales, television contracts, merchandise sales and licensing agreements." The NCAA prohibits players from any share of that revenue.

Ketterman said that despite the concerns raised by some management-side attorneys, "the topics [that will be negotiated should a team become unionized] will be very narrow." Health coverage could improve for the athletes, and players who suffer a disability while playing might be given disability coverage after they graduate. The students might be able to make decisions about where they live and be given accommodations on class scheduling, and generally be less controlled every hour of every day, Ketterman said.

The biggest issues would involve workers' compensation and taxation of the players' scholarships. "If we call these players employees, the natural outflow is if they're injured playing, they have workers' comp coverage," he said. This could substantially raise the rates private universities now pay since injuries are routine as compared to injuries in classrooms and other sports.

Would the students' scholarships need to be taxed? Ketterman believes the IRS could do a workaround on this and prevent the taxation of scholarships.

"How this will affect football, I don't really know," Ketterman said. "But I think top notch programs are going to attract top notch players." But the answers probably won't be known before today's grade-school aged children begin receiving offers to play since the procedural process will likely involve years of court battles, he said, which could include a ruling by the U.S. Supreme Court.

NLRB governs private, not public, universities

James C. Franczek, Jr., one of the most powerful labor lawyers on the management side, who negotiates on behalf of the City of Chicago with unions from nearly every city agency, including the public schools, acknowledges that the players raised some very legitimate issues. "The fundamental problem, though,

(Continued on page 267)

Juvenile Justice, Part I: Automatic expungement of juvenile records

Proposed legislation would require the state police to expunge arrest records when juveniles turn 18 if they were never charged and have no recent arrests.

Over the last several years, juvenile justice advocates began noticing a troubling trend: Minors who were arrested for a crime but never charged in a delinquency petition were learning that their arrest records were somehow getting out to prospective employers, landlords, and others. How could it be that, in the strictly confidential juvenile justice system, young adults were facing roadblocks in their efforts to get jobs, job training, housing, licenses, and to pursue other productive endeavors that would let them move forward in life?

One young woman completed an Illinois Job Corps program and when she applied for her pharmacy technician license, the licensing agency learned that she had an "aggravated battery" on her record, said Carolyn Frazier, an attorney and clinical law professor with the Children and Family Justice Center at Northwestern University School of Law. The girl was involved in a fight with other girls at school and was never charged with a crime, yet in some database, her arrest was listed without any dispositional information. Similarly, young man working as a janitor at a Chicago public school was fired after one of his annual background checks showed two arrests. Neither resulted in delinquency petitions or a finding of guilt.

As Frazier put it, we're in a "brave new world of data integration" where municipalities small and large are sharing information with one another, the state, and the federal government. State police used to send information to the FBI, but that practice ended three years ago.

A bill passed in the Illinois Senate would begin to address this issue by requiring the state police, which receives all arrest records from every municipality, to expunge the records of any juvenile who has turned 18, was never charged, and who had no arrests six months prior to his or her 18th birthday. The bill, HB 4084, which had broad bipartisan support and no opposition from the Illinois State Police, is now pending in a House committee, sponsored by Rep. Arthur Turner (D-Chicago). The Senate bill was sponsored by Kwame Raoul (D-Chicago). Chicago Mayor Rahm Emanuel also supported the legislation.

'[I]t's difficult to keep everything confidential'

For years, the Illinois State Police has been a repository for all arrests made in municipalities. Under existing law, 18 year olds may go to court and petition to have their arrests expunged, but it costs money and most young adults are unaware of this option. Adults can immediately petition to have their records expunged after an arrest or an acquittal.

"Even though, theoretically, you can file yourself, I don't think very many of us would be comfortable doing that. I think many children and their parents generally assume that because the child cleaned up the graffiti and apologized to the shop owner, there's nothing to worry about," said Elizabeth Clark, president of the Juvenile Justice Initiative. "With a statewide database…, it's difficult to keep everything confidential."

Although the bill requires state police to expunge records each year, it could be tweaked as it makes its way through the House. The legislation states that "[t]he Department of State Police shall automatically expunge, on an annual basis, law enforcement records pertaining to a minor who has been arrested if (a) the minor has been arrested and no petition for delinquency was filed with the clerk of the circuit court; (b) the minor has attained the age of 18; and (c) since the date of the minor's most recent arrest, at least 6 months have elapsed without an additional arrest." The bill also requires that an individual be appointed to ensure that the records are being expunged on an annual basis.

"This is a good place to start; a good first step" in reforming the juvenile justice system, Frazier said. Like other juvenile justice advocates, Frazier would like to see a legislative commission established to get to the root of why and how confidential information involving minors is being released. Additionally, they'd like arrest records that don't result in a delinquency petition withheld from the state police. And ideally, the U.S. Justice Department would order the FBI to follow the same directive that the Illinois State Police would under the proposed law. ■

Juvenile Justice, Part II: An end to automatic transfers to adult court?

A legislative proposal would stop the automatic transfer of juveniles to adult court, requiring that judges determine whether the transfer is appropriate.

Some members of the Illinois House are championing a proposed law that would eliminate the automatic transfer of juveniles charged with certain offenses into the adult court system without first allowing a judge to determine if transfer is appropriate.

Under existing law, minors aged 15, 16, and 17 charged with certain serious felonies, including murder, aggravated criminal sexual assault, and certain gun and gang crimes near a school, are automatically transferred to adult court. In many cases, according to a study conducted by the Juvenile Justice Initiative, an Illinois nonpartisan nonprofit group, the charges are ultimately lowered to less serious offenses that wouldn't trigger automatic transfer.

According to a recent study by the Juvenile Justice Initiative that looked at statistics gathered in 2010 through 2013, 257 minors were automatically transferred to adult court. Only one child was white. Once in adult court, many minors have their offenses lowered and strike plea bargains.

In fact, 54 percent of the convictions were for lesser offenses than originally charged. Only 13 percent of those transferred had been charged with murder, according to the study's findings.

The proposed law, HB 4538, would not end the practice of trying juveniles as adults. But it would require a hearing before a juvenile judge who would hear testimony and consider the child's entire history and circumstances, including the precise role the child had in the crime, before determining whether transfer would be appropriate. Currently, prosecutors have discretion to decide whether a minor's case should be heard in adult court.

The House Judiciary Committee voted in favor of the proposed bill in March and at press time, the bill is in the House rules committee. A representative from the Cook County State's Attorney's office testified against the proposal. Office spokeswoman Sally Daly explained the office's position.

"It is our opinion that juvenile offenders charged with the most serious and violent offenses should continue to be charged consistently as adults pursuant to existing statute, with public safety being our first and foremost concern," Daly said. "The introduction of judicial discretion in a case by case basis would lead to the inconsistent treatment of the most violent juvenile offenders in the system."

Public interest still the determining factor

Bill sponsor Rep. Elaine Nekritz (D-Buffalo Grove), chair of the House Judiciary Committee, said in an interview that some in law enforcement circles were concerned that, among other public safety concerns, a minor might commit a murder and receive only a maximum four-year sentence if tried in juvenile court. Nekritz' response: "Judges are probably smarter and politically, they don't want that to happen."

Allison Flaum, the legal director of the Children & Family Justice Center at Northwestern University School of Law, said the proposed change "does not in any way eliminate the prospect of transfer. All it does is have these decisions happen in a court room on the record by a juvenile court judge and in doing that, Illinois would be in line with a vast majority of states that have some mechanism of judicial review."

The standard for transfer under Illinois law is not whether moving a minor into the adult system would be in the child's best interest, but whether it would be in the public's interest, Flaum explained.

The factors a judge would consider include a child's family and criminal history, his or her criminal background, physical and emotional health, the seriousness of the offense, and whether the child was directly responsible as opposed to being an accessory, or just being present during the crime, Flaum said.

The full Juvenile Justice Initiative Report can be found here: http://jjustice.org/wordpress/wp-content/uploads/Automatic-Adult-Prosecution-of-Children-in-Cook-County-IL.pdf. ■

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cases

Waiver of personal jurisdiction by appearance does not apply retroactively

***BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311.**

On March 20, 2014, the Illinois Supreme Court held that waiver of personal jurisdiction by appearance does not apply retroactively to orders entered before the appearance, resolving a conflict in the appellate courts. Under section 2-301 of the Illinois Code of Civil Procedure, a party who files a responsive pleading or motion before challenging personal jurisdiction "waives all objections" to personal jurisdiction. 735 ILCS 5/2-301(a-5). The court found that neither the language nor the legislative history of section 2-301 requires that waiver applies retroactively. Therefore, waiver by appearance is prospective only.

On June 9, 2010, BAC Home Loans Servicing obtained a default judgment in the Circuit Court of Cook County for foreclosure and sale of Kim Mitchell's home. Mitchell filed a motion to vacate the judgment. Mitchell then withdrew her initial motion and filed a motion to quash, arguing that service was defective. The process server stated the summons was left at Mitchell's residence with her daughter, Michelle Foreman. However, Mitchell did not have a daughter and did not know a Michelle Foreman. The circuit court denied Mitchell's motion to quash, and the appellate court affirmed.

On appeal to the Illinois Supreme Court, Mitchell argued that the default judgment against her was invalid because the circuit court lacked personal jurisdiction over her, as service had been improper. BAC Home Loans conceded that service was improper but argued that Mitchell waived any objections to personal jurisdiction by filing a motion to vacate before challenging personal jurisdiction.

The court noted it had previously held that waiver of personal jurisdiction by appearance is prospective only and does not apply to orders entered prior to appearance. This rule, the court stated, is based on the due process ideal of giving defendants their day in court before a judgment is entered against them. However, as BAC Home Loans pointed out, section 2-301 of the Code of Civil Procedure has since been amended to state broadly that "all objections" are waived when a defendant appears or submits a motion before challenging personal jurisdiction. 735 ILCS 5/2-301(a-5). Some appellate courts have found that this language indicates waiver applies regardless of the timing of the proceeding.

The court first examined the language of section 2-301 and found that it does not address whether waiver could validate orders that have already been entered without personal jurisdiction. The court therefore concluded that the statute is ambiguous and then turned to its legislative history. Prior to amendment, the court noted, section 2-301 distinguished between special and general appearances. A defendant could make a special appearance to challenge personal jurisdiction; all other appearances were deemed general appearances that waived personal jurisdiction. The court found that section 2-301 was amended to eliminate the distinction between special and general appearances, which had led to confusion and unknowing waiver.

The court concluded that because the amendment was intended to give defendants more protection, allowing retroactive waiver would be inconsistent with its purpose. Therefore, the court held, waiver of personal jurisdiction under section 2-301 is prospective only.

The Good Samaritan Act does not immunize physicians providing services on a compensated basis, regardless of whether the patient is billed

***Home Star Bank & Financial Services v. Emergency Care & Health Organization, Ltd.*, 2014 IL 115526.**

On March 20, 2014, the Illinois Supreme Court, as a matter of first impression, held that the term "fee" in the Good Samaritan Act includes a doctor's hourly compensation, including instances where the doctor is paid but the patient is not directly billed for the services provided. (For more about this case, see the May LawPulse.) The court concluded that the Act's use of "fee" should be broadly construed to include both a patient being billed and a physician being paid. This interpretation is consistent with the legislative intent to promote volunteerism because, while a physician might need the Act's immunity as an incentive to act as a volunteer, a doctor being paid to render emergency services does not.

Plaintiff Edward Anderson was admitted to the emergency room at Provena St. Mary's Hospital. Several days later, he began having trouble breathing and a "Code Blue" was called. Defendant Dr. Murphy was working in the emergency room at the time; Dr. Murphy was an employee of Emergency Care & Health Organization, Ltd. (ECHO), and not of the hospital. Dr. Murphy responded to the Code Blue by attempting to intubate Anderson. Anderson eventually sustained a severe and permanent brain injury.

The plaintiffs filed a negligence action against Dr. Murphy and ECHO. Dr. Murphy moved for summary judgment, asserting that he was immune from liability for negligence under section 25 of the Good Samaritan Act of Illinois. This section provides that any person with a medical license "who, in good faith, provides emergency care without fee to a person" is not liable for civil damages. 745 ILCS 49/25. Dr. Murphy argued that he was shielded from liability because Anderson was not specifically billed for the care he provided; the hospital billed Anderson for supplies used during the Code Blue, but not for physician's services. The plaintiffs countered that the Act was inapplicable because Dr. Murphy was doing his job when he treated Anderson, and was paid an hourly wage; therefore he was not providing his services "without fee" under the Act. The trial court held that Dr. Murphy was immune from liability under the Act and granted summary judgment to defendants. The plaintiffs appealed, and the appellate court reversed and remanded, holding that the Act was meant to apply to volunteers and not to those who treat patients within the scope of their employment and are compensated for doing so.

On appeal to the Illinois Supreme Court, the defendants argued that the trial court properly granted summary judgment under a line of cases which interpret "without fee to a person" in the Act as unambiguous, concluding that a physician is entitled to claim

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immunity for negligently performing emergency services where the patient is not billed and the decision not to bill is made in good faith. The plaintiffs argued in favor of a line of cases concluding that "fee" is ambiguous and makes the Act inapplicable to situations where a patient is billed and situations where a physician is paid without directly billing for the specified services.

The Illinois Supreme Court concluded that "fee" is ambiguous and includes situations where a physician provides emergency services on a compensated basis without billing the patient for the services provided. Therefore, the court held that Dr. Murphy did not provide his services "without fee" and could not claim immunity under the Good Samaritan Act.

legislation

Changes to public employee benefits

Public Act 098-0622 (eff. June 1, 2014) (amending 40 ILCS 5/12-133.1, 40 ILCS 5/12-140).

Recent amendments to the Illinois Pension Code include changes to provisions concerning employer and employee contributions, annual pension increases, duty disability benefits, and early retirement. The rate of employer contributions will increase from 1.1 times the employee contributions to 1.7 in 2015, 2.3 in 2017, and 2.9 in 2019. The 2.9 multiplier will remain in effect until the pension fund is 90% funded, and may thereafter be reduced to the extent necessary to maintain 90% funding. The rate of employee contributions will similarly increase from 9% to 10% in 2015, 11% in 2017, and 12% in 2019. Contributions will remain at 12% until funding levels reach 90%, and may thereafter drop to 10.5% as long as the fund remains at or above a 90% funding level.

Starting on January 1, 2015, all automatic annual pension increases will be calculated at the lesser of either 3% or one-half the annual unadjusted percentage increase in the Consumer Price Index for the previous year. However, payment of annual increases will be suspended in 2015, 2017, and 2019.

Duty disability benefits will also be progressively reduced. Any employee who becomes disabled as a result of an injury on the job that was incurred during the performance of regular job duties and cannot continue performing his regularly assigned duties can receive a duty disability benefit. Currently such benefit consists of 75% of the regular salary when duty disability benefits begin. Current amendments reduce duty disability benefits from 75% of the regular salary to 74% as of January 1, 2015. On January 1, 2017, disability benefits will be reduced to 73% of the original salary, and on January 1, 2019, these benefits will be further reduced to 72% of the original total salary.

These amendments also change retirement options effective January 1, 2015. In the case of employees hired as of January 1, 2011, the age of normal retirement will decrease from 67 to 65; the age of early retirement will also decrease from 62 to 60. In the case of those employees hired and first making contributions to the retirement fund before January 1, 2011, the minimum retirement age for early retirement will increase from 50 to 58, applicable to those employees younger than 45 on January 1, 2015.

Hunting licenses for adolescents

Public Act 098-0620 (eff. Jan. 7, 2014) (adding 520 ILCS 5/3.1-9 new).

The Illinois Wildlife Code has been amended to authorize Illinois residents that are 16 years of age or under to acquire a Youth Hunting License. This renewable license affords limited hunting privileges to the holders without imposing testing or education requirements. License holders may only hunt and carry a firearm, bow, arrow, or crossbow under the accompaniment and supervision of a parent, grandparent, or guardian who is at least twenty-one years of age

and who has a valid Illinois hunting license. Upon turning seventeen years old, the license holder must successfully complete a hunter safety course approved by the Department of Natural Resources in order to obtain a full hunting license and be able to hunt without supervision.

New standards for digital availability of public data

Public Act 098-0627 (eff. Mar. 7, 2014) (adding 20 ILCS 45).

The newly enacted Open Operating Standards Act establishes a protocol for Illinois government agencies to make public data available on the Internet. This open operating standard will be known as Illinois Open Data and will make public data available through a single web portal. "Public data" includes all data that is collected in pursuance of those entities' official responsibilities and which is otherwise subject to disclosure pursuant to the Freedom of Information Act.

Public data will be accessible to external search capabilities, able to be regularly updated, and kept in a format that allows for public notification of such updates. Public data sets made available on the web portal will be provided for informational purposes only, and the State will not be liable for any deficiencies in the completeness or accuracy of the data.

administrative agencies

Changes to funding distribution under the Abandoned Residential Property Municipality Relief Program

Illinois Housing Development Authority

The Housing Development Authority has amended rules regarding the Abandoned Residential Property Municipality Relief Program. 47 Ill. Adm. Code 381 (eff. Mar. 10, 2014). Grant applicants will now be divided into four geographic categories with the percentage of funds allocated to each category as follows: 25% to the City of Chicago; 30% to Cook County (excluding the City of Chicago); 30% to counties surrounding Cook County; and 15% to municipalities in the rest of the state. Applicants will be ranked against others in their geographic area based on their need, capacity, impact, budget, and readiness to proceed.

Educational opportunities for children of deceased or disabled veterans

Illinois Department of Veterans' Affairs

The Department of Veterans' Affairs recently adopted amendments aimed at implementing the Children of Deceased Veterans Act and providing educational opportunities for these children. 95 Ill. Adm. Code 101 (eff. Mar. 12, 2014). To qualify for benefits, children of eligible veterans must: (1) be between the ages of ten and seventeen, with the exception that an eighteen year old may receive benefits while completing high school; (2) reside in Illinois for at least one year before applying for benefits; and (3) attend a public or private educational institution in Illinois. These benefit payments shall not exceed $250 for tuition per child annually.

A parent is an eligible veteran through either death or disability in connection with eligible service. Either the U.S. Department of Defense or the U.S. Department of Veterans Affairs may make these determinations. Eligible service includes time served during World War I, World War II, the Korean Conflict, the time period in which veterans were liable for induction under the Universal Military Training and Service Act, and the Vietnam Conflict.

With regard to disabled veterans, eligibility is further dependent on the veteran not receiving disability compensation. Upon receiving a 100% disability rating by the U.S. Department of Veterans' Affairs for two consecutive years, a veteran will be considered permanently disabled. The educational benefits shall be paid to the child so long as the 100% disability lasts and the child is eligible.

To apply for and receive benefits, applicants must submit an Application for Veterans' Children Educational Opportunities and a Certificate of Attendance and Statement of Expenditures for the Veterans' Children Educational Opportunities.

New guidelines for group psychotherapy services

Illinois Department of Healthcare & Family Services

Rural Health Clinics (RHCs) and Federally Qualified Health Centers (FQHCs) in Illinois may bill for group psychotherapy sessions so long as specific timing, size, scope, and documentation requirements are met. 89 Ill. Adm. Code 140 (eff. Mar. 13, 2014). These sessions may only occur twice a week with only one session per day. Each session must last at least forty-five minutes, and the groups should not exceed twelve patients, each of whom must have been diagnosed with a mental illness. Residents of homes licensed under the Nursing Home Care Act or the Specialized Mental Health Rehabilitation Act are ineligible for group psychotherapy services.

RHCs and FQHCs must further maintain records of the patients treated with group therapy, documenting each session's focus, how much each patient participates, and the duration of the session. Only select individuals may lead the group sessions, including a psychologist, a licensed clinical social worker, a licensed clinical professional counselor, a licensed marriage and family therapist, an advanced practice nurse certified in psychiatric and mental health nursing, or a licensed physician who has completed or is attending an accredited general psychiatry residency program. In leading the session, the professional must select a group-treatment model specifically targeted at addressing the psychiatric needs of the particular group.

Annual surcharges assessed on live adult entertainment

Illinois Department of Revenue

Live adult entertainment facilities, commonly known as striptease clubs, will now be assessed an annual surcharge. 86 Ill. Adm. Code 900 (eff. Mar. 10, 2014). Only facilities that are open to the public will be subjected to the new surcharge. Facility operators may chose to pay the surcharge according to one of two methods. First, the operator could elect to pay a surcharge equal to $3 per person admitted to the facility. It is within the operator's discretion to pass along this cost to the customer or to find additional sources of revenue to cover the expense. Second, an operator may elect to pay a flat fee based on the facility's gross taxable receipts under the Retailer's Occupation Tax Act. A $25,000 surcharge would be assessed for gross taxable receipts equal to or greater than $2,000,000; $15,000 for gross receipts between $500,000 and $2,000,000; and $5,000 for gross receipts less than $500,000.

Certification for drinking water examiners

Illinois Environmental Protection Agency

Pursuant to the Public Water Supply Operations Act, the Illinois Environmental Protection Agency ("EPA") has set forth procedures to obtain a drinking water operator certification. 35 Ill. Adm. Code 681 (eff. Apr. 1, 2014). In order to be eligible to take a water supply operator examination, an individual must have graduated from high school or have the equivalent of a high school education, be able to read and write English, submit evidence of his or her character, and pay the required fee.

In order to pass the exam, individuals must obtain a score of at least 70%. Passing test scores will be valid for six years. After passing the exam, individuals may apply for a certificate of competency. The Illinois EPA will assess the individual's education and experience, along with contacting three references, to determine eligibility for the certificate. Individuals that pass the exam but do not have the required experience necessary for the certification will be considered Operators in Training.

Flat rate for Illinois Racing Board occupational licenses

Illinois Racing Board

Applicants for occupational licenses from the Illinois Racing Board are now subject to paying a blanket annual fee of $25, regardless of job position. 11 Ill. Adm. Code 502 (eff. Mar. 1, 2014). This fee now applies to persons who perform professional services as well as racetrack employees. ■

Building Your Case with Social Media Evidence

Can you get the other side's damaging Facebook posts into evidence? How do you make sure they don't vanish at a click of the "delete" key? Here's a look at emerging principles and best practices in this fast-moving area of law.

By Ed Finkel

A prep school in the Miami area fails to renew its principal's employment contract, and he responds with an age discrimination suit claiming he was fired inappropriately. He settles for $150,000, of which slightly more than half, $80,000, is a payment that must be surrendered if he or his wife breaches confidentiality.

As their daughter was involved with the suit, the former principal and his wife tell her they have settled and are happy with the result. The daughter almost immediately gets onto Facebook to share the news that her parents have won the case and crows the school "is now officially paying for my vacation to Europe this summer. SUCK IT."

This news travels forth from her more than 1,000 Facebook friends and at some point it reaches the ears of school officials that confidentiality has been breached. Not because the daughter broadcast the news on Facebook per se, but because her parents told her what had happened, in violation of the confidentiality agreement. The Facebook posting just became the school's evidence.

"While it was not itself a breach, it later did prove, because the community got word of this" that confidentiality had been breached, says Mark C. Palmer of Champaign-based Evans, Froehlich, Beth & Chamley, Ltd., one of the presenters at a half-day "Social Media in Litigation" conference sponsored by the ISBA in Chicago on April 4. "The breach was telling the daughter…'Yes, it's been settled.' And then the Facebook posting provided the evidence of the breach."

Palmer notes two key takeaways from the result: "Obviously, in a confidentiality agreement you need to be careful of

Ed Finkel is an Evanston-based freelance writer.

the exact language you use and who and how that confidentiality could be contained to different parties, such as your immediate family members and so on," he says, adding wryly, "More important, never, ever tell a teenager something you don't want ending up on several social media outlets. Never."

It's no kidding around that the proliferation of social media during the past decade since Facebook's founding has raised a multitude of new issues related to the use of social media posts in litigation – what steps you should take to preserve social media evidence, what discovery techniques are available, and how to get it successfully admitted into evidence. While courts are still sorting out the details, some basic principles and best practices are emerging.

Serving a subpoena to an actual provider like Facebook is almost never the best way to get access to social media posts.

The challenges of preserving social media evidence

The 'perfect preservation letter.' When an attorney suspects the contents of the opposing party's social media accounts might be needed for discovery, the first step is to send out a preservation-of-evidence letter to the opposing counsel as soon as possible, says Peter LaSorsa, a Mapleton-based practitioner, who also presented on April 4. You can use a standard lawyerly letter for other attorneys, but if you're sending one to an unrepresented party, make sure you're crystal clear.

"Make it in language that later on, they can't go into court and say, 'I didn't understand it. I don't know what preservation of evidence is,'" he says. "Spell it out so a high-schooler can understand it. It's the old [saying], 'Know your audience.'"

Sharon Nelson, president of Virginia-based digital forensics and information security firm Sensei Enterprises, who presented at a similar forum March 28 at the ABA Tech Show, recommends that attorneys download a guidebook called "The Perfect Preservation Letter" written by Craig Ball, a computer forensic analyst and former trial lawyer (see "Resources" sidebar).

In the guidebook, Ball notes that preservation letters are intended to remind opponents to preserve evidence but also to serve as "the linchpin of a subsequent claim for spoliation, helping to establish bad faith and conscious disregard of the duty to preserve relevant evidence."

LaSorsa sends out such a letter any time he sends a demand. "Even before anything is filed, in the same envelope," he says. "So there can be no mistake what I want saved."

Warning clients not to delete. You should also take great care to properly counsel clients about the need to preserve social media and other electronic evidence, Palmer says. "With a simple click, social media content can be edited and deleted," he says. "While underlying electronic data may still exist containing the deleted content, retrieval may be difficult and costly, [if it's even] possible."

For that reason, he adds, "Litigants have a duty to preserve relevant evidence that they know, or reasonably should know, will likely be requested in reasonably foreseeable litigation, and the court may impose sanctions on an offending party that has breached this duty."

A litigation hold is considered to be in effect when litigation or regulatory action is pending – or when one is reasonably anticipated, Nelson says. "The devil is in [how you define] 'reasonably anticipated,'" she says. "If you have had somebody write you a letter [saying] that they're going to sue you, you can assume litigation is coming. If your spinach is making people ill and sending them to the hospital, you can assume legal trouble. People can say, 'You reasonably should have known.'"

Plaintiffs often don't preserve their own evidence, and plaintiffs' attorneys should know that it's a good practice to send a preservation letter to their clients, Nelson says. "There have been sanctions given by judges, and adverse influence instructions, to the effect that what is missing is [damaging]," she says of social media evidence that can't be reconstructed.

Judges' have become less tolerant of the loss of such evidence as social media has become more commonplace, Nelson says. "They're more stringent than they once were," she says.

Attorneys and clients should treat potential social media evidence with the same caution as any other type, says Bryan Sims, a Naperville-based practitioner who also presented at the ISBA forum. "If it's relevant, you can't go destroy it – in this case, delete it – in the same way you couldn't take all your records from a transaction and shred them," he says. "What happens is, people get in trouble, they panic because they've got a Facebook page, and they take it down and delete everything that was ever on it. That's never going to end well."

Social media discovery strategy and tactics

Scope of social media discovery. Once you've sent the letter to the other side,

LaSorsa says, think first about what you're trying to prove and whether you really need social media evidence for your case. "A lot of times, you might have to go through a huge expense [to obtain the evidence], and do you really even need to do that?" he asks. "At the end of the day, if you have some other way of proving what you need, do you want to go down that road? You may have problems, especially if it's been deleted."

Even if you think you do need social media evidence, asking for everything in a person's Facebook account is not likely to be received well by the opposing litigant or the court. Sims suggests finding out what you can from the portion of a litigant's social media information that he or she has made publicly available, then tailoring discovery requests based on that research. "If you see something [useful], then obviously you can send a more targeted discovery request with respect to information about that," he says. "The more focused you are, the more likely you are to have success."

Should you subpoena Facebook? Serving a subpoena to an actual provider like Facebook is almost never the best way to get access to social media posts. Nelson notes that the federal Stored Communications Act, which has been upheld in multiple court decisions, bars attorneys in civil cases from getting the actual social media content directly from providers, although they might be able to get dates and times of postings or other potentially useful metadata.

A better way to get it: make a request upon the user. "Typically it will be released to that person," she says. "Their attorney is going to review it first, [to make sure the data turned over] is relevant. You can't go fishing through somebody's social media site." (And don't friend a witness or party to get access to otherwise private portions of their Facebook or other social media pages. See the "Resources" sidebar for links to articles that say more about this.)

Find out more about social media evidence

The following articles are in the IBJ archive.

- *Facebook: What Family Lawyers Should Know*, by Adam C. Kibort (July 2013). http://www.isba.org/ibj/2013/07/facebookwhatfamilylawyersshouldknow
- *Tips for Authenticating Social Media Evidence*, by Nicholas O. McCann (September 2012). http://www.isba.org/ibj/2012/09/tipsforauthenticatingsocialmediaevi
- *Friending Your Enemies, Tweeting Your Trials: Using Social Media Ethically*, by Helen W. Gunnarsson (October 2011). http://www.isba.org/ibj/2011/10/friendingyourenemiestweetingyourtri
- *Does What Happens on Facebook Stay on Facebook? Discovery, Admissibility, Ethics, and Social Media*, by Beth C. Boggs and Misty L. Edwards (July 2010). http://www.isba.org/ibj/2010/07/doeswhathappensonfacebookstayonface
- *Will You Be My (Facebook) Friend?*, by Karen Erger (April 2010). http://www.isba.org/ibj/2010/04/willyoubemyfacebookfriend
- *Looking for "Facts" in All the Wrong Places*, by Hon. Ron Spears (February 2010). http://www.isba.org/ibj/2010/02/lookingforfactsinallthewrongplaces

These resources were recommended by Virginia-based digital forensics expert Sharon Nelson.

- *Authentication of Social Media Evidence*, by Judge Paul Grimm (36 Am. J. Trial Advoc. 433 (2013)).
- *Lorraine vs. Markel American Insurance Co.*, 241 F.R.D. 534 (D. Md. 2007).
- *The Perfect Preservation Letter*, by Craig Ball. http://www.craigball.com/perfect%20preservation%20letter.pdf

The following papers were prepared by Stacie L. Hanson of the Peoria office of Heyl, Royster, Voelker & Allen as part of their annual claims-handling seminars.

- *Effective Claims Practices: Overcoming Hurdles to the Use of Social Media* (May 22, 2013). http://www.heylroyster.com/_data/files/Seminar%202013/B%20-%20SKH%20-%20V6%20-%20Final.pdf
- *Effective Use of Social Media as a Litigation Tool for the Defense* (May 17, 2012). http://www.heylroyster.com/_data/files/Seminar%202012/E%20-%20SKH.pdf

Programs like Snagit and Camtasia can electronically capture social media posts.

Making printouts of social media postings. Though many lawyers print posts and other information off of social media sites, Nelson and LaSorsa caution against it. One needs to be able to authenticate that information, Nelson says, and none of the metadata – about when something was posted, or when it might have been edited, for example – comes with a printout. She recommends programs like Snagit or Camtasia to electronically capture and authenticate social media or other communications. "Fewer and fewer judges are admitting [printouts] because there's no metadata."

"By the time discovery gets started, that Facebook page could be long gone," LaSorsa says. "How are you going to prove [who authored it]? You could make a Facebook page look like [it belongs to] anybody. So a printout could be bogus. If you print out a Facebook page, that's all you're left with, is a paper document."

Getting social media admitted into evidence

Authentication. Once you've obtained the social media evidence you need, think about how you'll get it admitted. Authentication is the first step, Palmer

says, as it would be with any evidence (a 2012 IBJ article treated authentication in depth – see sidebar). "It is important to not let technology distract you from the standards of proper foundation, namely how can one satisfy authentication, or identification, sufficient to support a finding that the evidence is what the proponent claims it is," he says.

But electronic communication presents an evidentiary challenge not common to in-person or telephone conversations, Palmer notes. "Technology has created a foundation issue of showing who was on the other end of the 'line,' whether text message, e-mail, instant message, Tweet, Facebook posting, and on and on," he says. "Circumstantial evidence of access to an account, computer, or device may be one method. Embedded GPS location metadata or even cell tower pinging may be others."

You can attempt to identify the author's writing style, Palmer says. This can include "the use of abbreviations, symbols, punctuation, capitalization, salutations, signoffs, etc.," he says. "It's almost like 'modern day handwriting.'"

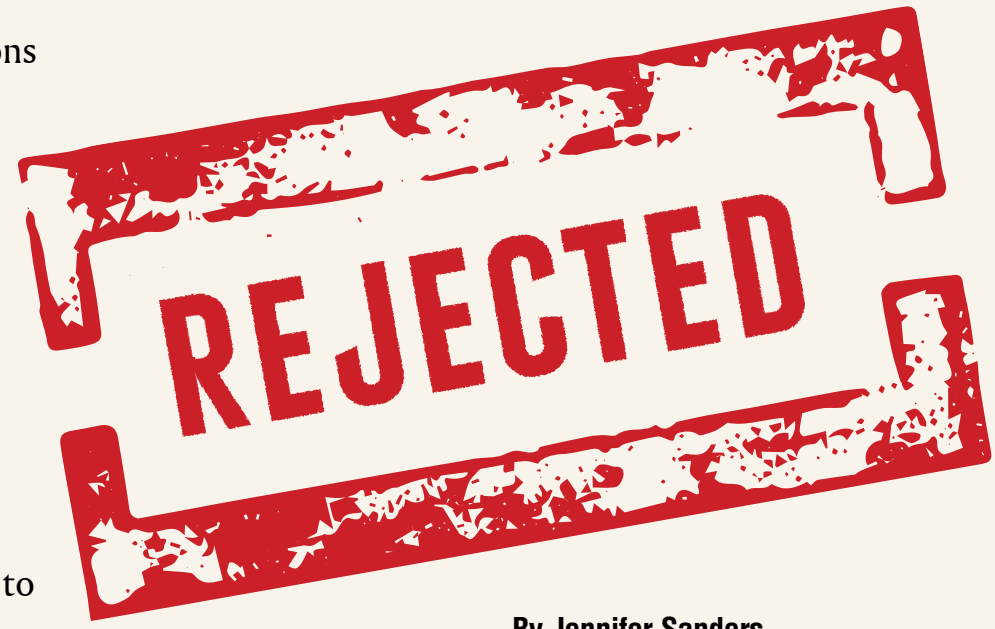
Nelson, who was speaking to a national audience, suggests that attorneys carefully read Rule 901 of the Federal Rules of Evidence, which governs authentication of evidence and says it can be done with circumstantial evidence that reflects the evidence's content. Illinois attorneys should further consult Rule 901 of the Illinois Rules of Evidence, which is similar to its federal counterpart. Nelson recommends a 2013 article by Judge Paul Grimm as a great place to get details (see sidebar). She also noted that he "godfather of all cases" on authentication, even though it involved e-mail rather than social media, is *Lorraine vs. Markel American Insurance Co.*, 241 F.R.D. 534 (D. Md. 2007).

'The basic rules are the same.' Sims suggests that attorneys try to determine what they want admitted in advance of a trial. Overall he doesn't see much difference in getting social media evidence admitted than evidence from any other source. "The fact that it's social media doesn't give it some sort of special status, good or bad, in terms of admissibility," he says. "The basic rules are the same regardless of what you want to get admitted: You have to demonstrate to the judge that the evidence is relevant, authentic, and not subject to exclusion because it's hearsay."

Attorneys sometimes get "hung up" on the authentication piece but need to keep in mind that judges don't need to be convinced beyond any reasonable doubt. "If the opposing party says, 'I didn't post that,' but a bunch of posts before or afterward are from this person, it's good circumstantial evidence," he says. "It's the same analysis as with any other piece of evidence.… Is there something here that would demonstrate that the judge would believe the person I say wrote this [actually wrote it]?" ■

Pretrial Motions – Are You Getting Them Right?

Recent appellate opinions and orders show that too many attorneys improperly label and file motions to dismiss and for summary judgment at the trial level. Here's a quick guide to understanding these motions, highlighting key things to remember when filing.



By Jennifer Sanders

Motion practice is a key component of litigation. Although motions may appear routine and simple, they are anything but rudimentary and require an attorney's utmost attention to precision and a thorough understanding of the rules governing them.

More importantly, understanding what motions to file when can mean sink or swim for a newly licensed attorney. And even seasoned veterans can make mistakes when it comes to identifying the proper motion to file.

Of course, most attorneys would like to think they know how to properly file the most frequently used motions, such as motions to dismiss or motions for summary judgment. However, recent appellate opinions[1] and orders[2] show that attorneys have been confusing a few commonly filed motions – specifically, those filed under sections 2-615,[3] 2-619,[4] and 2-1005[5] of the Illinois Code of Civil Procedure. Those opinions and orders have highlighted the mistakes attorneys are making and have gone great lengths to explain how to properly file these motions.

For example, in April 2013, Justice Knecht of the fourth district appellate court made a special point in *Reynolds v. Jimmy John's Enterprise, LLC*[6] to clarify the differences between these three motions. The majority of Justice Knecht's opinion was dedicated to sifting through the numerous improperly filed motions and explaining how they should have been filed. In closing, Justice Knecht devoted an entire section of the opinion to discussing the differences between these commonly filed motions, emphasizing that "[t]he Code and meticulous motion practice demands preservation of the distinctions between sections 2-615, 2-619, and 2-1005."[7]

Whether you are a newly licensed attorney or have been engaging in motion practice for years, a review of these motions is in order. This article explains when to file what motion and reviews the key caveats for each.

1. See, *e.g.*, *Clemons v. Nissan North America, Inc.*, 2013 IL App (4th) 120943; *Reynolds v. Jimmy John's Enterprise, LLC*, 2013 IL App (4th) 120139; *Miller v. Harris*, 2013 IL App (2d) 120512; *Howle v. Aqua Illinois, Inc.*, 2012 IL App (4th) 120207; *In re T.P.S.*, 2012 IL App (5th) 120176.
2. See, *e.g.*, *McClure v. Haisha*, 2013 IL App (2d) 130365-U; *Stover & Co. v. Salvation Army*, 2013 IL App (1st) 121366-U; *1801 W. Irving, LLC v. Jonathon Splitt Architects, Ltd.*, 2013 IL App (1st) 121357-U; *Jin Park v. Foster Bank*, 2013 IL App (1st) 30426-U; *Olser Institute, Inc. v. Miller*, 2013 IL App (1st) 123053-U.
3. 735 ILCS 5/2-615 (West 2012).
4. 735 ILCS 5/2-619 (West 2012).
5. 735 ILCS 5/2-1005 (West 2012).
6. *Reynolds*, 2013 IL App (4th) 120139.
7. *Id.* ¶ 51.

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Section 2-615 motions

Section 2-615 of the Code of Civil Procedure governs motions with respect to pleadings. "The primary purpose of pleadings is to apprise one's adversary and the court of the nature of the claim or defense asserted,"[8] and to "present, define, and narrow the issues and limit the proof needed at trial."[9] After a pleading has been filed, an objection may be made, but it must be raised by motion.[10] The purpose of filing motions with respect to pleadings is to correct defects in the pleadings prior to trial.[11]

Although pleadings take many forms, the focus of this article is civil complaints and the corresponding section 2-615 motions that object to those complaints. Two motions in particular – a motion to strike a pleading as substantially insufficient in law and a motion to dismiss a cause of action – are strategically useful and often necessary. It is important not only to know the difference between them but to understand how they work together and how they compare to other motions in the Code of Civil Procedure – namely, motions filed under section 2-619 and section 2-1005.

Motion to dismiss v. motion to strike. To begin, let us clarify the difference between a motion to dismiss and motion to strike pursuant to section 2-615. A motion to strike attacks the complaint itself and requests that parts of the complaint or the complaint in its entirety be stricken, while a motion to dismiss challenges the entire action and asks that the cause be dismissed based on the pleadings.

As Justice Gordon of the first district explained in a recent opinion, "often, we say that a pleading or a portion thereof is 'dismissed.' This is incorrect. Pleadings are stricken in whole or in part; only actions are dismissed. The dismissal of a complaint cannot be equated with a striking of a party's pleading and this distinction is a substantive one which has long been recognized in Illinois."[12]

What attorneys often file, however, and what is generally the focus of discussion in appellate opinions, is a section 2-615 motion to dismiss an action based on the pleadings. Such motions attack the legal sufficiency of a complaint. In other words, a section 2-615 motion asks whether the plaintiff stated a cause of action that would entitle him to relief.

For example, imagine your client has been sued for breach of fiduciary duty. In order for the action to survive a motion to dismiss, the complaint must plead facts sufficiently showing that (1) a fiduciary duty existed between the plaintiff and your client and (2) your client breached the duties imposed upon him as a matter of law as a result of the relationship.[13] At this stage, the court will not determine whether a fiduciary relationship *actually existed* or whether your client *actually breached* that relationship, but only whether the facts state a claim for breach of fiduciary duty if taken as true.

Accepting allegations as true. Note that when ruling on a section 2-615 motion to dismiss, a court must accept all well-pleaded facts and any reasonable inferences therefrom as true,[14] as well as view the allegations in the complaint in the light most favorable to the plaintiff.[15] Thus, a court will deny a section 2-615 motion to dismiss so long as the plaintiff pleads *any* facts that would state some articulable cause of action, "even if that cause of action is not one that the plaintiff intended to assert."[16]

Likewise, keep in mind that courts allow liberal amendments to pleadings,[17] giving the plaintiff additional opportunities to sufficiently state his cause of action. However, also be aware that failure to challenge the sufficiency of the complaint in the trial court will cause forfeiture of the issue on appeal.[18] So do not be discouraged from filing a section 2-615 motion to dismiss simply because the plaintiff has been given leave to amend his complaint.

Affidavits are irrelevant. Other key nuances to remember about section 2-615 motions is that a court is limited to the factual allegations of the complaint and may not consider extraneous matters when reviewing the sufficiency of the complaint.[19] Thus, matters such as depositions and affidavits are irrelevant to a court's ruling on a section 2-615 motion. Don't attach such items to a section 2-615 motion. Doing so could be confusing to the judge or opposing counsel and could contribute to a court's decision to reverse on appeal.

A section 2-619 motion can be characterized as a "yes, but" – "Yes, the facts in plaintiff's complaint are true, but I have a valid defense that warrants dismissal of the case."

Further, a court may not consider conclusions of law or conclusions of fact unsupported by specific allegations of fact when ruling on a section 2-615 motion.[20] Be careful not to rely on them when arguing against or defending a section 2-615 motion to dismiss.

Section 2-1005 motions for summary judgement

Motion to dismiss v. motion for summary judgment. You must understand the difference between a section 2-615 motion to dismiss and a section 2-1005 motion for summary judgment. The purpose of a motion for summary judgment is to determine if there are any issues of triable fact. It should only be granted where no genuine issue of material fact exists.[21]

A section 2-615 motion accepts the facts in the complaint but questions whether a cause of action has been stated. A section 2-1005 summary judgment motion, however, assumes a cause of action has been adequately stated but challenges the facts[22] and asks the court to summarily rule that the facts favor the moving party. Further, a summary judgment motion goes beyond the pleadings and considers the exhibits, "affidavits,

8. 2 Nichols Illinois Civil Practice § 26:1, at 6-7 (rev. 2011).
9. *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 307 (1981).
10. 735 ILCS 5/2-615(a) (West 2012).
11. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 422 (1981).
12. *In re Estate of DiMatteo*, 2013 IL App (1st) 122948, ¶ 55.
13. *Miller v. Harris*, 2013 IL App (2d) 120512, ¶ 21.
14. *DiMatteo*, 2013 IL App (1st) 122948, ¶ 57.
15. *Miller*, 2013 IL App (2d) 120512, ¶ 16.
16. *DiMatteo*, 2013 IL App (1st) 122948, ¶ 58.
17. See, *e.g.*, *Department of Healthcare & Family Services ex rel. Daniels v. Beamon*, 2012 IL App (1st) 110541, ¶ 16.
18. See *Fox v. Heimann*, 375 Ill. App. 3d 35, 41 (1st Dist. 2007).
19. *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 47.
20. *DiMatteo*, 2013 IL App (1st) 122948, ¶ 58.
21. *Rodman v. CSX Intermodal, Inc.*, 405 Ill. App. 3d 332, 335 (1st Dist. 2010).
22. *Reynolds v. Jimmy John's Enterprise, LLC*, 2013 IL App (4th) 120139, ¶ 52.

depositions, and admissions on file,"[23] but a section 2-615 motion "considers only the facts on the face of the pleadings."[24]

Returning to our above hypothetical, consider the following: the plaintiff's complaint pleaded facts sufficiently establishing a cause of action for breach of fiduciary duty and, therefore, the court denied your client's section 2-615 motion to dismiss. Assume, however, that your client has deposition testimony and an affidavit proving that a fiduciary relationship between your client and the plaintiff did not in fact exist.

A motion to strike attacks the complaint, while a motion to dismiss challenges the entire action and asks that it be dismissed.

Based on this information, your client can file a section 2-1005 motion for summary judgment. Unlike with the section 2-615 motion to dismiss, the court will go beyond the complaint, considering the affidavit and deposition, and determine whether an actual fiduciary relationship existed. At this stage, the court is no longer bound by the factual allegations in plaintiff's complaint and will grant summary judgment in your client's favor.

Section 2-619(a)(9) motions to dismiss for an 'affirmative matter'

Statutes of limitations. In contrast to a section 2-615 motion to dismiss, a motion to dismiss based on section 2-619(a)(9) of the Code of Civil Procedure admits the legal sufficiency of a complaint.[25] It also accepts all well-pleaded facts and any reasonable inferences derived from those facts as true.[26] Such motions are used to "dispose of issues of law and easily proven issues of fact at the outset of litigation."[27]

A section 2-619 motion requests the court to dismiss the action because "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim."[28] Thus, the defendant is not denying that a cause of action lies, as with a section 2-615 motion, but is claiming that some affirmative matter negates the plaintiff's cause of action completely.

What often troubles attorneys and is important to understand about a section 2-619 motion to dismiss is what constitutes an "affirmative matter." As the appellate court puts it, "[a]n affirmative matter encompasses any defense other than a negation of the essential allegations of the cause of action."[29] Stated another way, an affirmative matter is a defense "outside [of] the complaint that defeats it."[30] It is not merely evidence contesting facts stated in the complaint.

One example would be a statute of limitations. Imagine your client was involved in a car accident in which the other driver suffered serious injuries. The driver sues your client, alleging your client's negligence caused the accident and the driver's resulting injuries.

The driver, however, did not file suit until four years after the accident occurred. Generally speaking, because Illinois provides for a two-year statute of limitations on personal injury claims,[31] your client could file a section 2-619 motion to dismiss, asserting that the passing of the two-year statutory period serves as an affirmative matter barring the plaintiff's case.

Once the defendant has met its burden of proving an affirmative matter

23. *Howle v. Aqua Illinois, Inc.*, 2012 IL App (4th) 120207, ¶ 41.
24. *Reynolds*, 2013 IL App (4th) 120139, ¶ 52.
25. *Howle*, 2012 IL App (4th) 120207, ¶ 35 (quoting *Winters v. Wangler*, 386 Ill. App. 3d 788, 792 (4th Dist. 2008)).
26. *Brandt v. MillerCoors, LLC*, 2013 IL App (1st) 120431, ¶ 12.
27. *Fink v. Banks*, 2013 IL App (1st) 122177, ¶ 18.
28. 735 ILCS 5/2-619(a)(9) (West 2012).
29. *Asset Acceptance, LLC v. Tyler*, 2012 IL App (1st) 093559, ¶ 23.
30. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31.
31. See 735 ILCS 5/13-202 (West 2012).

PRETRIAL MOTIONS AT A GLANCE

	Purpose	What to attach?
§ 2-615 Motion to Strike	Requesting that a pleading be stricken, in whole or in part	Nothing; court can only consider the pleading's factual allegations
§ 2-615 Motion to Dismiss	Dismissing a cause of action based on the pleadings	Nothing; court can only consider the pleading's factual allegations
§ 2-619(a)(9) Motion to Dismiss	Disposing of issues of law and easily proven facts at the outset of litigation	Affidavit showing the basis for dismissal (e.g., statute of limitations), unless it is apparent on the face of the pleading
§ 2-1005 Motion for Summary Judgment	Determining if there are any issues of triable fact	Pleadings, exhibits, affidavits, depositions, and/or admissions on file

avoiding or defeating the claim, the burden shifts to the plaintiff to establish that the defense is unfounded or "that proof of the defense would require resolution of an essential element of material fact."[32] The plaintiff may satisfy this burden by presenting affidavits or other proof.

Attachments required. Remember too, that unlike a section 2-615 motion, which does not consider anything outside of the pleadings, a section 2-619 motion to dismiss must be accompanied by an affidavit "showing the basis for dismissal unless the matter forming the basis for dismissal is apparent on the face of the complaint."[33] Rarely will the defect appear on the face of the pleadings, so be mindful of the fact that affidavits almost always need to be attached to a section 2-619 motion. Also note, however, that although a section 2-619 motion accepts the well-pleaded facts as true, it "does not admit the truth of any allegations in [the] complaint that may touch on the affirmative matters raised in the [section] 2–619 motion."[34]

It is also important to understand that even though a section 2-619 motion to dismiss "shares procedural similarities with a [section 2-1005] summary judgment motion,"[35] they are distinctly separate motions. In a recent opinion, Justice Steigmann of the fourth district compared these two motions, explaining that a summary judgment motion is "essentially an answer denying an allegation set forth in the complaint."[36] It is a fact-based motion that can basically be viewed as asserting the allegations in the complaint as "not true."[37]

A section 2-619 motion, on the other hand, can be characterized as a "yes, but"[38] motion because it does not deny the factual allegations in the complaint but rather responds to those allegations with a defense outside of the complaint. In other words, the defendant is saying, "Yes, the facts in plaintiff's complaint are true, but I have a valid defense that warrants dismissal of the cause of action."

Section 2-619.1 – combining motions

Finally, to truly perfect the use of the motions discussed above, you must understand how to combine them. Section 2-619.1 of the Code of Civil Procedure provides that "[m]otions with respect to pleadings under [s]ection 2-615, motions for involuntary dismissal or other relief under [s]ection 2-619, and motions for summary judgment under [s]ection 2-1005 may be filed together as a single motion in any combination."[39] A combined motion must be filed in parts, with each part identifying and concerning only one of the three named sections and clearly stating the grounds or points relied upon under each section upon which it is based.[40]

In the above mentioned opinion, Justice Steigmann appended an epilogue emphasizing the importance of properly combining motions under section 2-619.1.[41] He warned attorneys against commingling separate claims brought under sections 2-615, 2-619, and 2-1005, explaining that doing so only serves to "complicate and confuse" the court.[42] He also urged trial courts to *sua sponte* reject those motions that do not adhere to the statutory requirements of section 2-619.1 and allow defendants to properly re-file such motions.[43]

However, if you are inexperienced in combining section 2-615, 2-619, and 2-1005 motions or simply find it too daunting, you have the option of separately filing such motions and avoiding the confusion altogether. But before doing so, consult the information above and ensure that you have chosen the proper motion.

Think before you file

Failing to file the proper motion could cost your client time and money and invite the possibility of reversal. Both are situations you want to avoid, whether you're a newly licensed attorney or seasoned veteran. Before you file, make sure you understand how the key motions differ and how they work together. ■

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32. *Lawson v. Schmitt Boulder Hill, Inc.*, 398 Ill. App. 3d 127, 130 (2d Dist. 2010) (quoting *Reilly v. Wyeth*, 377 Ill. App. 3d 20, 36 (1st Dist. 2007)).
33. *In re Estate of Krpan*, 2013 IL App (2d) 121424, ¶ 21.
34. *Stover & Co. v. Salvation Army*, 2013 IL App (1st) 121366-U, ¶25.
35. *Reynolds v. Jimmy John's Enterprise, LLC*, 2013 IL App (4th) 120139, ¶ 53.
36. *Howle v. Aqua Illinois, Inc.*, 2012 IL App (4th) 120207, ¶ 36.
37. *Id.*
38. *Id.* ¶ 35.
39. 735 ILCS 5/2-619.1 (West 2012).
40. *Id.*
41. *Howle*, 2012 IL App (4th) 120207, ¶¶ 69-73.
42. *Id.* ¶ 72.
43. *Id.* ¶ 73.

A Practitioner's Guide to Illinois' Speedy-Trial Statute

Illinois courts have recently clarified the meaning of certain provisions of the speedy-trial statute. This article reviews those decisions and provides guidance for prosecutors and defense attorneys on calculating a defendant's speedy-trial period.

By Jill Ausdenmoore

Illinois' speedy-trial statute contains two key provisions: a criminal defendant in custody must be brought to trial within 120 days of the day he was brought into custody, and a defendant out of custody must be brought to trial within 160 days of the date he demands trial.[1] Sounds simple, right?

Not so fast. The statute also allows a court, in limited circumstances, to grant the state a continuance of "not more than an additional 60 days."[2] Moreover, any delay "occasioned by the defendant" tolls the speedy-trial period.[3] So, when *must* the state bring a defendant to trial? Finding the right answer is crucial, as the consequence of miscalculating a defendant's speedy-trial period is certain and severe: the defendant must be released and the charges against him must be dismissed.[4]

Fortunately, Illinois courts have recently provided some guidance. In *People v. Lacy*, the Illinois Supreme Court held that the portion of the speedy-trial statute allowing the state to seek a continuance of "not more than an additional 60 days" means more than meets the eye.[5] At the same time, other Illinois decisions have outlined what it means for a defendant to "occasion" a delay.

Turning first to *Lacy,* this article explores those recent Illinois decisions to chart a course by which criminal law practitioners can successfully navigate Illinois' speedy-trial statute.

An "additional 60 days"

In *Lacy*, the defendant was arrested and charged with first degree murder and home invasion.[6] He remained in custody thereafter.

Before trial, the state filed two motions to continue under section 103-5(c) of Illinois' speedy-trial statute. In its first motion, the state explained that the only eyewitness to the crime could not travel for trial because she was in the midst of a high-risk pregnancy. In its second motion, filed approximately one month later, the state asserted that another witness, a crime scene technician, could not attend the scheduled trial because he had been deployed to Afghanistan.

Over the defendant's objections, the trial court granted both motions. Together, the two continuances totaled more than 60 days.

Over 180 days later, the defendant filed a motion to dismiss, asserting that the statutory speedy-trial period had expired. Specifically, the defendant argued section 103-5(c) allowed a total of 60 days of continuances in addition to the 120-day speedy-trial period that applied to him; thus, according to the defendant, the state was required to bring him to trial within 180 days. As the 180-day period had passed, the defendant claimed his case should be dismissed.

The trial court agreed with the defendant, finding the state could request multiple continuances under section 103-5(c) but those continuances could total no more than 60 days. Because the defendant had been in pretrial custody for 203 days that were attributable to the state, the court dismissed the charges and ordered the defendant released. The appellate court affirmed the trial court's decision, concluding the state was limited to seeking a total of 60 days' continuances.

The supreme court granted the state's petition for leave to appeal and reversed the appellate court's decision, concluding that section 103-5(c) of the speedy-trial statute does not limit the state to a total of 60 days of continuances.[7] The court rejected, however, the state's argument that section 103-5(c) sets "no limits" on the number of continuances that can be granted, explaining the state is entitled to only one 60-day continuance for each "item" of material evidence.[8]

The supreme court also emphasized that section

1. 725 ILCS 5/103-5(a), (b).
2. *Id.* § 103-5(c).
3. *Id.* § 103-5(a), (b), (f).
4. *Id.* § 103-5(d); *People v. Mayo*, 198 Ill. 2d 530, 536 (2002).
5. *People v. Lacy*, 2013 IL 113216, ¶¶ 11, 16-17.
6. *Id.* ¶ 4.
7. *Id.* ¶¶ 11, 16-17.
8. *Id.* ¶ 18.

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103-5(c) imposes "significant restraints" on the state's ability to seek a continuance. For each continuance the state seeks, the court opined, it must show that (1) the evidence sought is material to the case, (2) the state exercised due diligence in obtaining the evidence, and (3) reasonable grounds exist to believe that the evidence will be available at a later date.[9]

A delay "occasioned by the defendant"

Lacy makes clear that, in certain situations, prosecutors can use section 103-5(c) of Illinois' speedy-trial statute to get more than 60 additional days to prepare for trial. But other portions of the statute may provide the state even more preparation time if the speedy-trial period is suspended during any delay "occasioned by the defendant."[10] So, when is a delay "occasioned by the defendant"?

The key to navigating the speedy-trial statute for prosecutors is to keep close track of which delays are attributable to the defendant and which are solely attributable to the state.

Defendants in custody. For a defendant in pretrial custody, the 120-day speedy trial "clock" starts to run automatically from the day he is taken into custody, but it tolls any time a defendant asks for or agrees to a delay.[11] A defendant can also "agree" to a delay through inaction – namely, by failing to object when the state requests a continuance or the trial court sets a date outside the 120-day period.[12]

An objection can either be a written demand for trial or an oral demand for trial on the record.[13] Although a demand does not have to be made through the use of any "magic words," it does have to include a request for a "speedy" trial.[14]

Making a basic request for trial before any delay is proposed – for instance, during arraignment or at a status hearing – is insufficient.[15] A defendant's objection must be unequivocal; thus, a defendant cannot, for example, state that he wishes to renew a previous speedy-trial demand but then suggest a trial date outside the speedy-trial period.[16] Recently, the Illinois Appellate Court held that a defendant in custody must object to *all* continuances, not just those that push the trial date outside the 120-day speedy-trial period.[17]

Defendants out of custody. For a defendant released on bail or on his own recognizance, the speedy-trial period does not start to run automatically like it does for a defendant in custody.[18] Rather, the defendant must make a demand for trial – in writing – to commence his 160-day speedy-trial term.[19]

A defendant waives his right to a speedy trial where, by an affirmative act, he contributes to an actual delay or agrees to a continuance.[20] The second and third districts of the appellate court have held that an agreed delay by a defendant out of custody to a trial date *within* the prescribed 160-day period is not a delay attributable to the defendant because no actual delay of trial occurs.[21]

A defendant also waives his speedy-trial demand by failing to appear at all subsequent court dates set by the court; the defendant will then have to make another speedy-trial demand to commence a new speedy-trial period.[22] Of course, a defendant need not appear at *every* court date, only those dates "set by the court." So, for example, a defendant did not waive his speedy-trial demand by failing to appear at a status date for return on a subpoena. That was a date set by the state, not the court.[23]

Generally, the reason for a defendant's failure to appear at a court date is irrelevant for purposes of speedy trial.[24] However, the appellate court has drawn a distinction between a failure to appear – which waives a defendant's speedy-trial demand – and an absence. In *People v. Kohler*, the second district appellate court found that where a defendant was not personally present at a hearing but his attorney appeared, informed the court the defendant was ill, and made an unopposed motion to continue, the defendant did not "fail to appear" but was "absent." Thus, he did not waive his speedy-trial demand.[25]

The first district reached a similar conclusion in *People v. Higgenbotham*, concluding that where a defendant did not attend her court date but her attorney appeared, provided a doctor's note (explaining that she was in the hospital), and requested a continuance under section 114-4(i) of the Criminal Code, she was "absent."[26]

Nonetheless, the *Higgenbotham* court held that the same defendant "failed to appear" when she missed subsequent court dates, despite later providing a note explaining that she remained hospitalized on those dates. The court concluded that to avoid the effect of waiver, the defendant needed to have communicated her illness to the court *before* she missed her court appearance, not afterward.[27]

To date, the concept of an "absence" as expressed in *Higgenbotham* and *Kohler* has been applied narrowly, i.e., only to situations in which a defendant cannot appear in court due to illness. Recently, the appellate court refused to accept a defendant's claim that he was "absent" where he did not appear in court because he was in custody in another county.[28]

Interestingly, the court indicated that it might have been willing to deem the defendant absent if the record had shown that he made attempts to contact the court, his attorney, or the prosecutor before his trial date. Thus, the distinction between a "failure to appear" and an "absence" seems to hinge on whether

9. *Id.*
10. 725 ILCS 5/103-5(a), (b), (f).
11. *People v. Kliner*, 185 Ill. 2d 81, 115 (1998).
12. *People v. Phipps*, 238 Ill. 2d 54, 66 (2010); *People v. Cordell*, 223 Ill. 2d 380, 388 (2006).
13. 725 ILCS 5/103-5(a).
14. *Phipps*, 238 Ill. 2d at 66.
15. *Cordell*, 223 Ill. 2d at 391-92.
16. *People v. Hampton*, 394 Ill. App. 3d 683, 689 (2d Dist. 2009).
17. *People v. Wade*, 2013 IL App (1st) 112547, ¶¶ 24-29.
18. 725 ILCS 5/103-5(b).
19. *Id.*
20. *People v. Zeleny*, 396 Ill. App. 3d 917, 920 (2d Dist. 2009).
21. *Id.*; *People v. LaFaire*, 374 Ill. App. 3d 461, 464 (3d Dist. 2007).
22. See *People v. Minor*, 2011 IL App (1st) 101097, ¶¶ 4, 17 (defendant›s speedy-trial period commenced in October, when she filed her second speedy-trial demand).
23. *People v. Bauman*, 2012 IL App (2d) 110544, ¶ 27.
24. *Minor*, 2011 IL App (1st) 101097, ¶ 17.
25. *People v. Kohler*, 2012 IL App (2d) 100513, ¶¶ 34-38.
26. *People v. Higgenbotham*, 2012 IL App (1st) 110434, ¶ 24.
27. *Id.* ¶¶ 25-27.
28. *People v. Wigman*, 2012 IL App (2d) 100736, ¶¶ 53-55.

the defendant communicates his absence before his court date.

What do these recent speedy-trial decisions mean for prosecutors and defense attorneys, and how can they avoid miscalculating a defendant's speedy-trial term? Here are some observations.

The implications of *Lacy*

Prosecutors: Pay attention to *Lacy's* limitations. For prosecutors, *Lacy* is a double-edged sword. On the one hand, *Lacy* permits multiple 60-day continuances – no doubt a helpful tool in a complicated case involving numerous witnesses and mountains of evidence.[29] On the other hand, however, *Lacy*'s allowance of only one 60-day continuance per evidentiary "item" means that if your star witness cannot come to trial after the court has already granted you a 60-day continuance to obtain that witness's testimony, you're out of luck.

A defense attorney's best strategy for dealing with Illinois' speedy-trial statute: speak up!

But all is not lost. The *Lacy* dissent offers two solutions in that situation: (1) seek a plea bargain with the defendant; or (2) proceed to trial without the witness's testimony.[30] Moreover, if the defendant is in pretrial detention, you can seek an order lowering the defendant's bond or releasing the defendant on his own recognizance, thereby extending the speedy-trial period from 120 to 160 days.

Defense attorneys: make a clear record. For defense attorneys, *Lacy* highlights the importance of making a clear record in the trial court. Be sure the record shows the precise "item of evidence" for which the state sought a continuance and that your client has objected to the continuance. Doing so will help preclude the state from obtaining a second continuance for the same evidence at a later date.

Tips from other Illinois decisions

Prosecutors: keep track of delays. *Lacy* aside, the key to successfully navigating Illinois' speedy-trial statute for prosecutors is to keep close track of which delays are attributable to the defendant and which are solely attributable to the state. It's easier said than done, but miscalculating a defendant's speedy-trial period is, essentially, giving the defendant a "get out of jail free" card.

For a defendant in custody, prosecutors should ask themselves the following questions each time a delay occurs.

1. Did the defendant suggest or agree to the delay? If so, it is attributable to the defendant.
2. Did the defendant agree (or fail to object) to a trial date within the 120-day period? If so, the delay is attributable to the defendant.
3. Did the defendant agree (or fail to object) to a trial date outside the 120-day period? If so, the delay is attributable to the defendant.

Likewise, to calculate the 160-day period that applies to defendants out of custody, prosecutors should ask the following questions.

1. When did the defendant make a written speedy-trial demand? This is when the speedy-trial term begins.
2. Did the defendant appear at all dates set by the court after making a demand? If so, he has not waived his speedy-trial demand.
3. Was a defendant who did not appear "absent" as expressed in *Higgenbotham* and *Kohler*? If so, the defendant did not waive his speedy-trial demand.
4. If the defendant failed to appear and was not "absent," did he make a second written speedy-trial demand? Calculate the defendant's speedy-trial term from the date of this second demand.

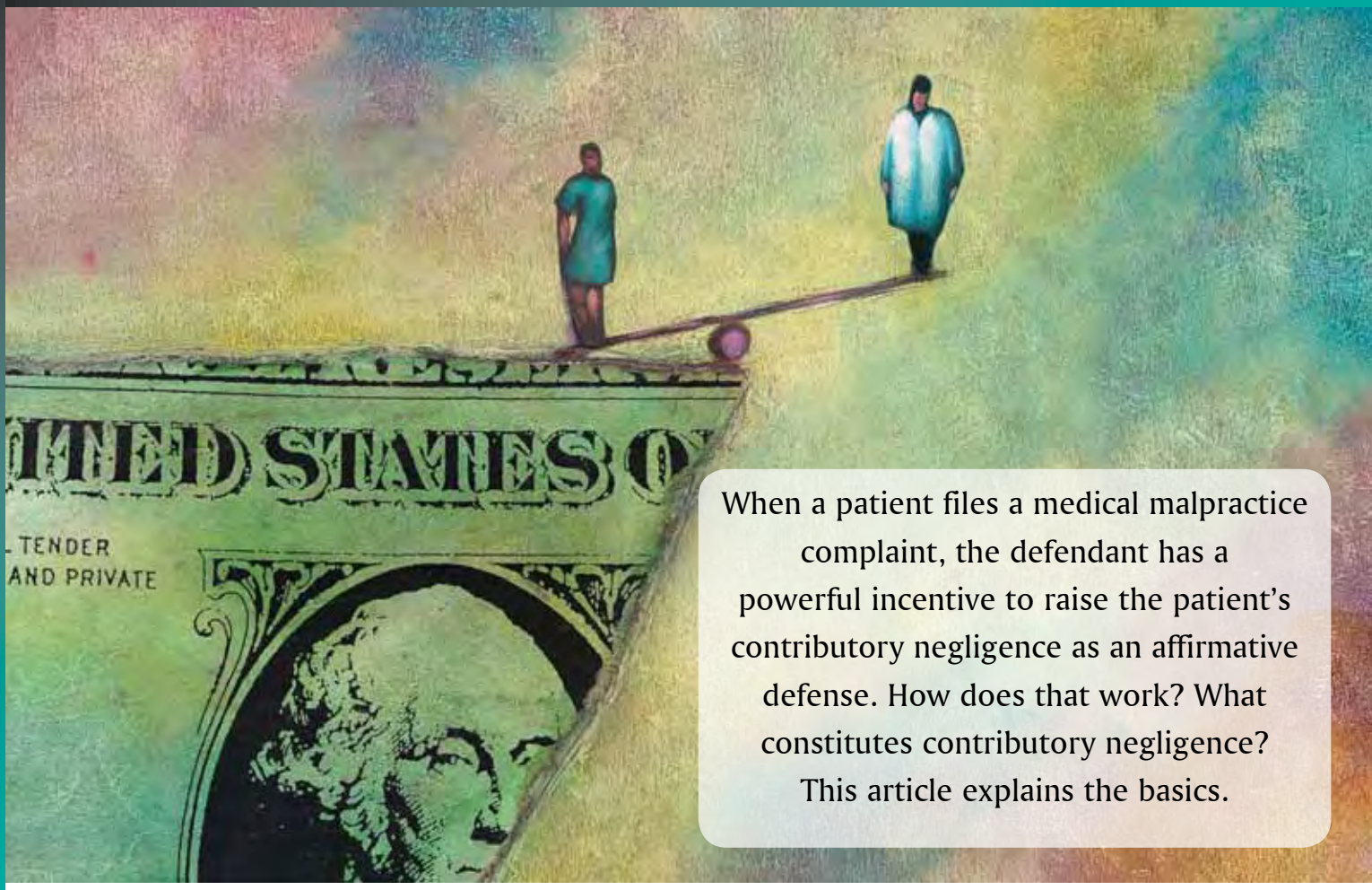
Defense attorneys: speak up! A defense attorney's best strategy for dealing with Illinois' speedy-trial statute can be summarized in two words: speak up! If your client is out of custody, make a speedy-trial demand. If the state seeks a continuance or the trial court sets a trial date outside the speedy-trial period, object.

Illinois courts have made clear that the speedy-trial provisions are to be used as a sword to bring a defendant's case to trial, not as a shield to be used after the fact.[31] Thus, a defense attorney does his or her client a disservice by lying in the weeds, sitting idly by in the hopes that the client won't be brought to trial in time and will have his conviction reversed on appeal. Worse yet, the failure to speak up could result in an ineffective-assistance-of-counsel claim.

Conclusion

Calculating a defendant's speedy-trial period is a tedious and cumbersome project at best. Thankfully, Illinois courts have endeavored to make the process a little easier. By reviewing *Lacy*, paying attention to other recent decisions concerning the speedy-trial statute, and following the guidelines set forth in this article, both prosecutors and defense attorneys can avoid common speedy-trial pitfalls. ■

29. See *People v. Lacy*, 2013 IL 113216, ¶ 31 (Garman, J., dissenting) (pointing out that, under the majority's interpretation, the State may be able to obtain multiple continuances "[i]n a complex case with many witnesses and much evidence").
30. *Id.* ¶ 35.
31. *People v. Cordell*, 223 Ill. 2d 380, 390 (2006).



When a patient files a medical malpractice complaint, the defendant has a powerful incentive to raise the patient's contributory negligence as an affirmative defense. How does that work? What constitutes contributory negligence? This article explains the basics.

Blaming the Patient:

Medical Malpractice and Contributory Negligence

A patient who files a medical malpractice lawsuit alleges that a medical professional is responsible for causing his or her injury or illness. By filing a contributory negligence affirmative defense, the medical professional contends that the patient shares the blame for the injury or illness.

By Robert P. Vogt

This article explores several issues practitioners should consider when a contributory negligence defense is raised in a medical malpractice case. Specifically, it discusses (1) the historical evolution of contributory negligence, (2) the type of conduct found to constitute contributory negligence, (3) the low level of proof required of defendants, (4) how beneficiaries can be contributorily negligent, and (5) the implications of the patient's failure to mitigate.

The historical evolution of contributory negligence

Illinois' law of contributory negligence has evolved over time. Initially, Illinois' common law held that a patient had to prove he or she was *not* guilty of contributory negligence before bringing a med-mal claim[1] or

1. *Mueller v. Sangamo Construction Co.*, 61 Ill. 2d 441, 448 (1975).

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the claim was barred.[2] The harshness of this approach eventually led the Illinois Supreme Court to swing to the opposite end of the spectrum.

Alvis v. Ribar[3] reflects that revised approach – a pure comparative negligence system. Under it, the jury simply compares the negligence of the patient with that of the medical professional and assigns the appropriate percentage of responsibility to each party. With pure comparative negligence, a patient can be 98 percent responsible for causing her own injuries and still recover the 2 percent of damages allegedly caused by the medical professional's negligence.[4]

This second approach, however, was abandoned, and Illinois now uses a third approach – a legislatively enacted, modified comparative negligence system.[5] Under Illinois' current rule, a medical malpractice patient may recover for any injuries caused by a medical professional's negligence as long as the jury finds the patient is less than 50 percent responsible for causing the injury. Otherwise, he or she is barred from obtaining recovery.

Conduct that constitutes contributory negligence

Illinois follows the longstanding rule that contributory negligence can be raised as a defense in medical malpractice cases.[6] As members of a modern society, patients have an obligation to take care of themselves. Recognizing this, the law imposes a duty on every person to exercise that degree of care a reasonably prudent person would take to avoid injury or illness under the same or similar circumstances.[7] Contributory negligence occurs when a patient breaches that duty by failing to exercise appropriate care for his or her own safety.[8]

Failure to exercise reasonable care includes behavior that contributes to causing the injury at issue in the patient's lawsuit. Each case is fact specific,[9] and the question of contributory negligence is ordinarily a question of fact for the jury.[10]

The medical professional must raise a patient's contributory negligence as an affirmative defense.[11] Illinois courts recognize that a contributory negligence instruction is appropriate when a medical professional presents a theory in which the patient's own negligence "precedes or is contemporaneous with" the professional's alleged malpractice.[12]

Examples of contributory negligence. Illinois courts have held that contributory negligence may occur where the patient refills prescriptions without a physician's approval, takes medications too frequently, is insufficiently physically active, refuses to reduce a medication regimen, takes long automobile trips in spite of warnings not to do so, and fails to report the development of pain.[13]

It can also be raised where a patient refuses to undergo recommended surgical procedures,[14] fails to report symptoms,[15] misses a follow-up exam,[16] leaves the hospital against the physician's advice,[17] commits suicide by jumping out of a window,[18] gets out of bed against her doctor's orders,[19] refuses to accept a blood transfusion,[20] fails to obtain medical care in a timely manner,[21] fails to regularly take prescribed medications,[22] misinforms her doctor about the medications she is taking,[23] fails to follow a doctor's instructions to inform the doctor of certain physical changes,[24] refuses to accept treatment,[25] fails to follow a doctor's advice regarding a follow-up exam,[26] fails to undergo a medical procedure,[27] refuses to participate in therapy,[28] fails to seek treatment for her medical condition or injury,[29] or whose intoxication contributes to cause the patient's injury.[30]

It could be contributory negligence when a patient refills prescriptions without a physician's approval, takes medications too frequently, or fails to report pain.

In each of these cases, the medical professional presented evidence that an act or omission by the patient contributed to cause the injury at issue in the patient's lawsuit. Because the patient's own behavior was tied to the injury that was the basis of the patient's claim, the medical professional was allowed to ask the jury to assess the patient's percentage of responsibility for causing his or her injury. Whether the patient did or failed to do the acts in question and, if so, to what extent the patient's own behavior caused or contributed to the patient's injury, were questions of fact for the jury.

Causal connection between negligence and injury. For evidence of a patient's contributory negligence to be admissible, there must be a causal connection between the patient's alleged negligence and the injury at issue. The patient's alleged negligence is not relevant unless it caused, in whole or in part, the injury for which the patient is seeking recovery. "Negligence in the air, so to speak, will not do."[31]

In *Owens v. Stokoe*, for example, an unconscious patient suffered an injury to his left inferior alveolar nerve during oral surgery.[32] In a subsequent malpractice lawsuit, the dentist asserted that the patient's poor oral hygiene prior to his surgery, his refusal to allow an x-ray to be taken, and his failure to secure a second opinion prior to the surgery amounted to

2. *Id.*
3. *Alvis v. Ribar*, 85 Ill. 2d 1, 27 (1981).
4. See *Marcin v. Kipfer*, 117 Ill. App. 3d 1065 (4th Dist. 1983).
5. 735 ILCS 5/2-1116 (2013).
6. *Id.*
7. *Gruidl v. Schell*, 166 Ill. App. 3d 276, 280 (1st Dist. 1988).
8. *Id.*
9. *Krklus v. Stanley*, 359 Ill. App. 3d 471, 480 (1st Dist. 2005).
10. *Pantaleo v. Our Lady of the Resurrection Medical Center*, 297 Ill. App. 3d 266, 282 (1st Dist. 1998).
11. 735 ILCS 5/2-613(d) (2013).
12. *Krklus*, 359 Ill. App. 3d at 480; but see *Schmidt v. Klinman*, 2005 U.S. Dist. LEXIS 31206 *2 (N.D. Ill. 2005) (holding that a patient's "actions subsequent to alleged tortious conduct can constitute the basis for contributory negligence").
13. *Witherell v. Weimer*, 118 Ill. 2d 321, 339 (1987).
14. *Asher v. Stromberg*, 78 Ill. App. 2d 267, 273 (1st Dist. 1966).
15. *Aimonette v. Hartmann*, 214 Ill. App. 3d 314, 321 (2d Dist. 1991).
16. *Id.*
17. *Bartimus v. Paxton Community Hospital*, 120 Ill. App. 3d 1060, 1070 (4th Dist. 1983).
18. *Biundo v. Christ Community Hospital*, 104 Ill. App. 3d 670, 674 (1st Dist. 1982).
19. *Brady v. McNamara*, 311 Ill. App. 3d 542, 551 (1st Dist. 2000).
20. *Corlett v. Caserta*, 204 Ill. App. 3d 403, 415 (1st Dist. 1990).
21. *Lebrecht v. Tuli*, 130 Ill. App. 3d 457, 476 (4th Dist. 1985).
22. *Krklus v. Stanley*, 359 Ill. App. 3d 471, 480 (1st Dist. 2005).
23. *Id.*
24. *Moller v. Lipov*, 368 Ill. App. 3d 333, 346 (1st Dist. 2006).
25. *Newell v. Corres*, 125 Ill. App. 3d 1087, 1090 (1st Dist. 1984).
26. *Gill v. Foster*, 157 Ill. 2d 304, 313 (1993).
27. *Fisher v. Slager*, 201 Ill. App. 3d 480, 488 (1st Dist. 1990).
28. *Id.*
29. *Smith v. Perlmutter*, 145 Ill. App. 3d 783, 788 (3d Dist. 1986).
30. See *Brown v. Decatur Memorial Hospital*, 51 Ill. App. 3d 1051, 1053 (4th Dist. 1977).
31. *Renslow v. Mennonite Hospital*, 67 Ill. 2d 348, 355 (1977) (citing Pollock, Torts 361 (14th Ed. 19939)).
32. *Owens v. Stokoe*, 115 Ill. 2d 177 (1986).

contributory negligence.

In rejecting these defenses, the Illinois Supreme Court recognized that the allegations, even if true, had no causal connection to the patient's resulting nerve injury. Since the patient was unconscious during the surgical procedure and nothing he did or failed to do caused the injury at issue in his lawsuit, the link between the patient's alleged negligence and the resulting injury was absent.

The patient's alleged negligence is not relevant unless it helped cause the injury for which the patient is seeking recovery.

Likewise, in *Barenbrugge v. Rich*, a patient sued her physician for failing to diagnose her breast cancer during an exam in January 1980.[33] In response, the physician sought to have the jury instructed that the patient was contributorily negligent for failing to notify the physician of a physical change that she admittedly noticed in her breasts during April 1980. Her breast cancer was diagnosed in May 1980.

According to the physician, since the patient was alleging a delay in diagnosing breast cancer, any delay due to the patient's own behavior (i.e., from April to May 1980) was contributory negligence and should be considered by the jury. The *Barenbrugge* court found, however, that no evidence showed that if the patient had been examined during April rather than May 1980 her outcome would have been different.

The defendants in both *Owens* and *Barenbrugge* raised conduct by the patient that was arguably negligent. However, neither defendant submitted evidence of a causal connection between the patient's alleged negligence and the injury at issue. Without such evidence of proximate cause, the necessary connecting link between the patient's conduct and the injury at issue is absent.

The (low) level of proof required to get an instruction

Because contributory negligence is an affirmative defense to the patient's claim, the medical professional carries the burden of proof.[34] Illinois courts have ruled that a contributory negligence instruction is appropriate where there is "some" evidence of a patient's negligence,[35] where the evidence supporting the medical professional's contributory negligence defense is "slight,"[36] and when there is "any evidence" of contributory negligence on the part of the patient.[37]

These holdings are consistent with the

33. *Barenbrugge v. Rich*, 141 Ill. App. 3d 1046 (1st Dist. 1986).
34. *Casey v. Baseden*, 111 Ill. 2d 341, 347 (1986).
35. *Moller v. Lipov*, 368 Ill. App. 3d 333, 346 (1st Dist. 2006).
36. *Bartimus v. Paxton Community Hospital*, 120 Ill. App. 3d 1060, 1070 (4th Dist. 1983).
37. *Gruidl v. Schell*, 166 Ill. App. 3d 276, 281 (1st Dist. 1988).

Illinois Supreme Court's *Pedrick* standard.[38] Under *Pedrick*, if there is any evidence of contributory negligence on the patient's part, a question of fact is created and the issue of the patient's contributory negligence must be submitted to the jury. Courts have specifically ruled that in connection with medical malpractice cases, the *Pedrick* standard is "used to determine whether the issue of plaintiff's contributory negligence should be submitted to the jury."[39]

A beneficiary's contributory negligence can also limit recovery

Illinois law also holds that the beneficiary of an estate is contributorily negligent whenever his or her negligence contributes to cause the injury or death for which the estate is seeking recovery.[40] Like the analysis employed when assessing a patient's contributory negligence, the inquiry focuses on whether an act or omission by the beneficiary helped cause the injury and/or death at issue.

Illinois courts have held that parents can be found to be contributorily negligent for injuries suffered by their children[41] and that spouses can likewise be held contributorily negligent where the complaining spouse's own carelessness is causally connected to the beneficiary's injury or death.[42] Simply put, when a family member seeks to recover for an injury to, or death of, another family member, the family member seeking recovery is not immune from Illinois' contributory negligence principles.

After the injury: The failure to mitigate

A patient's contributory negligence is similar to but different from his or her failure to mitigate. Mitigation focuses on damage caused by the patient's conduct *after* he or she has suffered an injury due to a medical professional's alleged malpractice.[43]

When a patient's carelessness occurs before or concurrently with the medical professional's alleged negligence, the general rules of contributory negligence apply. The patient can recover as long as the jury finds he or she is not more than 50 percent responsible for the claimed injuries.

However, once medical malpractice is complete (i.e., once an injury is suffered by the patient), comparative negligence principles no longer apply. Instead, the patient's duty is to take appropriate steps to reduce or mitigate those injuries he or she has already suffered.[44]

In this respect, the rule on mitigation imposes a continuing duty on an already injured patient to exercise reasonable diligence and ordinary care so the patient does not worsen any injuries already allegedly caused by a medical professional.[45] Illinois law imposes a duty on the patient "to exercise reasonable diligence and ordinary care in attempting to minimize his damages after an injury has been inflicted."[46]

An instruction about a patient's failure to mitigate is appropriate whenever a patient's alleged negligence follows that of the medical professional. A jury can hold a patient responsible for failing to mitigate whenever (1) the patient commits a careless act or omission after he or she has already suffered an injury or illness caused by medical malpractice and (2) the act or omission worsens the patient's condition.[47]

Note that Illinois courts recognize that mitigation is a defense used solely to reduce, not eliminate, a patient's alleged damages.[48] Because the premise of a mitigation defense is that the patient already has suffered an injury due to medical malpractice, it only addresses whether the patient's conduct exacerbated the malpractice-caused injuries. Illinois law holds that a medical professional is not responsible for any worsening or aggravation of the patient's injury that the patient herself causes by her own post-malpractice carelessness.

Conclusion

Illinois' modified contributory negligence system allows for a jury to decide whether a patient's conduct helped cause the injury or illness at issue in the patient's medical malpractice lawsuit. Because such a defense reduces, and can even eliminate, a medical professional's exposure, the contributory negligence defense will continue to arise in medical malpractice cases.

For these reasons, it is important to be familiar with the issues that may arise when the patient's acts or omissions become the focus of an affirmative defense. ■

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38. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967).
39. *Gruidl*, 166 Ill. App. 3d at 281.
40. *Haist v. Wu*, 235 Ill. App. 3d 799, 816 (1st Dist. 1992); see also Illinois Pattern Jury Instruction B31.08.
41. *Pantaleo v. Our Lady of the Resurrection Medical Center*, 297 Ill. App. 3d 266, 282 (1st Dist. 1998).
42. *Biundo v. Christ Community Hospital*, 104 Ill. App. 3d 670, 674 (1st Dist. 1982); *Haist*, 235 Ill. App. 3d at 816.
43. *Brady v. McNamara*, 311 Ill. App. 3d 542, 549-50 (1st Dist. 2000).
44. *Tsoukas v. Lapid*, 315 Ill. App. 3d 372, 377 (1st Dist. 2000); see also Illinois Pattern Jury Instruction 105.08 (2013).
45. *Brady*, 311 Ill. App. 3d at 547.
46. *Malanowski v. Jabamoni*, 332 Ill. App. 3d 8, 13-14 (1st Dist. 2002).
47. *Brady*, 311 Ill. App. 3d at 549-550.
48. *Id.*

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LUXURY TAX:

Collecting from High-Income Judgment Debtors

By Andrew N. Plasz

It's clear under Illinois law that a judgment creditor may take no more than 15 percent of a judgment debtor's wages through a wage deduction order. When a judgment debtor earns a high salary, owns no non-exempt assets, and refuses to satisfy the judgment, creditors are understandably frustrated.

There may be hope for judgment creditors in this situation, however. This article looks at some of the arguments they can make to lay claim to part of the remaining 85 percent of such a high income judgment debtor's gross wages through means other than a wage deduction order.

The Illinois statutory framework

The Illinois statute on wage deductions provides that money can be deducted from a debtor's wages to satisfy a judgment.[1] Under the statute, "wages" are defined as "any hourly pay, salaries, commissions, bonuses, or other compensation owed by an employer to a judgment debtor"[2] and the "maximum wages subject to collection under a deduction order shall not exceed 15% of the gross amount paid for that week."[3] (Note that federal law provides for a higher limit of

1. 735 ILCS 5/12-801 *et seq.*
2. *Id.* § 12-801.
3. *California-Peterson Currency Exchange, Inc. v Friedman*, 316 Ill. App. 3d 610, 613 (1st Dist. 2000) (citing 735 ILCS 5/12-803).

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Few things are more frustrating than winning a judgment but struggling to collect it while the high-income defendant lives a lavish lifestyle. This article argues that wages used for investments or to purchase luxuries should be subject to collection by a judgment creditor.

up to 25 percent of disposable earnings per week.[4])

Section 2-1402 of the Code of Civil Procedure, which provides for citations to discover assets (the "citation statute"), states that a court may

> compel the judgment debtor to pay to the judgment creditor or apply on the judgment, in installments, a portion of his or her income, however or whenever earned or acquired, as the court may deem proper…provided that the judgment debtor shall not be compelled to pay income which would be considered exempt as wages under the Wage Deduction Statute.[5]

Section 2-1402(k-5) of the citation statute also references the wage deduction statute and states that "if the court determines that any property held by a third party respondent is wages…the court shall…enter such necessary and proper orders…including…the granting of the statutory exemptions allowed by Section 12-803."[6]

Getting at the 85 percent

What are "wages" under the statute? Creditors can attempt to argue that the definition of "wages" in the wage deduction statute does not allow debtors to place the bulk of their wage income – the 85 percent – off limits. The definition of "wages" is "any hourly pay, salaries, commissions, bonuses, or other compensation owed by an employer to a judgment debtor."[7] The argument here is that once the "employer" pays the judgment debtor, the wages are no longer "owed" and thus no longer fall within the definition of "wages" under the statute, making them available to the creditor.

Does the 15 percent limit in the wage deduction statute constitute an exemption? As the law could be considered unclear, creditors can try to argue that the 15 percent limit on wage deduction orders in section 12-803 does not make the other 85 percent "exempt" from collection per se. The section does not speak in terms of exemptions, and none of the Illinois exemption statutes contains an exemption for wages.[8] However, section 2-1402(k-5) of the citation statute, which was enacted after the Wage Deduction Act, refers to "exemptions allowed by Section 12-803."[9] Section 2-1402(c)(2) also refers to wages "considered exempt" under the wage deduction statute.

A number of federal cases interpreting Illinois law have held that the 15 percent limit in section 12-803 does not create an exemption. In *Wienco v. Scene Three*, the seventh circuit held that Illinois law "does not limit the amount of earnings that may be made available to a judgment creditor based solely on the percentage of earnings requested" and labeled a debtor's argument to the contrary "absurd."[10]

The U.S. Bankruptcy Court for the Northern District of Illinois found in *In re Koeneman*, that for purposes of federal bankruptcy law, the wage deduction statute does not allow insolvent persons to "accumulate and shelter funds in a bank account simply because they derive from wages."[11] The court stated that the "Illinois Legislature is quite capable of creating a general [bankruptcy] exemption when it chooses to and has not previously relied on implication to accomplish this."[12]

Similarly, the court in *In re Jokiel* cited *Koeneman* and found that "once wages are received or deposited into a bank account" they are no longer protected and "creditors can collect on them through a citation proceeding or other form of process."[13] In other words, the wage deduction statute "simply puts a temporary limit on how much of the debtor's wages a judgment creditor can take before the wages are paid to the debtor."[14]

In *In re Thum*, the U.S. Bankruptcy Court held that section 12-803 does not create an exemption for accrued but unpaid wages.[15] The *Thum* court reasoned that "construing the statutes as creating a general exemption for accrued and unpaid wages would lead to the anomalous result that wages, exempt while unpaid, would loose their exempt status upon receipt by the employee."[16]

The court went on to say there was no basis to suggest that section 12-803 "provides an exemption for wages that have been paid to an employee which are held in the form of cash or a bank deposit."[17] It reasoned that an "insolvent

Creditors can try to argue that the 15 percent limit on wage deduction orders does not make the other 85 percent "exempt" from collection.

4. 15 U.S.C. § 1673(a)(1).
5. 735 ILCS 5/2-1402(c)(2).
6. *Id.* § 2-1402(k-5).
7. *Id.* § 12-801.
8. *Id.* § 12-901 *et seq.*; *id.* § 12-1001.
9. *Id.* § 2-1402(k-5).
10. *Wienco v. Scene Three*, 29 F.3d 329, 330 (7th Cir. 1994).
11. *In re Koeneman,* 410 B.R. 802, 827 (Bankr. N.D. Ill. 2009).
12. *Id.* at 826.
13. *In re Jokiel*, No. 09-B-27495, 2012 WL 33246 at *4 (Bankr. N.D. Ill. 2012).
14. *In re Radzilowsky,* 448 B.R. 767, 769 (Bankr. N.D. Ill. 2011).
15. *In re Thum*, 329 B.R. 848, 854 (Bankr. C.D. Ill. 2005).
16. *Id.*
17. *Id.* at 854.

person may not accumulate and shelter funds in a bank account simply because they derive from wages."[18]

Therefore, once a judgment debtor "deposits his wages into a bank account…the funds become fair game for creditors."[19] The *Thum* court then held that section 12-803 has "no relevance to the exemptions that a debtor may claim in a bankruptcy case."[20]

The creditor could argue that "exempt" wages remain exempt only as long as they are being spent on necessities rather than luxuries.

On the other hand, at least one Illinois court has stated that the wage deduction statute's 15 percent limit results in the remaining 85 percent being exempt from collection.[21] The U.S. Bankruptcy Court for the Northern District of Illinois in *In re Mayer* also came to this conclusion,[22] though the *Mayer* court did not address whether wages lose their exemption after they have been paid. In *Johnson v. Ford Motor Credit Co.*, the bankruptcy court held that the provision limiting wage deductions to 15 percent of a debtor's gross weekly pay is "an exemption statute" that "protects debtors and their families, not creditors."[23]

Note that courts have held the federal limit on wage garnishments is not an exemption, at least for bankruptcy purposes.[24] Courts have also held that the federal limit does not protect funds deposited in bank accounts.[25]

The "quality of moneys" test. Even if a court holds that the 15 percent limit on wage deductions effectively makes the other 85 percent of wages exempt, the creditor could argue that "exempt" wages retain their exempt character only so long as they retain the "quality of moneys"[26] – i.e., as long as they retain their liquidity.

In *Auto Owners Insurance v Berkshire*, the Illinois Appellate Court held that funds distributed from a retirement plan do not lose their exempt character upon distribution, with certain limits. "A debtor may trace the exemption from the exempt asset to the liquid form, but the concept of tracing is not limitless.

18. *Id.* at 855.
19. *Id.*
20. *Id.* at 854.
21. *California-Peterson Currency Exchange, Inc. v. Friedman*, 316 Ill. App. 3d 610, 619 (1st Dist. 2000) ("defendant may exempt 85% of that compensation from collection pursuant to Section 12-803 of the Wage Deduction Statute").
22. *In re Mayer*, 388 B.R. 869 (Bankr. N.D. Ill. 2008).
23. *Johnson v. Ford Motor Credit Co.*, 57 B.R. 635, 639 (Bankr. N.D. Ill. 1986).
24. See, *e.g.*, *Smith v. Frazier*, 421 B.R. 513, 518 (S.D. Ill. 2009).
25. See, *e.g.*, *Usery v. First National Bank of Arizona*, 586 F.2d 107 (9th Cir. 1978).
26. For a general discussion of tracing, see, Darrell W. Dunham, *Tracing the Proceeds of Exempt Assets in Bankruptcy and Non-Bankruptcy Cases*, 3 S. Ill. U. L.J. 317 (1978).

So long as the debtor continues to hold and to use the funds for the support of the debtor and his family, the exemption statutes require the exemption of funds traceable from exempt payments."[27] The court quoted the decision of the U.S. Supreme Court in *Philpott v Essex County Welfare Board* and stated that "exempt funds [would] remain exempt so long as they retain the 'quality of moneys'."[28]

Using this logic, creditors could argue that funds in excess of what a debtor needs to support himself and his family should be subject to turnover. The opinion in *Auto Owners Insurance* indicates that "exempt" funds must be used for "support" of the debtor and his family to retain their exempt character.[29] Creditors could argue that, say, a $4,000 monthly rental payment for a luxury apartment is excessive and not required for "support." Thus, the funds used for these payments have lost the "quality of moneys" and are therefore not exempt.

Public policy. On its face, the "public policy" articulated by the courts protects judgment debtors. The Illinois Appellate Court held in *Libby Furniture & Appliance Co. v. Nabors* that it "is obvious that in enacting the legislation relating to wage deductions, the General Assembly intended that the procedures be simplified, the costs held to a minimum, and the employee be given every possible protection against harassment."[30]

This policy is mentioned in other decisions.[31] As far back as 1875, the Illinois Supreme Court construed section 14 of the Garnishment Act, which then provided that the "wages…of a defendant, being the head of a family and residing with the same, to an amount not exceeding $25, shall be exempt from garnishment."[32] The court held that this "statute was enacted for a humane purpose: for the benefit of the debtor's family, as well as himself, and should receive a fair and liberal construction that it may effectuate the beneficent object the legislature had in view."[33]

It is difficult to see, however, what "humane purpose" is served by allowing a high-income judgment debtor to spend lavishly on luxury items while he refuses to satisfy his debts. As one commentator has noted, "[n]o purpose is served by exempting yachts, sports cars and other frills."[34]

Practical issues

A creditor who successfully uses one of these theories to reach a debtor's money in a bank or brokerage account has a straightforward remedy. The creditor serves a citation to discover assets on the third party holding the funds (i.e., the bank or brokerage house) and moves for turnover.

But for a high-income debtor with a lavish lifestyle who isn't stockpiling money in an account, the creditor will

(Continued on page 301)

27. *Auto Owners Insurance v. Berkshire*, 225 Ill. App. 3d 695, 698-99 (2d Dist. 1992).
28. *Id.* at 699 (quoting *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 416 (1973)).
29. *Id.* at 698-99.
30. *Libby Furniture & Appliance Co. v. Nabors*, 86 Ill. App. 2d 381, 385 (1st Dist. 1967).
31. See, *e.g.*, *California-Peterson Currency Exchange, Inc. v Friedman*, 316 Ill. App. 3d 610, 618 (1st Dist. 2000)
32. *Bliss v. Smith*, 78 Ill. 359 (1875) (citing Ill. Rev. Stat., chap. 62, sec. 14).
33. *Id.*
34. Dunham, *supra* note 26, at 344.

Substitute Service of Process – Like Father, Like Son?

Is substitute service of process valid if it's on the defendant's father, in the defendant's driveway? Here's an answer gleaned from the ISBA litigation discussion group.

ISBA discussion groups let you pose questions to and share information with lawyers from Chicago to Cairo. Join at www.isba.org/discussions.

Substitute service on the defendant's father in the defendant's driveway – is it valid?

David W. Schopp, Aurora. A defendant can be served at his usual place of abode by leaving a copy with a member of the family or person at least 13 years old residing there. Case law says that the family member need not reside there.

But what are your thoughts on this: Defendant's father (who does not reside with defendant) was served while in his car backing out of defendant's driveway. Special process server knocks on car window and asks if father is the defendant.

Father says he is John Doe, Sr. and not John Doe, Jr. (the defendant). When asked if father knows the location of defendant, father further states that he did not know where defendant was, even though defendant was also in the car.

1. Was defendant served via substitute service at his usual place of abode?

2. What would be the ramifications, if any, of the father admitting, under oath, that he lied to the special process server?

An ISBA lawyer responds

Fred Nickl, Chicago. Lying to a process server = shoulder shrug. As long as [the father] admits it and doesn't testify or sign an affidavit that perpetuates the lie.

Abode service: we give a seminar to private detectives and their investigators (process servers) on service. Your question is unique to us, but I would use the cases that say:

• A defendant's "usual place of abode" is, generally, where that person lives. The key consideration is whether delivering service there is "reasonably likely to provide the respondent with actual notice of the proceedings." *United Bank of Loves Park v. Dohm*, 115 Ill. App. 3d 286 (2d Dist. 1983).

• [in arguing that] the property surrounding the residence [i.e., the driveway] is fair game, [note that] the front porch and stairs are fair game already….

• But maybe a better analogy is: One may serve the doorman of the defendant's apartment building only when the intended recipient is intentionally refusing to come to the lobby to accept service. See *Harrell v. Bower Motors, Inc.* 2004 WL1745758 (N.D. Ill. July 30, 2004).

Keep in mind:

• The server *must* inform the person served of the contents of the summons. *Tomaszewski v. George*, 1 Ill. App. 2d 22 (1st Dist. 1953).

• It is enough to identify the documents (i.e., a summons and complaint), state from which court they were issued, and give the court date. *Freund Equipment, Inc. v. Fox*, 301 Ill. App. 3d 163 (2d Dist. 1998).

• The server *must* also later mail a copy of the summons to the defendant. *Tomaszewski*. However, the person who makes delivery to the abode need not be the same person who mails the documents. *Mid-America Federal Savings & Loan Ass'n v. Kosiewicz*, 170 Ill. App. 3d 316 (2d Dist. 1988).

• You must send a copy of the complaint and summons to each individual defendant in a separate envelope. Even if the defendants live together, each must be mailed separately. *Central Mortgage Co. v. Kamarauli*, 2012 IL App. (1st) 112353 (Ill. App. 1st Dist. Nov. 5, 2012).

• Family members (as defined by *Anchor Finance Corp. v. Miller*):

(1) The whole body of persons who form one household, thus embracing servants;

(2) parents with their children, whether they dwell together or not; and

(3) the whole group of persons closely related by blood.

• Maid or housekeeper is family, *Lewis v. West Side Trust & Savings Bank*, 286 Ill. App. 130 (1st Dist. 1936).

• Service on in-laws is probably good service. *Citimortgage v. Lubowicki*.

• Girlfriend/boyfriend? Probably not good service.

• Cousins? Aunts? Uncles? Case law has not determined what "closely related by blood" means in the context of service of process. ■

The Appearance of Professionalism

Women lawyers are perpetually under the sartorial microscope. Aren't they competent to make their own judgments about their professional obligations – including what they wear to work?

Clothes make the man. Naked people have little or no influence on society.
– Mark Twain

"There are moments, Jeeves, when one asks oneself, 'Do trousers matter?'"
"The mood will pass, sir."
– P.G. Wodehouse, *The Code of the Woosters*

Aside from the news itself, one of the disconcerting things about watching morning TV news programs is the frequent airing of Jos. A. Bank[1] commercials, with their headless shots of male models in suits that, according to the eardrum-shattering voice-over, are offered on a "buy three and get two free"[2] basis, along with ever-changing quantities of free shirts, ties, pocket squares, sock garters, and everything else a guy needs to go to the office without being arrested for indecent exposure.[3]

These ads bother me not just because they are loud enough to be heard in the shower or because headless guys are creepy. They also remind me there is no *Jan.* A. Bank, no one-stop shop for the woman lawyer who wants to buy a business suit (or five) without breaking the bank, who wants clothes expressly designed for work, rather than whatever it is that designers think women do with their lives.[4]

Observations about women lawyers' attire too often sound like fashion critiques from *Project Runway* with a dash of prudery thrown in.

Assembling workworthy gear from the spangled, skimpy, and strange costumes offered up by the fashion industry can be a daunting task. Complicating matters further, there is often a lack of consensus about what is appropriate, as the lively debate on blogs like Corporette.com ("fashion, lifestyle, and career advice for overachieving chicks") attests.

And women lawyers, it seems, are perpetually under the sartorial microscope. For example, Loyola Law School, Los Angeles students recently received a memo about "Ethics, Professionalism, and Course Requirements for Off Campus Externs" that included this observation: "I really don't need to mention that cleavage and stiletto heels are not appropriate office wear (outside of ridiculous lawyer TV shows), do I? Yet I'm getting complaints from supervisors…"[5]

Unsurprisingly, this remark generated plenty of heat in the blogosphere, *e.g.*, "How many times do women in the law need to be told not to dress like streetwalkers?"[6] One commentator observed that this memo "comes from a long legal tradition of professors, judges and fellow attorneys schooling female lawyers on just how to dress," citing examples like a bar association's "What Not to Wear" fashion show in which judges, law professors, and law students were invited to "nitpick" women's courtroom attire, and a Tennessee judge's dress code for women lawyers appearing before him, established because he believed that "the women attorneys were not being held to the same standard

1. Where did the "eph" go? You have to wonder if the authors of *The Bluebook: A Uniform System of Citation* were involved in naming the company, as "Jos." looks suspiciously like one of the Bluebook's weird and illogical abbreviations for citations, *e.g.*, "Ill. B.J." Can we look forward to citations like *Jos. & the Amaz. Tech. Dreamcoat*?
2. The ratio of paid-for suits to "free" suits changes perpetually, and could be an annoying third-grade "word problem" where you have to figure out how much each suit costs. By the way, Jos.'s amazing deals were recently lampooned on *Saturday Night Live* in a commercial offering Jos. A. Bank suits as an economical alternative to paper towels. A perky mom explains, "I spend a lot of my time cleaning up messes, so I need something that's absorbent and affordable. So what do I reach for? A suit from Jos. A. Bank. With their innovative 'buy one, get three free' pricing, a suit from Jos. A. Bank is effectively cheaper than paper towels." http://www.nbc.com/saturday-night-live/video/jos-a-bank-cleaning-product/2768588.
3. I made up the part about the sock garters. I think.
4. Whatever it is, it often seems to require microskirts and sequins.
5. Staci Zaretsky, "Law School Sends Memo About Inappropriate Student Cleavage, Hooker Heels," March 19, 2014, AbovetheLaw.com, http://abovethelaw.com/2014/03/law-school-sends-memo-about-inappropriate-student-cleavage-hooker-heels/.
6. *Id.*

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as the men."[7]

Some 25 years ago, *Mirabella* magazine tolled the death knell for "laughable dress-for-success suits and even more laughable floppy bow ties" and declared that working women could fly "their own personal flag."[8] But here we are, still scrutinizing women lawyers and what comes out of their closets. Let's figure out why this is happening, and how (and whether) to talk about this in a way that doesn't denigrate the professionalism of women lawyers.

There is no tailor-made solution

There is nothing wrong with advising law students about the sartorial norms and expectations of their future employers. Whether we like it or not, appearance matters – perhaps never more than now, when the "Word of the Year" for 2013 was "selfie"[9] and a carefully crafted Facebook persona is *de rigueur.*

And for lawyers, the issue of "what to wear" is bound up with ideals of professionalism, meeting clients' expectations, and respect for the tribunal. The Preamble to the Illinois Rules of Professional Conduct requires that "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials," and that probably includes dressing appropriately.

But it is not always clear what "appropriate" attire looks like for women lawyers. Take the example of stilettos, which Loyola's externship director believed to be so far outside of the realm of "office attire" that they were not worth mentioning. Others, however, believe them to be "a woman's power tool"[10] and a sign of success:

> Many 80s professional women sought to distance themselves from the stiletto by opting for low heels but they were often ridiculed for this "desexing" choice. High fashion reacted with a more sexualized form of "power dressing," complete with toweringly high "killer heels".... By the 1990s, many argued that the trappings of stereotyped femininity should be transformed into signifiers of success, including high heels.[11]

Wear flats and be desexed or wear heels and be vilified – there's no way to win.

Even where there is consensus about what to wear, it can be extremely difficult to find it in stores if this is the year (or decade) that Fashion decrees it *de trop*. This happened with pantyhose – a conservative dressing must-have – which were on the verge of extinction until Kate Middleton started sporting them, prompting a nylon renaissance.[12] Skirt suits where the skirt ends somewhere near the wearer's knee are on the endangered list, too, and I can only hope that some celebrity savior will take up their cause sometime before I retire.

Cutting the Gordian Knot

So every woman finds her own way through the sartorial labyrinth, and emerges with her own unique solutions to the problem of what to wear to work. Perhaps the differences invite commentary, but too much of it is destructive and divisive. There must be a better way.

Typically, observations about women lawyers' attire are offered as a means of promoting professionalism. Despite that characterization, they too often sound like fashion critiques from *Project Runway* with a dash of prudery and/or snobbery thrown in. But if the true goal is advancing professionalism, then any advice should be rendered in a professional manner, with due regard for the competence, intelligence, and professionalism of the women to whom it is addressed.

Indeed, before any advice is offered, serious consideration should be given to the idea that women lawyers, after all, are competent to make their own judgments about their professional obligations – including what they wear to work. ■

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7. Amanda Hess, "Female Lawyers Who Dress Too 'Sexy' Are Apparently a 'Huge Problem' in the Courtroom," Slate.com, March 21, 2014, http://www.slate.com/blogs/xx_factor/2014/03/21/female_lawyers_still_must_dress_conservatively_to_impress_judges.html. *See also* Bobby Allyn, "Rutherford County Judge Issues Dress Code for Female Lawyers," *The Tennessean*, June 13, 2013, http://archive.tennessean.com/article/20130613/NEWS01/306140020/Rutherford-County-judge-issues-dress-code-female-lawyers.

8. Genevieve Buck, "R.I.P., Floppy Tie: It's A New Era In Career Dressing For Women," *Chicago Tribune*, August 2, 1989.

9. *See* "Oxford Dictionaries Word of the Year 2013: SELFIE," http://blog.oxforddictionaries.com/press-releases/oxford-dictionaries-word-of-the-year-2013/.

10. Elin Schoen Brockman, "A Woman's Power Tools: High Heels," *New York Times*, March 5, 2000, http://www.nytimes.com/2000/03/05/weekinreview/a-woman-s-power-tool-high-heels.html.

11. Elizabeth Semmelhack, "A Delicate Balance," *New York Times*, Opinion Pages, November 1, 2013, http://www.nytimes.com/roomfordebate/2013/11/01/giving-stilettos-the-business/a-delicate-balance-women-work-and-high-heels.

12. *See* Tatiana Boncompani, "For Pantyhose, It's Back to Work," New York Times, November 9, 2012, http://www.nytimes.com/2012/11/11/fashion/pantyhose-is-back-in-style.html.

LUXURY TAX | *Continued from page 297*

have a harder time reaching the 85 percent of income not subject to a wage deduction order. The creditor could request that the court enter an installment order for the payment of the lavishly spent income under section 2-1402(c)(2) of the citation statute, which permits installment payments.

In that case, the judgment debtor will likely point to language in that section stating that the "debtor shall not be compelled to pay income which would be considered exempt under the Wage Deduction Statute" though an installment order.[35]

In response, the creditor can argue that the 15 percent rule does not create an exemption, and that even if it did no exemption applies to funds used for reasons other than supporting a debtor and his or her family.[36]

Any such installment order entered by the court should require the judgment debtor himself to remit monthly payments. Don't forget that only 15 percent of a judgment debtor's wages may be collected through the debtor's employer pursuant to a wage deduction order.[37] ■

35. 735 ILCS 5/2-1402(c)(2). A debtor may also argue that the federal limit on wage deductions prohibits this type of order.

36. But see *In re Koeneman,* 410 B.R. 802, 826 (Bankr. N.D. Ill. 2009) ("plain language of…Section 1402 serve only as a limitation of the amount of wages a court can order to be turned over in the course of Supplemental Proceedings following a collection judgment"). If the court is not willing to enter an installment order, actually collecting funds that the judgment debtor is using to pay rent on a luxury apartment on an ongoing basis presents several practical challenges. Assuming that a citation to discover assets is served on the judgment debtor's bank account into which the wages in question are deposited, that citation will automatically terminate six months from the date of the citation respondent's first personal appearance in court in response to the citation. Ill. S. Ct. R. 277(f). A citation may be extended beyond six months "as justice may require." *Id.* The court may also grant a judgment creditor leave to issue a new citation after a previous citation proceeding, however there are rather narrow limits on this relief. Ill. S. Ct. R. 277(a).

37. 735 ILCS 5/12-803.

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