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FROM THE EDITOR

New Directions for the DCBA Brief

BY TED A. DONNER

Welcome to Volume 23 of the DCBA Brief. Since Mike Davis ended his remarkably successful tenure as Editor-in-Chief in July - as you may have noticed already - we’ve made quite a few changes around here. We’ve redesigned the look and feel of the magazine and added a new logo to the cover. We’ve added a host of new features and enlisted the involvement of dozens of new contributors. The goal is a magazine that will continue to provide its readers with legal analysis and updates but also provide more insight into what the DCBA community is all about.

The people primarily responsible for this effort, who have volunteered their time to try and make this experiment work, include a number of stalwart regulars from the DCBA Brief’s history (we’re glad to welcome Tim Newitt and Tom Else back to the group) as well as a number of new faces, including Shawn S. Kasserman, Jeffrey J. Kroll, Melissa Mistretta, and Daniel Walker Jr. With these additions to the bullpen, we have what we believe is an amazing group of capable people working with the Publication Board this year and an equally amazing group of people charged with the thankless job of keeping it all organized. Our thanks in advance to Eric Waltmire who, in preparation for his stint as next year’s Editor-in-Chief, is this year’s Associate Editor and will be overseeing the lead articles, this issue’s Articles Editor, Joe Emmerth, Melissa Piwowar, this year’s Assistant Editor, who is editing the monthly case law updates that appear in the magazine as Sidebars. John Pcolinski, who should know better after twice serving as Editor-in-Chief, has taken on the auspicious job of News Editor. We’re also grateful to Kristen Scribner for her extraordinary help in creating the new designs for this magazine and Robert E. Potter III, the photographer whose cover images you’ll be seeing more of these next many months. Thanks, finally, to Jacki Hamler and Leslie Monahan at the DCBA and to Mary Anne McManus who has a difficult task ahead of her, trying to get all this new content into 48 pages each month.

We hope to publish a magazine which honors the goals and ideals of the DCBA, including this organization’s commitment to education, community, and service. So, in addition to the new content you’ll find each month, we’ve also scheduled three Special Editions for the coming year. Our January edition will be published just before the DCBA Mega Meeting and will include an expansive preview of that event along with coverage on the importance of continuing legal education. Former DCBA President, Tom Else, who we are grateful to have back with the magazine, is serving as the lead editor for that issue. Then (shortly after our regular schedule is interrupted by this year’s DCBA Grief), our May edition will feature Law Day and the myriad ways that lawyers can and should give back to the community. Art Rummler (yes, of the Judge’s Nite Band) is editing that issue. Then, finally in July, we’ll close out the year with an issue dedicated to the history of the courthouse at 505 County Farm Road. It was 20 years ago this next July that the DuPage Judicial Center opened its doors and we’re celebrating that occasion with a few trips down memory lane. Leading the charge in putting that issue together is DCBA mainstay and former President, Jim McCluskey.

We may someday count the current DCBA President, Steven Ruffalo, among our rank as well. But, for now, we’re grateful for the role he’s played in helping us shape this new publication. Steve has been touting the importance of revitalizing the DCBA Brief since well over a year ago. He’s helped make some of these new directions possible and he’s been encouraging and supportive at every step along the way. At virtually every bar event at which he’s spoken since the installation, he’s promised a new, more community focused magazine is on its way. As editor, I’m hopeful that, with this edition, we are at least starting to deliver on that promise. Please let us know what you think.

Ted A. Donner is an AV-rated attorney with Donner & Company Law Offices LLC and an adjunct professor with Loyola University Chicago School of Law. He is the author of two national treatises for Thomson-West including Jury Selection: Strategy & Science and the Attorney’s Practice Guide to Negotiation. He was the Editor-in-Chief of the DCBA Brief for 2007-08 and served as Associate Editor in 2006-07 and 2009-10.
Dear Editor:

Back in 1958, through the efforts of the American Bar Association, President Dwight D. Eisenhower proclaimed the previously known as “May Day” or “International Worker’s Day” as Law Day USA. Its observance was later codified into law by Public Law 87-20 on April 7, 1961. In contrast, most countries celebrate May Day on the same day and it is designated Labor Day or International Worker’s Day. Law Day USA along with Loyalty Day was created to counter-balance these celebrations which were communist inspired.

In February 1958, President Eisenhower recognized the first Law Day when he proclaimed that henceforth, May 1st of each year would be Law Day. He stated, “In a very real sense, the world no longer has a choice between force and law. If civilization is to survive, it must choose the rule of law.” Please remember the Cold War was in full swing at that time. As a member of the military between 1958 – 1960, I guarantee you there was “a real threat” which created angst for everybody in the USA, Russia and Europe.

As we all know, the DuPage County Bar Association together with the Illinois State Bar and other Bar Associations, celebrate Law Day and in the case of the DuPage County Bar, the Chief Judge, Steve Culliton, provided the State of the Courthouse message to all 73 attendees. Of the 73, three were from the judiciary. I recall an incident back on May 1, 1960, outside of St. Peters Basilica in Rome, the first May Day demonstration I’ve ever seen: The communist party was marching and shouting and waving red flags while other workers were marching up and down the street and demonstrating as vigorously as they possibly could, the workers obviously were not sophisticated but they understood the importance of the day.

By contrast, what did we as a Bar Association do on May 1st to honor the day and celebrate our many freedoms? One thing we didn’t do is attend the Law Day Lunch which is the purpose of this letter. There were 73 attendees present to hear Judge Culliton give his thoughts on Law Day - - very clever, very funny. The 73 attendees included only three judges and 70 members. For those judges and lawyers who are otherwise predisposed not to attend, shame on you. Of course, everybody has an excuse why he or she should not attend. Next year, mark your calendar because the Bar Association does provide the platform in which to celebrate. Let’s see to it that next year we make this a real exciting event.

Respectfully submitted,
Joseph F. Mirabella
Mirabella, Kincaid, Frederick & Mirabella, LLC

Dear Editor:

With respect to Ms. Hernandez’s July article, I strongly disagree with the author’s opinion regarding the Legislature’s specifically-crafted hearsay exception for the Drew Peterson prosecution. Although she may be correct in her assessment of the lack of an ex post facto factor, I respectfully submit that the author misinterprets the strength of Crawford v. Washington in barring such exceptions unless there is a more particularized guarantee of trustworthiness. The type of hearsay exception that the Legislature has carved out for the prosecution in the Drew Peterson case is a quintessential example of the unreliable statements Crawford seeks to bar. A successful prosecution implementing such hearsay will result in a short-lived victory once the fog of bias is cleared and a reviewing court can assess the hearsay evidence in the clarity of legal reasoning.

Jack Donahue
Donahue, Sowa & Magaña

Have something to say about the DCBA, this magazine, or anything you’ve read in these pages? Send your letters to the DCBA Brief by email to: letters@dcbabrief.org. We look forward to hearing from you.
DiTommaso-Lubin welcomes retired Judge Kenneth Abraham to the firm and announce two new practice groups.

Following 15 years of service as a judge, Kenneth Abraham has joined DiTommaso-Lubin as a litigation consultant and a dispute resolution specialist. Bringing almost 40 years of experience as an attorney and judge, Ken will head one of DiTommaso-Lubin’s two new practice groups.

Arbitration & Mediation Group

Ken will serve as head of the firm's Arbitration & Mediation Group. During his 7.5 year tenure as Supervising Judge of Arbitration in the court-annexed Mandatory Arbitration program, Ken has a vast realm of experience. He has trained and supervised over 400 arbitrators, co-authored the current Arbitrator's Handbook used by the 18th Judicial Circuit, and was editor of the ADR Quarterly. He now serves as an arbitrator with the American Arbitration Association and through the 18th Judicial Circuit's program. Ken is available for private arbitrations.

Having received over 160 hours in ADR education (including two 40+ hour mediation courses), Ken also served as Supervision Judge of Mediation for the 18th Judicial Circuit. During his last year as a judge, Ken mediated and settled over 325 cases. Both Ken and Vince DiTommaso are available to assist in resolving your client’s case. For more information about the benefits of dispute resolution, visit our website at www.ditommasolaw.com.

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I keep our tradition, my first President’s Page will be the text of the speech I delivered to our esteemed members and guests who were in attendance at the DCBA’s Annual Meeting & Installation Event held this past June 3rd. To make sense of this speech, you first need to know that on the morning of June 3rd as I returned to my office from court, I received an email containing a “Speaker’s Challenge.” The challenge was offered as a unilateral contract. Should I choose to accept by performing, I was to include 10 phrases within my speech (devised by the offerors). If I succeeded in doing so, then – and only then -- I would secure a pledge of $1000 to the DuPage County Bar Foundation as offered by the magnanimous troublemakers responsible for issuing the installation speech.

I am pleased to report that the offered challenge was fully performed, and not only have we received a $1000 payment from the firm of Knobbe, Laho, Grandishar & Mack, we also received a matching pledge of an additional $1000 from Judge Rodney Equi and the firm of Schiller, DeCanto & Fleck. The result is a total of $2000 in contributions to the DuPage County Bar Foundation. Although not a bad return for 17 minutes worth of work, lest we forget these generous contributions were not possible but for those good spirited folks who felt that your new President would take the bait. So that you can fully appreciate the challenge presented by these ten phrases, I have highlighted them as they were delivered within my speech below.

I want to extend my sincerest thanks to my family and friends who have pushed everything else in their lives aside, traveled and sacrificed so that they could be here with me to share this special moment. I want to thank my entire firm for being here and showing your support; it means a lot to me that you are all here. I want to thank Rod Equi, John Demling, Ann Jorgensen.

The list comprising the Speaker’s Challenge is as follows: (1) Writing on the bathroom wall; (2) Vexatious; (3) Because that’s how I roll; (4) The American Civil Law System can be reduced to seven words: “who pays how much to whom when?”; (5) Whatever; (6) John Cena is the World Wrestling Federation Champion; (7) Ever since I was a young girl… (or crossover dribble); (8) Psychoanalyze; (9) Hug it out; (10) Try and Buy.
and Kent Gaertner for the roles they have played, not only tonight but in the years that led to tonight. They are each deeply committed to the DuPage County Bar Association and have each been true leaders in their own right. I’ve known Rod since I started in 1989 and he’s been not only one of my closest friends, but a mentor and a role model; his standard is excellence – anything less is not worth doing. Among his other accomplishments, I am quite confident that Rod is also the only one here who knows John Cena is the World Wrestling Federation Champion.

I want to thank my wife Lisa and recognize my lovely daughters Olivia and Reese. Many of you know Olivia from the DC trip this past March. She made many new friends and counts many of you as her adoptive aunts and uncles. Anyone who knows me well, really well, knows that I am shamelessly proud of my family. Tonight the DCBA gains in Lisa, a first lady who is not only energized but who has that certain panache, that touch of savoir faire that simply defies “budgetary constraint.” When I asked Lisa “Why do we need flowers here tonight?” she told me “Ever since I was a young girl, I’ve loved the details, because that’s how I roll.”

Now over the past 21 years, I might have missed one or two of these installations but I will tell you that I’ve seen some really good speeches; I’ve also seen some not-so-good speeches. Through it all though, the one thing I’ve noticed, the one constant is that by the time the incoming President gets to speak to the audience its only after they have eaten their feast, swilled their cabernet and taken in their tiramisu. By then everyone is pie-eyed, looking up at the speaker - just like you all are looking at me now - wondering if they can get out without being seen. Whatever. Don’t even think about it…this is not a try and buy, I have been sworn in as your President and you are all here for the duration of this speech.

Tonight instead of dazzling you with the great things I have planned for the DCBA this coming year (and believe me you would be dazzled) I’m not going to squander these waning moments of lucidity on anything substantive. I may be terribly wrong about this, but I think a better way to introduce myself and the first lady to you – is through an actual true story. And no, the names have not been changed to protect the innocent, because there are no innocent characters in this story.

In the summer of 2007, my wife Lisa is scheduled to give birth to our second daughter, Reese. It’s a C-section so she has an actual appointment at 7:30 a.m. on July 6th. For the past half dozen years we have had a Fourth of July party at our house for family and friends. And even though its just two days before the date she’s giving birth, Lisa insists that having the party will be a great way for her to spend her last days of pregnancy. So we have 150 people over and she does her usual great job without voicing a single complaint to anyone other than me. My brother Tony and his wife, Cindy, and their two daughters are staying at our house to help us get through the delivery, they’re sitting for our daughter Olivia. Tony is an internist – very talented – and Cindy has formal training as a pharmacist. So, on the evening before my wife is to give birth, I approach them on the side and tell them how I’ve been a little tense lately and unable to sleep.
New Lawyers, Old Courthouse

BY JOHN J. PCOLINSKI, JR.

The 20th Anniversary of the dedication ceremony for the current DuPage County Courthouse at 505 County Farm Road in Wheaton, Illinois, is coming up on November 2, 2010. For those who remember the old courthouse and those who are curious about it, the timing of this month’s night out with the New Lawyers Committee thus couldn’t be better.

The New Lawyers Committee is hosting its October gathering at Court House Square in Wheaton on October 14, 2010 from 5:30 to 8:30 pm. Court House Square is a new townhome and condominium development housed in the Historic DuPage County Courthouse at 201 N. Reber Street, Wheaton, Illinois. The courthouse was built in 1896 and housed the court system for DuPage County until the opening of the Judicial Center in 1991 at 505 N. County Farm Road.

Angela Aliota is the chair of the New Lawyers Committee. “You meet people,” she said, describing the value of taking part in New Lawyers’ events. “You talk to the judges, you make connections with other lawyers, you make new friends and find mentors. That’s what this program was designed to do in the first place and it works very well.”

The Committee hosts monthly receptions at a variety of locations throughout the county. This month’s event just happened to come together in a way that allows attorneys a trip down memory lane. “Patty Murray came up with the idea [to hold the gathering at Court House Square],” Aliota said. “She called Sue Makovec to suggest it. She’s an attorney and a real estate agent . . . It worked out really well. It’s great for us, perfect timing.”
Leslie Monahan is the DuPage County Bar Association’s new Executive Director. She came in after Glenda Sharp, who had held the position for nine years, left in April of this year. As she said in her last message to the members, Sharp “had a wonderful nine years with this organization.” She said in that letter, “I hope you find that member services and communications have improved since 2001. But change is inevitable, and such change will be good for the DuPage County Bar Association, our leaders, our members, and for me.”

Taking over from Sharp, Monahan has had just a few months to get acclimated to her new role and, in the process, has already identified herself as a driving force in that change. In a recent interview, she told us about the DCBA’s future goals and some of the changes that members can expect to see in the coming years.

One of the DCBA’s primary goals for the upcoming year, she said, is to increase awareness of member resources. That means a focus on communication, which is one of the reasons this magazine has a new look, the DCBA itself has a new logo, and a host of other initiatives are in the works.

“When I first took on this position, Monahan said, “the thing that stood out most to me was the quality of services that the DCBA offers to its members.” Monahan was referring to member resources such as the lawyer referral service, networking events, and continuing education programs. As Executive Director, Monahan acts as an advisor to many of the committees that drive these services. The DCBA uses press releases, email blasts, and website announcements to let members know about these services. In the upcoming year, Monahan said, the DCBA is focused on boosting communication about these resources. She emphasized the importance of giving members information they need to take full advantage of the resources available to them.

Also on the list of initiatives being pursued is the DCBA website. “A facelift to the website has been in the works for a while,” Monahan said, “well before I took on this position.” Monahan said she intends to continue the efforts that have been underway to develop an updated website for the bar association. She said she is hopeful an updated website will go live and be visible to members by the end of the year. Still, she said, “there are bugs and hiccups to work out. We will want to test the system and be sure that it is running properly before we roll it out to the public.” Some advantages of the updated website will be functional and others will be aesthetic. Functionally speaking, she said, the website will allow the DCBA and its members to communicate more effectively. The aesthetic advantages have to do with the DCBA’s image. Monahan thus said we should pursue an updated website “that will rejuvenate the DCBA image with a more modern look and feel.”

Some of the DCBA’s other goals in the coming years will be less visible, Monahan explained. She said she has goals to increase organizational efficiency and to do some work with the design of the DCBA’s headquarters on County Farm Road. Her experience is in association management. She believes that associations run similar to small businesses, and it is therefore with basic business principals in mind that she acts as advisor to the DCBA Board and the DCBA’s various committees.

Tony then goes to his dopp kit and draws out an Ambien ER. The “ER” is for extended release. He tells me I will sleep like a baby and wake up feeling completely refreshed so long as I take the pill eight hours before I am expected to awake. Later that night my wife, Lisa and I are in our bathroom getting ready for bed and just as I tip my head back to drink the water to swallow the pill, she says to me, “what’s that you’re taking?” In response, I explain to her that this is an Ambien ER and that it is being taken under a doctor’s specific instructions and that there is nothing to worry about. She rolls her eyes and warns me that tomorrow morning we need to be en route to the hospital by 6:15 a.m., no excuses, and no exceptions. You can see the writing on the bathroom wall, can’t you?

Fairly warned, I fall into a deep sleep only to be awakened by Lisa’s hands on my shoulder, gently prodding me back to consciousness at 6:20 a.m. the next morning as I slept straight through the alarm. Despite the prodding, I am completely unable to stand up, dizzy, still quite sleepy and unable to rise. I reassure
DCBA Installs New Officers and Directors

The 131st Installation of Officers and Directors of the DuPage County Bar Association took place on June 3, 2010 at The Grotto in Oak Brook Illinois. The Honorable Ann B. Jorgensen officiated for the proceedings and the Honorable Rodney W. Equi delivered an entertaining and illuminating Keynote Address.

Sworn in as officers were Steven M. Ruffalo, President, Colleen McLaughlin, President Elect, Sharon R. Knobbe, Second Vice President, Patrick B. Hurley, Third Vice President, Kent A. Gaertner, Immediate Past President, John A. Pleviak, Secretary/Treasurer, Lynn Mirabella, Assistant Treasurer, Timothy M. McLean, General Counsel and Gerry Cassioppi, Associate General Counsel. Sworn in as new directors were James J. Laraia, who retired as Assistant Treasurer, Terence C. Mullen, who retired as General Counsel and Angela M. Aliota. Sworn in as a returning director was John J. Pcolinski, Jr. who expressed great admiration for the pond adjacent to the restaurant. Retiring Directors were Brenda M. Carroll, Cecilia Najera and Patrick B. Hurley.

The Board of Directors awarded Distinguished Service Awards to Herb J. Bell, Dennis W. Hoornstra, John C. North, Arthur W. Rummler, Angel M. Traub and Daniel Walker, Jr. Joseph M. Laraia was awarded the Ralph A. Gabric award for his lengthy service to the association and his community and Sean McCumber was named Lawyer of the Year for his multitude of contributions to the DCBA in the last year and before.

her that I will be ready in a minute and that I just need to rest for another moment or two as I collapse sideways in the bed. Some would say that my delay at this point bordered on vexatious. Seeing the futility of reviving me, Lisa then attempts to awaken Tony and Cindy in an effort to get someone to get her to the hospital on time. Moments later she returns to advise me that both Tony and Cindy appear to have taken the same pill I have as they are in the grips of the same sort of sleep coma. Upon learning of my condition, Tony suggests groggily that I might be having a heart attack which is met with my wife’s oft repeated response “Oh Please.” In this moment the Ruffalo household is well on its way to becoming the punch line to a joke: “How many medical professionals and attorneys does it take to get the pregnant lady to the hospital?”

As I hear the sounds of Lisa and Cindy exiting the house, I know darn well that if I don’t figure out a way to get my butt in that car, I will never live this down. This is right about where my legal training kicks in; discerning
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**Bar Foundation Seeks Record Attendance For Second Annual Golf Outing**

Members of the DCBA now have two golf outings to plan on attending each year, the DCBA’s Annual Golf Outing (which was held on July 1) and the DuPage County Bar Foundation (“DCBF”)’s Annual Golf Outing, now in its second year, which was scheduled as this issue went to press for September 16, 2010. The Foundation is a 501(c)(3) not-for-profit organization, headed by the prior year’s DCBA President (Kent Gaertner). The Foundation raises money to be used for scholarships and grants to a number of organizations and students.

The DCBA’s Annual Golf Outing was held at the Naperville Country Club on July 1, 2010 and attended by 121 golfers. The day started with registration and lunch before attendees headed out to the course for 18 holes.

![Golfers posing for a picture](image1)

(1) Don Ramsell, Steve Ruffalo, Mike Calabrese, Kent Gaertner

(2) Len Monson, Bob Heap, Phil Nathe, Dick Kuhn
The “Beat the President” hole netted $500 for Legal Aid and four grand prizes were given away in a raffle, including a Kindle package, two sets of Cubs Tickets, and a Golf package. “After Golf we served a delicious dinner outside with several food stations and open bar,” said Sue Makovec of the DCBA. “It was a great turnout and a beautiful day. The Country Club really did a great job.”

The Foundation is looking for similar success and an even better turnout, if at all possible, to raise money and support for the many organizations and people it supports. “I am pleased to announce that the Second Annual DCBF Golf Outing will be held at beautiful Itasca Country Club on Thursday September 16th, 2010,” Gaertner wrote in his message to DCBA members. “The day begins with lunch and registration starting at 11:00 a.m., followed by golf and concludes with a cocktail hour (open bar), dinner and auction starting at 5:30 p.m.”

“This is not your normal golf outing with contests on every hole, prizes and raffle tickets for sale,” Gaertner emphasized. “This is a leisurely round of golf with friends, at a beautiful private club. During cocktails and dinner, there will be a silent auction to benefit the work of the DuPage County Bar Foundation. We will be auctioning off some very nice prizes.”

At last year’s DCBF Golf Outing, the prizes included: tickets to sporting events, golf at excellent courses, use of a Las Vegas condo, gift certificates to restaurants, complimentary financial planning, golf equipment, gift baskets, use of a San Juan condo, artwork and spa services. Gaertner reiterated the need for additional donors this year and his hope for a strong turnout. “[I]f you would like to donate a prize to be auctioned off we would be most grateful,” he said. “If you have access to tickets for sporting events, access to private golf clubs, access to vacation properties, etc. and would consider making them available, those are always popular items to bid on. Merchandise donations of upscale items are a winner. If you would simply like to donate cash, the DCBA staff will convert the donation into interesting auction items.”

Last year the DCBF awarded $15,000 in grants and $10,000 in scholarships because of the support of DCBA members.
DCBA Runners Brave The Heat for a Good Cause

BY JON D. HOAG

On July 22, 2010, approximately two dozen runners from the DuPage County Bar Association (DCBA) teamed up to participate in the Seventeenth Annual Race Judicata fundraiser hosted by Chicago Volunteer Legal Services (CVLS). The 5K race was held in Chicago’s Grant Park and looped through lower Hutchinson Field along scenic Lake Michigan. Proceeds from the race went to the CVLS Foundation, which works to ensure equal access to justice for everyone. The CVLS provides a large variety of pro bono legal services to those in need for such services.

Notwithstanding that the temperature at race time was at or near a sweltering 90 degrees, it was reported that approximately 200 teams (nearing 4,000 participants) and over 100 volunteers braved the heat to participate in this important fundraising event. This is the second year that the DCBA Running Club has organized a group to run in Race Judicata. The DCBA Running Club made a good showing and intends to expand DCBA’s presence at this event in years to come. In addition, the DCBA Running Club is always looking for additional members to participate in organized and recreational runs. In fact, a few members from the Running Club plan to run together in the Miami Half Marathon on January 30, 2011.

The DCBA’s annual Basic Skills Seminar is now scheduled for November 12, November 19, and December 3, 2010. The seminar is designed for new admittees who are required to take a basic skills course one year after admission to the bar. These sessions will run on each of the dates scheduled (Fridays) at the Attorney Resource Center on the third floor of the DuPage Judicial Center in Wheaton, Illinois from 12:00 noon to 5:00 p.m.

The DCBA will confirm approval from the Illinois MCLE Board to satisfy the Basic Skills Course Requirement of Illinois Supreme Court Rule 793. New admittees must attend all three sessions (The cost for attorneys admitted to practice less than one year is $105 for all three sessions). The DCBA welcomes participation by newer and tenured attorneys (those admitted to practice one to three years are charged $35 per session; all others pay $95 per session). Those seeking financial assistance should visit www.dcba.org/legal/cle.htm for a link to the DCBA’s Financial

Melanie MacBridge, Nancy Griffin

Dan Kuhn, Bob Miller, Umberto Davi

Tom Else, Andrea Else
Lawyers
Lending a Hand
Celebrates
Its Tenth
Anniversary

BY JOHN J. PCOLINSKI, JR.

Lawyers Lending a Hand celebrated its 10th year on August 26, 2010 with a reception in the Attorneys’ Resource Center. Founded by now Judge Paul Marchese and then DCBA Executive Director Eddie Wollenberg, Lawyers Lending a Hand (or “LLH”) gathers volunteers who happen to be lawyers for non-legal pro bono activities. LLH conducts annual coat drives and Toys For Tots collections, has provided volunteer labor for food pantries and worked with animal shelters and other organizations. LH volunteers have been involved in such activities as pizza parties at the county convalescent center and baseball games with children who live in government subsidized housing.

On Thursday, September 23, at 5:00 p.m., LLH will be on hand at the Bar Center (lower level) to work with the Humanitarian Service Project. The Humanitarian Service Project, which is headquartered in Carol Stream, asked LLH to assist in their birthday project, wrapping gift boxes for children’s birthdays. Volunteers attending the event are asked to bring a roll of birthday wrapping paper and ribbon.

Then on Thursday, October 28 at 5:30 p.m., LLH will be volunteering at the York Community Resource Center in Lombard to host a barbeque. This project was highly successful in the past with 15 volunteers from the committee and 30 families participating. This event is one of many projects scheduled to commemorate “Make A Difference Day.” The address is 1S071 Luther Avenue in Lombard at the Church of the Bretheran. The center is one south block of Roosevelt Road and one block east of Meyers Road (park is available in the church parking lot).

The LLH annual coat drive is also coming up in November, followed soon thereafter by the toy drive in December. “Think of us when you clean out your closets,” LLH organizers told us. For the past ten years, the committee has donated thousands of coats, hats and gloves for the less fortunate, as well as thousands of toys. If you’d like to help, if you have any questions about LLH, or if you have any ideas for a volunteer opportunity, call Paul Marchese at (630) 407-8933 or Eddie Wollenberg at (630) 668-2415.

Hardship Policy and Grant Application.

The schedule for each day is as follows:

On Friday, November 12, registration and lunch are scheduled from 11:15 a.m. to 11:45 a.m. The program, which runs from 11:45 a.m. to 5:00 p.m will include segments on Traffic Court, Juvenile Court, Criminal Court, Small Claims Court & Post-Judgment Collections, and Real Estate Law & Practice.

On Friday, November 19, registration and lunch are scheduled from 11:15 a.m. to 11:45 a.m. The program, which runs from 11:45 a.m. to 5:00 p.m will include segments on Stress Management, Clerk of Court Services, and Starting Your Law Practice.

On Friday, December 3, registration and lunch are scheduled from 11:15 a.m. to 11:45 a.m. The program, which runs from 11:45 a.m. to 5:00 pm will include segments on Civil Law, Wills & Chancery, Employment Discrimination, Basic Adoptions, Name Changes & Guardianships, and Basics of Dissolution of Marriage.

OCTOBER 2010 15
DCBA Committee Chairs and Vice-Chairs
Selected for 2010-11

We would like to take this opportunity to congratulate and offer our best wishes
to the Committee Chairs and Vice-Chairs for this coming year:

Ross Mohlo, Melissa Mitchell
Alternative Dispute Resolution

Frank Markov, Ron Menna
Appellate Law & Practice

John P. Houlihan, Josh Greene
Bankruptcy Law & Practice

Steve Ruffalo, Colleen McLaughlin
Budget Committee

J. Matthew Pfeiffer, Jonathan Linne-meyer
Business Law & Practice

Rebecca Laho, Jean Ortega-Piron
Children’s Advocacy

Scott Hardek, Kim Davis
Civil Law & Practice

David Clark, Jeff Fowler
Continuing Legal Education

Jay Reese, Neal Cerne
Court Facilities and Library

Harry C. Smith, Anne Therieau
Criminal Law and Practice

Hon. Bonnie Wheaton, Daniele Pfluger
Diversity

Sharon Knobbe, Patrick B. Hurley
Driver School Oversight

Eileen Fitzgerald, Mary L. Collins
Elder Law

Patricia Murray, Clarissa Myers
Entertainment

Thomas Yu, Jim Cerami
Environmental Law

Neil Goltermann, Delrose Koch
Estate Planning & Probate

Sean McCumber, Maggie Bennett
Family Law and Practice

Vince Headington, Ron Hennings
Healthcare Law

Ana M. Mencini, Mary Field
Immigration Law

Cynthia Williams
In-House Counsel

Steven Behnkken, Jefferson Perkins
Intellectual Property

Angel Traub
Judges’ Nite

Kent A. Gaertner
Judiciary

Jim Barber, Elissa Hobfoll
Labor and Employment Law

Elizabeth Pope, Art Rummler
Law Day

George Buckun, Michelle Feola
Law in Literature

Anthony Abear, Jesse Barrientes
Law Practice Management

Patrick B. Hurley
Lawyer Referral Service

James Reichardt, Connie Gessner
Legal Aid

A. John Pankau
Legislative Liaison

Kenneth Florey, Todd Scalzo
Local Government

Susan Alvarado, Sean McCumber
Media

Raiford Palmer, Joe Emmereth
Membership

Angela Aliota, Lisa Giese
New Lawyers

Thomas A. Else, Kent Gaertner
Past Presidents’

Sharon Knobbe, Patrick B. Hurley
Planning

James S. Harkness, Charles Wentworth
Professional Responsibility

Ted A. Donner, Eric Waltmire
Publication Board

Leonard Monson
Real Estate Law and Practice

Mary Denise Cahill, Liz Simpson
School Law

Terry Benshoof
Tax Law and Practice

Colleen McLaughlin, Sharon Knobbe
Website Committee
As this issue goes to press, the New Chairs and Co-Chairs of the various DCBA Committees are busy preparing their 2010-11 schedules. By the time you have this magazine in your hands, the process should be in full swing. But it’s still early. Now’s a great time to contact the DCBA and sign up. There’s plenty in the works, but there’s also plenty more to be done.

In October, the Civil Law & Practice Committee and the Business Law & Practice Committee will join forces to present a program on business divorces. Anticipated topics will include statutory analysis, winding up, valuations, and receiverships. Anticipated speakers will include a Circuit Court judge from the Chancery Division as well as experienced attorneys whose practices focus on business litigation and corporate law. The date has not yet been set but for more information, contact Scott Hardek at: shardek@dykema.com.

Harry Smith tells us that the Criminal Law committee held its first meeting of the year August 26, 2010 in the Attorney Resource Center at the courthouse. This was an organizational meeting to establish member’s interest in the many upcoming projects. The committee is putting together a case law update sub-committee, a group who will work on the Mega-meeting presentation, and the formatting of a Petition for Certificate of Relief from Disabilities for convicted felons attempting certification/licensing in various fields.

New Health Law Committee chair Vince Headington reports that regular meetings of that committee are now scheduled to be held the second Monday of each month at noon at the Attorney Resource Center. As this issue went to press, a planning meeting was scheduled for September 13, 2010.

Angie Aliota and Lisa Giese want us to make sure that everyone knows they’re more than welcome to join other members of the DCBA and the New/Young Lawyers Committee for the group’s monthly night out around DuPage County. These events are held on the second Thursday of every month (the October event, which is scheduled to take place at the old courthouse, is the subject of our lead story for this issue). Although the group caters to new lawyers practicing seven years or less, all members are welcome. The committee will be scheduling judge panels in the near future and their second Annual Baseball trip is taking place on September 10, 2010. The trip involves a bus ride to Miller Park in Milwaukee where the Chicago Cubs are playing the Milwaukee Brewers. The event was a rousing success last year, with Sharon Knobbe presenting a seminar on social networking that was only interrupted a few times by the bus taking sudden stops or sharp turns. For $45 a person, the trip this year will likewise provide members a bus ride back and forth from the game and 1.5 hours of MCLE credit.

Committee chair and vice chair, Eileen Fitzgerald and Mary L. Collins tell us the new and already very popular Elder Law committee is meeting on the third Wednesday of each month this year. The first meeting was a business meeting to discuss the group’s plans for 2010-11. In September, the committee hosts a presentation from DuPage County Senior Services. In October, the plan is to host a MCLE presentation on VA benefits. The committee is already starting work on a seminar for the spring. There are proposed changes to the Medicaid laws in Illinois so that is sure to be an interesting topic.

George Buckun, Chair of the Law in Literature Committee, has scheduled that group’s first meeting for 4:00 p.m. on September 23, 2010 at the Attorney Resource Center. All DCBA members are invited to participate in the discussion of the following books: The Devil’s Highway: A True Story by Luis Alberto Urrea and Mexifornia: A State of Becoming (Revised Edition) by Victor Davis Hanson.

Putting Susan Alvarado and Sean McCumber together on a project may seem dangerous enough. But letting them play with cameras as well? That’s what’s happening in the Media Committee, anyway. Alvarado and McCumber tell us they “are working hard” to develop an exciting new “reality” format for LEGAL ACTION, the highly successful public affairs TV program jointly produced by the DCBA and NCTV. Can the Emmy’s be far behind?

Finally, McCumber also tells us that the Family Law Committee, which he chairs, will have its first CLE meeting at the Bar Center on October 23.
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The Illinois State Bar Association Annual Meeting was held in St. Louis, Missouri on June 25 and 26, 2010. The meeting consisted of a “CLE Fest,” and the annual assembly meeting of representative members of all judicial circuits in Illinois. On Saturday, June 26, Mark D. Hassakis of Mount Vernon, Illinois was installed as the 134th President of the ISBA.

Mark detailed his agenda for the upcoming year. His four main goals this year are: (1) special recognition of lawyers who have made extraordinary contributions to their local communities; (2) continued commitment to diversity: The ISBA has established a Diversity Leadership Counsel to help identify and involve diverse members of the profession in the formal activities of the ISBA; (3) Juvenile Justice Reform: The ISBA plans to help focus the attention of the public and the profession on improving and reforming the juvenile justice system in Illinois; and (4) to serve the ISBA members through LawEd programs and electronic services, and to bolster participation in the ISBA section councils and committees.

Also at the meeting, the ISBA Assembly passed the following proposals: (1) an amendment to the ISBA Bylaws and Assembly Policy and Procedures to allow elections by electronic voting; and (2) approval of the budget for 2010-2011.


Also was elected chair of the Assembly Agenda Committee.

Lastly, in May, the Civil Practice and Procedure Section Council requested a change in Illinois Supreme Court Rule 208(d) regarding recoverable costs. The request proposed that the following items be considered recoverable costs: (1) fees charged by a treating physician for a deposition that is used at trial; (2) the fees of a videographer for an evidence deposition used at trial; and (3) fees charged by the interpreter used to translate witness testimony used at trial.

Under the Supreme Court of Illinois decision in Vicencio v. Lincolnway Builders, 204 Ill. 2d 295, the deposition fees of a treating physician cannot be recovered from an unsuccessful litigant because they are not “costs” under Rule 208. The court did conclude that videographer costs are included in 208(d), but that to be recoverable the video has to be “used at trial”. The recommended amendment by the Council asked that costs under Supreme Court Rule 208 include reasonable treating physician, videographer and interpreter fees.

The Board of Governors at the May meeting voted against the proposed amendment. This amendment would have been favorable to the general personal injury practitioner in DuPage County. However, the medical malpractice plaintiffs’ lawyers in Chicago lobbied against it, and thus the proposal was defeated.

By James F. McCluskey

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the ability to make sound judgments and knowing right from wrong. I don’t even drag a comb through my hair, just get myself plopped into that car, looking like something the cat dragged in. We arrive at the hospital in the nick of time, courtesy of Cindy’s chauffeur service and I sleep like a baby the entire trip. As Lisa and I are dispatched to a pre-op room with a couple of nurses and a physician, I sprawl myself across two chairs, slouching, pale and clammy. One of the nurses notices my appearance and chalks it up to “nervous father syndrome,” which she adds is quite common in these situations. Hearing her diagnosis, I mumble that I might just have West Nile Virus. Suddenly I have the undivided attention of the Doctor and both nurses, while Lisa lays unattended, minutes from surgery, again rolling her eyes and saying “Oh Please.”

Let’s fast forward to the delivery room where the delivering physician announces: “OK Dad, your baby girl is coming out now. If you want to have a look, now’s the time.” Feeling much better, I begin to stand when I feel a tug on the sleeve of my shirt. A very cute anesthesiologist who is seated just to my left whispers to me, “I am a 100 pound lady and you are a 175 pound man. Should you choose to rise and see this, and then faint and collapse, please know that I cannot pick you up off the floor.” Because I cannot stand the sight of blood - my Dad and brother are doctors - I quickly connect the dots and decide to stay put.

A healthy and happy baby Reese arrived that morning, right on time. We could not have been happier. Now I’ve told you this story - not to demonstrate my own ability to overcome adversity and stick to a plan - but instead so that you can appreciate what your new first lady has had to endure. That was almost my worst day at home. Now I’ll tell you about my worst day professionally – bar none.

Several years ago I was asked to put on a cause hearing in a town in DuPage County not too far from here. The Board of Trustees was to receive evidence and determine if cause existed to oust one of their town officials. What began as a small hearing turned into much more – the official was very popular - a little league coach, lived in town forever. Turns out that Village Hall didn’t quite have the seating capacity to accommodate the 200 plus residents who were planning on attending the hearing. The hearing had to be conducted in a gymnasium. Of the crowd, not a single one appeared to be in support of the ouster. The ousteed had top flight counsel from a high profile Chicago firm who was greeted with a standing ovation after his opening statement. He could have dropped his pen and gotten cheers.

Then came my opening statement. Not only was I booed and heckled, at the conclusion of my opening, I turned to the audience and saw them – 200 in unison – tilt to one side and pull out signs from underneath their fannies which exhibited a drawing of a kangaroo with a red slash drawn diagonally through the middle – signifying their message “no kangaroo court.” They all pronounced the sign in unison. I’ll say it was quite a sight.

It was a hearing that went from 7:30 p.m. to 2:30 a.m. About half way in it became obvious that if not for the court reporter – who I brought to the hearing – I would have had nobody to talk to during breaks in the action. Objections were ruled on by “special counsel” who just like Caesar used his thumb in the movie Gladiator, let the crowd decide my fate. It was tough to endure.

Afterwards, I limped home, didn’t sleep a wink and found myself actually needing to get into my office at 7:30 a.m. the next morning solely to be around “my posse,” to tell them my horrible story, to get their reaction, to be with fellow attorneys. Sometimes there are things only attorneys understand and appreciate. We cannot psychoanalyze one another, but we sure are good listeners and counselors. The Board found cause existed and the case was then appealed to the Circuit Court and on to the Second District. The Board’s decision was affirmed at both levels. And none of this made me feel any better.

I have come to appreciate if not savor the decorum and order we are treated to every day in our courtrooms presided over by our judges and kept orderly by our bailiffs. Those who believe the
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American Civil Law System can be reduced to seven words: “Who pays how much to whom, when?” have never experienced, truly experienced, administrative review.

In the three years that preceded my installation tonight, I have attended each of the annual bar leadership institutes held in Chicago by the ABA. I have spoken with dozens of bar officials from bars similar to ours. In comparing the DCBA to many other bars, I want to say that there are several things that make us unique…these are the two that I think most of: (1) The mutuality that exists between bench and bar. In this association, it is one of our key features. We have mutual respect, mutual cooperation, and mutual independence. (2) We have created a culture of passing down to the next generation of attorneys the same professionalism and strength of character that we found here when we arrived. For as long as we have any influence over this Association, we should all jealously guard these traits.

I, like most who have made a career in the practice of law, have a handful of folks within the profession who have had a lasting impact on my own professional existence. They are, in some small measure, why we are who we have become. For me they have been Ralph Dichtl, Rod Equi, Joe Laraia and John Roselli. To each of them, I owe a great debt of gratitude.

And now, in what I hope becomes a tradition of every incoming President, I’d like us to observe a moment of silence in tribute to those Past Presidents that we’ve honored tonight are looking down on us with a contented smile.

I have three pieces of business before moving to adjourn.

(1) I’d like my wife and daughters to come up … Lisa, will you accept this rose as the new first lady of the DuPage County Bar Association? And knowing that in 2011 and 2012 Colleen and Sharon will be your Presidents leaving us without any first ladies, I’d like to have a second for Tom Else’s Motion to make my daughters Olivia and Reese appointed as honorary first ladies for 2011 and 2012.

(2) Because I may never a better opportunity than this, I’d like to thank my Mom and Dad for putting up with me as a kid – I think I was responsible for my younger brother and sister going away to the Culver Military Academy. You never stopped believing in my (even though it was nip and tuck at various points in my youth). There is no better gift that a parent can give a child than to believe in them. Thank you – Thank you all.

(3) Finally, I have someone here who can explain why the advice to “Hug it Out” is worth exactly $1000 tonight, Rod Equi.
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by J. Matthew Pfeiffer

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Welcome! It is my honor and privilege to be the Articles Editor for this, the first issue of the 2010-2011 DCBA Brief. You may notice that the DCBA Brief has undergone some changes since you last perused its helpful pages. We have redesigned the logo, changed the layout and design of the interior, and generally given it a well-deserved upgrade. As Bob Dylan famously said, “Times, they are a-changin’.”

In this issue, we have an outstanding selection of articles for your enrichment. For those of us who slept through Civil Procedure in law school, we have an excellent primer on Stare Decisis from William Hutul and Joseph Callahan. In this uncertain economic climate, we bring you a timely article from Benjamin W. Meyer interpreting the Illinois Mechanics Lien Act, which clarifies payment obligations between property owners, contractors, and subcontractors. We also have an article by Jessica Fiocchi regarding e-mail communications, confidentiality, and the Illinois Rules of Professional Responsibility. This article is especially relevant due to the recent changes in the Rules. And we have an article from Brian Sharpe about the significant effect that PDAs (Blackberrys, iPhones, etc.) are having on how jury trials are being conducted.

We then move to a very practical article on what businesses can do to retain documents in litigation and avoid claims of Spoliation, brought to us by J. Matthew Pfeiffer. Finally, we’ve got a humorous and important message from Jim Reichardt, giving us several good ideas on how to manage our practice from beyond the grave.

A big “Thank You” goes out to all of the volunteers and staff who devoted many, many hours to the redesign and planning of this year’s DCBA Brief. Thanks in particular to Melissa Piwowar who serves as the Sidebars Editor for this section, Ron Menna and Harry C. Smith for their contributions, and Mark Carroll who edits the student articles. We hope you enjoy the new look, and we look forward to bringing you the best legal publication Illinois has to offer.

BY JOSEPH F. EMMERTH IV

The articles published in this magazine are generally contributed by lawyers and paralegals who are members of the DCBA. If you are interested in submitting an article to be considered for publication in the DCBA Brief, please contact the magazine’s Associate Editor, Eric Waltmire, at ericwaltmire@dcbabrief.org. Our publication guidelines for author submissions appear at dcbabrief.org/submissions.html. Practicing attorneys whose articles are selected for publication in the DCBA Brief are qualified to receive CLE credit under the applicable Illinois rules.

STUDENT ARTICLES

The DCBA Brief has a long standing commitment to providing a forum for law students in the Chicago metropolitan area. If you are a law student who attends one of these schools or otherwise has an interest in the practice of law in DuPage County, you can join the DCBA for no charge and are then eligible to contribute articles to be considered for publication. If you have interest in submitting a student article, please contact our Student Articles Editor, Mark Carroll at markcarroll@dcbabrief.org.

SIDEBARS

The life blood of the DCBA is its committees, many of which are made up of practitioners with an interest in particular areas of legal study. In addition to the many CLE seminars they host, these committees put together case law updates that then appear in this section of the magazine as “Sidebars.” To include your committee’s case law updates in an upcoming edition of this magazine, please contact Assistant Editor, Melissa Piwowar, at melissapiwowar@dcbabrief.org.
Avoiding Spoliation Claims: 
Practical Tips for Business Entities 
Regarding Litigation Holds and 
Document Retention

BY J. MATTHEW PFEIFFER

Business litigation often involves a substantial volume of document production. Even a garden-variety commercial case involving a small corporation may spawn thousands of pages of paper during the course of discovery. Given the technological advances accomplished in the past couple of decades, attorneys and their business clients now find themselves digging through not only hard copies of documents but electronically stored information as well, such as current and archived e-mail, word processing documents, computer-generated spreadsheets, and so forth.

During the course of a lawsuit, your client might be accused of having intentionally or negligently discarded documents or materials pertaining to a pending or potential legal matter that arguably should have been preserved. How should an attorney handle this situation, and what can an attorney do before such a situation arises?

Pleading of a Spoliation Claim. The Supreme Court of Illinois has held that spoliation of evidence is a tort that can be pled under existing negligence principles, not as a separate intentional tort.1 An action for negligent spoliation may be brought concurrently with the underlying suit on which it is based.2 To sufficiently plead a spoliation claim, a plaintiff must allege the standard negligence elements: that the defendant owed a duty, breached that duty, and such breach proximately caused the plaintiff’s damages.3

In order to grant sanctions, the court must find: (1) that there was a duty to preserve the specific documents or evidence, (2) that the duty was breached, (3) that the other party was harmed by the breach, and (4) that the breach was caused by the breaching party’s willfulness, bad faith, or fault.4 If the Court finds that sanctions are appropriate, it then must determine whether the proposed sanction can ameliorate the prejudice that arose from the breach. If a lesser sanction can accomplish the same goal, the Court must award the lesser sanction,5 because sanctions “must be proportionate to the circumstances surrounding the failure to comply with discovery.”6

Duty Preserve. There is no general duty to preserve evidence.7 However, a duty to preserve evidence can be established when: (1) it arises by agreement, contract,
A party has a duty to preserve evidence that it has control over and which it reasonably knows or can foresee would be material (and thus relevant) to a potential legal action. A document is potentially relevant, and thus must be preserved for discovery, if there is a possibility that the information therein is relevant to any of the claims. The existence of a duty to preserve evidence does not depend on a court order. Instead, it arises when a reasonable party would anticipate litigation.

**Breach of Duty.** There must also be allegations from which to conclude that the duty to preserve evidence has been breached. In the Northern District of Illinois, a party’s failure to issue a litigation hold is not per se evidence that the party breached its duty to preserve evidence. Instead, reasonableness is the key to determining whether or not a party breached its duty to preserve evidence. A party fulfills its duty to preserve evidence if it acts reasonably. It may be reasonable for a party to not stop or alter automatic electronic document management routines when the party is first notified of the possibility of a suit. However, parties must take positive action to preserve material evidence. “More than good intentions [are] required; those intentions [must] be followed up with concrete actions reasonably calculated to ensure that relevant materials will be preserved,” such as giving out specific criteria on what should or should not be saved for litigation.

**Resulting Harm.** Third, the breach must have harmed the other party. This criterion is self-explanatory: the destruction of documents sought must have caused some prejudice to the party seeking them.

**Bad Faith or Willfulness.** Finally, there must be a sufficient level of fault to warrant sanctions. Findings of willfulness, bad faith, and fault are all sufficient grounds for sanctions. However, a court may only grant an adverse inference sanction upon a showing of bad faith. To find bad faith, a court must determine that the party intended to withhold unfavorable information. This intent may be inferred when a party disposes of documents in violation of its own policies or if a document’s destruction violates regulations (with the exception of EEOC record regulations). Fault is defined not by the party’s intent, but by the reasonableness of the party’s conduct. Mere negligence is not enough for a factfinder to draw a negative inference based on document destruction. Rather, gross negligence of the duty to preserve material evidence is generally held to be fault.

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**J. Matthew Pfeiffer** is a member of Fuchs & Roselli, Ltd. in Wheaton, Illinois, where his practice is concentrated in commercial litigation, business torts, creditors rights, commercial and personal loan enforcement, bankruptcies, workouts and reorganizations. He graduated from Purdue University in 1997 with a Bachelor of Science in Organizational Leadership and Supervision and obtained his law degree from Northern Illinois University College of Law in 2000.

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8 Dardeen, 213 Ill.2d at 336, 821 N.E.2d at 231.
11 Trask-Morton v. Motel 6 Operating L.P., 534 F.3d 672, 681 (7th Cir. 2008).
12 Trask-Morton v. Motel 6 Operating L.P., 534 F.3d 672, 681 (7th Cir. 2008).
13 Porche, 2009 WL 500622 at *5.
19 Porche, 2009 WL 500622 at *5.
20 Porche, 2009 WL 500622 at *5.
21 Porche, 2009 WL 500622 at *5. But see Trask-Morton v. Motel 6 Operating L.P., 534 F.3d 672, 681 (7th Cir. 2008) (“a showing [of bad faith] is a prerequisite to imposing sanctions for the destruction of evidence,” thereby refusing to issue sanctions because the level of fault had not risen to the level of bad faith).
22 Fass v. Sears, Roebuck & Co., 532 F.3d 633, 644 (7th Cir. 2008); but see OCE North America, Inc. v. Brazeau, 2010 U.S. Dist. LEXIS 25523 at *17 (N.D.Ill. March 18, 2010) (“After adverse inference may be appropriate if . . . the breach involved willfulness, bad faith or fault.”).
25 Park v. City of Chicago, 297 F.3d 606, 615 (7th Cir. 2002).
26 Park v. City of Chicago, 297 F.3d 606, 615 (7th Cir. 2002).
29 695 F.Supp.2d 824 (N.D.Ill. 2010).
property manager, Tharaldson Property Management, Inc., alleging that she cut her foot in her room due to a dangerous condition and suffered significant permanent damage to her leg as a result of the cut. During discovery, the plaintiffs sought relevant documents from the defendants, including daily cleaning reports, deep cleaning logs, employee names and contact information, employee schedules, and complaint reports. However, it was discovered that Tharaldson’s practice was to destroy daily cleaning logs monthly and to destroy deep cleaning logs, service logs, and complaint logs yearly. Tharaldson further responded that it provided all known contact information about the former housekeeping employees to the plaintiffs’ counsel and that it had no record of Olivarius’ injury complaint or the four letters she allegedly sent. The defendants claimed they were first notified of the incident when the plaintiffs filed the lawsuit.

The plaintiffs subsequently sought leave to amend their complaint to add a spoliation claim based on their discovery of the defendants’ document retention practices. In their proposed amended complaint, the plaintiffs alleged that Tharaldson knowingly destroyed or made unavailable evidence necessary for them to prove its negligence after it knew of the alleged injury. Specifically, they alleged that Tharaldson destroyed documents related to their claims after the injury occurred but before the litigation began, including daily cleaning reports, deep cleaning logs, service logs, complaint logs, and employee work shift information.

The court denied the plaintiffs’ motion to add a count for spoliation of evidence. In so ruling, the court noted that, as to the “relationship” prong, the plaintiffs did not plead a duty by agreement, contract, statute, or that Tharaldson ever voluntarily undertook to preserve the evidence. Therefore, the plaintiffs were left with the allegation that Tharaldson had a duty to preserve evidence under a “special circumstance,” contending that such a duty arose because Olivarius notified it of her injury the morning after it occurred and through four letters. The court determined that neither the fact that Tharaldson’s records were incomplete or that some of Tharaldson’s former employees could not be located was, on its own, not a basis for a spoliation claim. Tharaldson previously had been ordered to produce the personnel files of individuals who might have knowledge of the alleged incident, and it represented to the court that it had produced to the plaintiffs all relevant documentation in its possession. This was enough to satisfy the Olivarius court that the defendants had complied with discovery requirements and led to the conclusion that a spoliation claim could not be maintained given that compliance.

In Jones v. Bremen High School Dist. 228, in Bremen, the plaintiff sued her employer of twenty-five years, a school district, for employment discrimination based on race. She alleged that from April 2006 onward, she and other black secretaries were given more responsibilities than similarly situated white secretaries, that she was subject to insults and criticisms not given to similarly situated white secretaries, and that her employer was aware of this discriminatory behavior. She further alleged that the defendant’s discharge of her constituted retaliation for complaints she filed alleging racial and disability discrimination with the EEOC in October 2007 and with the IDHR in November 2007.

30 Olivarius, 695 F.Supp.2d at 830 (citing Dardeen, 213 Ill.2d at 337, 821 N.E.2d at 232-33).
31 Olivarius, 695 F.Supp.2d at 830 (citing Dardeen, 213 Ill.2d at 337, 821 N.E.2d at 232-33).
34 Olivarius, 695 F.Supp.2d at 830.
35 Olivarius, 695 F.Supp.2d at 830.
36 Olivarius, 695 F.Supp.2d at 830.
38 Illinois Department of Human Rights.
Jones received a right to sue letter in April 2008 and filed a lawsuit against the defendant in June 2008. It was undisputed that the defendant did not place a litigation hold on electronically created documents when it first learned in October 2007 that Jones had filed an EEOC charge against it. Instead, prior to June 2008 (when the lawsuit was filed), only three of the defendant’s employees were asked to search and preserve electronic mail, and they did so without any supervision by counsel based on what each of them deemed relevant. Three additional employees were added to this list in June 2008, after Jones’ complaint was filed. Any e-mail that existed prior to October 2008, which these employees did not preserve because they did not deem it relevant, could no longer be recovered. Other e-mail, which was deleted in the normal course of business by other employees who were not asked to preserve e-mail before October 2008, could not be recovered. By contrast, all e-mail created after October 2008 could be searched for relevant materials because they were backed up pursuant to a change in the defendant’s document retention procedures that called for automatically saving all e-mails from the district’s users in a searchable archive, which was a departure from its prior procedure of rewriting its backup tapes every thirty days. It was not until the spring of 2009 that the defendant instructed all of its employees to preserve e-mails which might be relevant to the litigation.

During the course of the litigation, she filed a motion for sanctions due to spoliation of evidence, alleging that the defendant failed to ensure that relevant documents were preserved during litigation and that such failure severely prejudiced plaintiff’s case. Jones asked for an adverse inference instruction to the jury that the destroyed documents would have supported her claims by containing discriminatory statements. She also asked the court to preclude the defendant from arguing that the absence of discriminatory comments in existing documents showed that no discriminatory comments were made or that she was not subject to discrimination or a hostile work environment.

The Bremen court determined that sanctions were appropriate given the defendant’s conduct, and that the defendant had a duty to preserve documents relevant to Jones’ claims when it received notice of her EEOC charges around November 2007. The court also found that the defendant breached its duty to preserve relevant documents. Although

40 Bremen, 2010 WL 2106640 at *3 (N.D.Ill. May 25, 2010).
41 Bremen, 2010 WL 2106640 at *3 (N.D.Ill. May 25, 2010).
it was aware at least by November 2007 that the plaintiff was challenging its treatment of her on the basis of her race and alleged disability and that its employees had the capability of permanently deleting e-mail relevant to her claims, the defendant did not request all employees who had dealings with her plaintiff to preserve their electronic records so they could be searched further by counsel for possible relevance to her case. Instead, it directed just three employees (one of whom was at the center of her complaints) to search their own e-mail without help from counsel and to cull from that e-mail what would be relevant documents. The court held that it would be unreasonable to allow a party’s interested employees to make the decision about the relevance of documents, especially when those same employees have the ability to permanently delete unfavorable e-mail from a party’s system.43 The Bremen court also expressed that “[m]ost non-lawyer employees... do not have enough knowledge of the applicable law to correctly recognize which documents are relevant to a lawsuit and which are not. Furthermore, employees are often reluctant to reveal their mistakes or misdeeds.”44

The court further noted the lack of evidence that a simple litigation hold to preserve existing e-mail would have placed any burden on defendant. “Such preservation efforts would have required very little effort; defendant’s technology department could have easily halted the auto-deletion process and asked all employees who supervised plaintiff... to preserve information.”45 It also was “troubled that the policy followed in this case is not the same document retention policy that defendant publically [sic] espouses on its web site and which was discovered by plaintiff in this lawsuit.”46

Ultimately, the court in Bremen determined that while there was no evidence of the defendant having willfully chosen its document retention system as a way to minimize exposure of potentially relevant documents for future lawsuits, the defendant was grossly negligent in its attempts to secure relevant documents at the first sign of litigation and prevent its employees at that time from destroying documents concerning the plaintiff’s claims.47 Noting the broad discretion that rested with it to fashion an appropriate sanction to remedy the prejudice to Jones, the court decided that because there was no deliberate effort to conceal harmful evidence, there would not be a finding that an adverse inference be drawn against the defendant that any e-mail it did not preserve contained discriminatory statements.48 However, the court granted the plaintiff the following sanctions: that the jury would be informed that the defendant had a duty to preserve all e-mail concerning the plaintiffs’ allegations beginning in November 2007, but did not do so until October 2008; that the defendant would be precluded from arguing that the absence of discriminatory statements from that period was evidence that no such statements were made; that the defendant would be assessed the costs and fees of the plaintiff’s preparation of the motion for sanctions; that the plaintiff would be permitted to depose witnesses concerning e-mails suddenly produced after the filing of her sanctions motion; that the defendant would pay for the cost of the court reporter for those depositions; and that the plaintiff would be permitted to submit a final fee petition after completion of those depositions.49

**Businesses should create and adopt document retention and litigation hold policies before destruction of evidence even becomes an issue.**

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43 Bremen, 2010 WL 2106640 at *7 (N.D.III. May 25, 2010).
44 Bremen, 2010 WL 2106640 at *7 (N.D.III. May 25, 2010).
45 Bremen, 2010 WL 2106640 at *7 (N.D.III. May 25, 2010).
46 Bremen, 2010 WL 2106640 at *7 (N.D.III. May 25, 2010).
Donald J. Ramsell has been named “Illinois Super Lawyer” by Chicago Magazine’s publishers since 2005. The Chicago Sun Times identified Mr. Ramsell as one of the top 5 DUI Defense Attorneys in the State of Illinois. Donald is a nationally recognized DUI defense attorney, author and lecturer on the topic of DUI defense. Recently, Don was also named one of “Illinois Leading Lawyers” in a statewide survey of his peers. Don has instructed attorneys on DUI defense in Illinois, Michigan, Texas and at Harvard. In 2007, Donald was nominated and recognized as a sustaining Member of the National College for DUI Defense.
letter from an employee or his or her attorney, or—most obviously—a summons and complaint against the company.

Give authority to specific personnel. Businesses should identify and give authority to one or more persons, or perhaps even a committee, authorized to impose a litigation hold at any time. Those same persons should also be charged with the task of setting the parameters for and spreading notice of the litigation hold companywide to ensure that no one violates the policy or structure established for retaining documents. To that end, and to the extent that these persons are not in-house counsel, they should be in contact with the entity’s internal legal department or with outside counsel immediately upon learning of an issue that potentially or actually would trigger a litigation hold to discuss the particulars of implementing the litigation hold.

Disseminate written notice of document retention procedures. A written notice or policy should be distributed companywide that clearly articulates the procedures that the employees and the company must follow to ensure retention of relevant documents related to a potential or existing claim. This helps to serve as a paper trail for your retention of relevant documents related to a potential or existing claim. This helps to serve as a paper trail for your business clients. Make sure that any published document retention policy is the policy that actually is followed. Otherwise, the court will raise an eyebrow with respect to why some different procedure was followed, just as the court did when it learned that the defendant’s actual policy and procedures differed significantly from those stated on its website.

“Quarantine” particular personnel. Businesses also must take appropriate measures to ensure that any employees who might have reason to conceal, delay providing, or destroy document evidence or who might be in a position to “accidentally” destroy evidence are isolated until the dispute giving rise to a litigation hold is fully resolved. This might include limiting computer access to certain records by password protection, putting certain records under lock and key with access restricted to only authorized personnel, and requiring all personnel to sign a log in order to gain access to an area where retained records are being stored.

Identify and preserve relevant documents. This should go without saying. Documents that could or should be protected from inadvertent or intentional destruction must be safeguarded. A specific location should be identified as the place where such documents will be maintained during the entirety of a litigation hold. Diligence should be exercised in performing an exhaustive review of all regularly used data sources as well as backup or archive sources, and notes or logs should be maintained regarding the date and time of such reviews as well as what was reviewed and by whom those materials were reviewed.

Monitor the document search and retention process. Businesses (and their attorneys, if necessary) should monitor the litigation hold during the course of a perceived legal issue, dispute, or litigation to ensure that the proper measures are continuing to be taken to protect relevant documents from intentional or inadvertent destruction. The employer must ensure that all sources of discoverable information are identified and searched and that any relevant documents located as a result of such searches are preserved until the dispute has been resolved completely. It would also be prudent to issue reminders about any existing litigation holds and document retention directives on a regular basis to ensure continued compliance.

Don’t “hide the ball”. Part of the reason the Bremen court imposed sanctions upon the defendant was that it appeared to have withheld documents from prior productions of discovery materials. Try to produce everything, or as close to that as possible, that is responsive to the opponent’s discovery request. This does not mean that you should try to bury an opponent with documents, relevant or not. It simply means that the specific request should be considered carefully and that all documents, whether you consider them to be relevant or not, should be produced. That way, if the court entertains a motion for sanctions or otherwise becomes involved in a discovery dispute, your client will be able to point to its good-faith effort right off the bat to turn over all physical evidence related to the request.

Maintain consistency in application of the system. If your client’s procedures for document retention and litigation holds are firmly established and strictly and consistently followed, that greatly would improve the chance of a court deciding that its actions are reasonable and in good faith and thus, increases the chance of its success in defending against a spoliation claim. Make sure that any published document retention policy is the policy that actually is followed. Otherwise, the court will raise an eyebrow with respect to why some different procedure was followed, just as the Bremen court did when it learned that the defendant’s actual policy and procedures differed significantly from those stated on its website.

Conclusion. Although there is no surefire method of completely avoiding it, there are plenty of actions that businesses may take to forestall a spoliation claim. Based on the continually increasing emergence of case law in this area and the judiciary’s apparent crackdown on evidence destruction through the assessment of sanctions, even a little effort to establish document retention policies and procedures for litigation holds will go a long way in protecting your business clients.
WORKING TO WIN

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All practitioners who have learned to lead normal lives know the importance of vacation planning, and I don’t mean airfare, hotels, and rental cars. I am talking about taking care of your clients while you are enjoying some well-deserved rest and relaxation. Good practice management requires that your clients can receive important legal service when they need it even when you are not there to provide it yourself. That’s why many of us have a system of referrals and backups to take care of these short term client needs while we are gone; someone needs to tend the farm while we’re away.

But what happens when we take our “permanent vacation”? How do our clients get served when we are never coming back? And what happens to the valuable practice we have spent years developing and nurturing? Dairy farmers know they can’t take vacations because the cows must be milked twice a day or they dry up. Notwithstanding some attorneys we know who are really “milking it”, what about our cash cows? How do we serve our clients and retain as much value in our practice for the benefit of our loved ones?

Just as the probate act provides for the disposition of the estate if we don’t write a will, the Illinois Supreme Court has provided for the pending cases of a deceased lawyer when there is no partner, associate, executor, or other responsible party capable of conducting the lawyer’s affairs. Under Supreme Court Rule 776, a receiver can be appointed to transition the deceased lawyer’s clients to new representation. To avoid having a complete stranger take over a practice under Supreme Court Rule 776, thoughtful solo practitioners can and should arrange for a transition in the event of their death or disability.

A relatively simple tool that can be utilized in the case of an attorney’s disability is the Statutory Short Form Power of Attorney for Property. The principal attorney can limit the applicability of the Power of Attorney for Property to business operations, while also providing for additional powers. Language can be inserted to empower the lawyer / agent to make deposits to, and disbursements from, the lawyer’s business accounts, including the IOLTA account. Language can also be included that enables the lawyer / agent to carry on the general representation

1 755 ILCS 45/3-3.
of the lawyer’s clients (with the consent of the client.) However, the Power of Attorney only becomes effective upon a ‘written finding’ that the attorney is under a disability. Interestingly enough, it is not required that the ‘written finding’ be made by a physician. Ostensibly, one or more colleagues or even a family member can make the ‘written finding’.

Similar provisions for carrying on of the attorney’s practice after death can be included in a will. Under independent administration in Illinois an executor has broad authority to conduct and delegate administrative functions. Even though the executor might not be a lawyer, at a minimum the executor could appoint an attorney to continue the practice on a temporary basis. The lawyer should leave instructions with the executor regarding whom the appropriate lawyers are. Most solo practitioners have an automatic referral system in case of illness or vacations, and logically these same lawyers would be the ones contacted in the event of death or disability. Because the names of those trusted colleagues might change from time to time, the instructions should not be contained in the will itself, but on a separate memorandum for the guidance of the executor.

Even before having a will admitted to probate, the executor can hire agents and legal counsel to market and liquidate the lawyer’s practice. Quick action on the part of the executor is imperative because sooner or later the deceased lawyer’s clients will find other legal representation. If they find it on their own no benefit will come to the estate. But if the executor, with the help of a lawyer knowledgeable in law practice management, can promptly get the word out to potential buyers of the practice there is a chance the estate may turn some of the practice’s value into cash for the lawyer’s loved ones.

The sole practitioner’s will (or trust, as the case may be) should contain some specific direction to the executor to give prompt attention to the hiring of counsel for the marketing of the practice. Since the probate act gives an independent executor the power to sell personal estate for cash or on credit, and given the risky nature of the transaction, the executor should be prepared to accept a purchase offer that includes payment to the estate of a fraction of fees actually realized from the sale. The agreement between the solo practitioner’s estate and the purchasing lawyer or firm would contain a schedule and perhaps a sliding scale of payments to the estate for fees actually generated over a period of time.

Invariably the lawyer-client relationship includes the office staff. The purchasing firm or attorney would do well to maintain the employment of the office staff as a means of binding the clients to the new practice. Much of the good will established in the practice is a product not only of the lawyer’s professional and personal skills, but also those of the office staff: associates, secretaries, paralegals, and other administrative assistants. They are vital to the operation of the practice their retention under the new ownership can be made a condition of the sale.

Just as estate planning lawyers challenge their clients to consider all the different scenarios that life may hold in store for them, so should lawyers think about their own practices and all the “what ifs” that can occur. It would be well worth the investment of some non-billable hours for the sole practitioner to have mercy on his or her Executor by preparing a transition plan, a list of things to do to keep the practice alive, and suggest prospects of buyers of the practice, so that the valuable herd of clients can be nurtured. Since the Illinois Supreme Court now permits the sale of a law practice it’s possible that with good estate planning and prompt, effective, and savvy administration, a deceased or disabled attorney’s practice can keep the cash cows happy and producing milk for the solo practitioner’s family.
Confidentiality and E-mail Communication: A Need for Clarification in Illinois’ Ethics Rules

BY JESSICA FIOCCHI

There is a point in the lives of most people in which they will have contact with an attorney. Whether this contact takes place during the purchase of your first home, preparing your will, or some other important situation, a concern is always choosing a lawyer that will adequately represent you and respect your desire for confidentiality. Confidentiality in the form of attorney-client privilege is one of the most heavily protected aspects of the legal profession, as is obvious with a glance at the Rules of Professional Responsibility.\(^1\) In conflicts between the confidentiality of the client and the interest the court system has in relevant evidence, confidentiality tips the scales, subject only to a few specific exceptions.\(^2\) Even in cases in which the attorney is aware that his client is guilty of a crime for which another person has been incarcerated, the attorney is not allowed, in most jurisdictions, to disclose this information to anyone without the permission of his client.\(^3\)

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\(^1\) Ill. R. of Prof’l Conduct 1.6.

\(^2\) Ill. R. of Prof’l Conduct 1.6 (b)-(d).

\(^3\) Ill. R. of Prof’l Conduct 1.6.
With the increase in the use of the internet in recent years, confidentiality of information has faced new challenges. Electronic communication (especially e-mail) has become more frequently relied upon, because now millions of people use e-mail accounts. In fact, today, over two million e-mails are sent every second. Along with this new way of sharing information, there has been more concern in how this information can be accessed by third parties and privilege can be inadvertently waived. For example, internet service providers have access to information sent through them via the internet in order that said e-mails reach their intended recipients. Courts often subpoena internet records, including e-mails, directly from the internet service providers, rather than from the home computers of the parties involved in litigation. This raises fewer fourth amendment concerns as it does not bring in belongings from the parties' homes, and allows for freer access to such information by the courts.

Illinois' Stance on Electronic Communication. In Illinois, the confidentiality rule of professional responsibility does not deal specifically with electronic communication. Comment 17 for Rule 1.6 in the Illinois Rules of Professional Responsibility discusses the actions that should be taken on the part of an attorney to preserve confidentiality: “...the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions.” The main question, then, comes down to whether or not using e-mail for attorney-client communication offers a “reasonable expectation of privacy.”

Similar considerations in past decades have included the concern of the Illinois State Bar Association [hereinafter ISBA] about the use of “cordless or other mobile telephones” that might be intercepted when discussing confidential matters. The opinion in which the ISBA suggested advising the client of the risk of the loss of confidentiality for communications on these telephones was later withdrawn, suggesting that as the use of these devices increased, faith in their use for confidential information increased. Internet communication has developed differently from telephone lines, with the use of internet service providers who transfer the data from one person's computer to the intended recipient's computer, giving them access to the information being sent. This variation may lead to a different development then that for cordless and mobile telephones. If more third parties have potential to access the information, the confidentiality of information may be compromised.

For example, a 2007 case from Illinois, Muro v. Target Corp., discussed the concerns that e-mail communication brings about. The case discussed the fact that e-mail chains may take place over several different days, that the different people being included on various e-mails within the chain may change from message to message, and that some e-mails within the chain may involve legal advice or a request for such advice while some other messages may not include such information. While these concerns did not lead the court to state that e-mail could not be used for the purpose of sharing privileged communication, it did say that for discovery purposes, the e-mails were not required to be separated out, which may lead to opposing counsel having access to some privileged information.

Such issues may lead an attorney to think of comment 17 from Rule 1.6, stating that "special circumstances...may warrant special precautions." According to the ISBA opinion on electronic communication, some states have come up with such precautions and required things like encryption of e-mail messages or client consent for “non-secure” communication.
munication.\(^\text{18}\) While the ISBA noted the decisions of these other states, Illinois did not follow the same route. Because of a supposed “reasonable expectation of privacy” that is the same as an ordinary telephone call, and because of the fact that e-mail interception is illegal under the Electronic Communications Privacy Act [hereinafter ECPA], the ISBA decided to advise that e-mail communication would not lose its status as privileged information.\(^\text{19}\) This goes along with comment 17 to Illinois Rule of Professional Responsibility 1.6, which discusses what should be considered in determining the expectation of confidentiality of communication, and includes “the extent to which the privacy of the communication is protected by law…”\(^\text{20}\) However, with the passage of the Patriot Act in 2001, the ability of the U.S. government to get around the ECPA weakens this argument, making the protection by law of electronic communication less powerful and more likely to be circumvented in some situations.\(^\text{21}\)

The Differing Opinions of Other States. In some recent decisions, other states have had differing opinions on whether or not communicating confidential information through e-mail waives the attorney-client privilege.\(^\text{22}\) For example, in the Eleventh Circuit case of Rehberg v. Paulk, the court stressed that privilege is not protected in e-mail communication.\(^\text{23}\) Although most of the court’s discussion focuses on a lack of “reasonable expectation of privacy” after it has been received by a third party, the fact that an e-mail is almost instantaneously received by any parties with access once the “send” button is clicked, suggests that such expectation is lost as soon as the message is sent.\(^\text{24}\) This was emphasized with the court’s discussion of the subpoena of the electronic communication from the internet service provider rather than from the sender. The court reasoned that because the sender of the e-mails had no “reasonable expectation of privacy,” and voluntarily allowed third parties access to the information, the court could subpoena the messages. This would avoid a Fourth Amendment violation that would take place if they were to have gotten the e-mails directly from the sender.\(^\text{25}\)

The Eleventh Circuit, similar to the Iowa and South Carolina courts discussed in the ISBA opinion 96-10, seems to hold the opinion that using e-mail to transmit information that is confidential automatically waives attorney-client privilege, and may be accessed by the court.\(^\text{26}\) The Eleventh Circuit does not equate e-mail communication with telephone communication, or discuss the illegality of intercepting e-mail messages that are not intended for a certain recipient.\(^\text{27}\) Instead, the Florida court focused on the way modern electronic communication works and the third parties involved with the delivery of every message sent through the system.\(^\text{28}\)

By contrast, a New Jersey case, Stengart v. Loving Care Agency, Inc., recently agreed with the decision of the Illinois State Bar Association, and held that using e-mail for the transmission of a confidential message does not automatically waive attorney-client privilege.\(^\text{29}\) Stengart recognized, as the Illinois State Bar Association did, a reasonable expectation of confidentiality for e-mails sent from a private, password protected e-mail account.\(^\text{30}\)

The defendant in Stengart argued that due to the company policy on computer use and the fact that plaintiff had used a company computer to access her personal e-mail account, plaintiff had waived the attorney-client privilege of e-mails sent between her and her attorney.\(^\text{31}\) The court disagreed with this argument, discussing the non-specific language used in the company policy, as well as the long-recognized significance of the attorney-client privilege and holding that since there was no notice given to plaintiff that messages from her personal, password protected e-mail address would be copied onto the hard drive of the company’s computer.\(^\text{32}\) Had the plaintiff been given notice that this was the case, using her private e-mail account may have been seen as a voluntary allowance of the company to view her communication with her attorney, and thus a waiver of privilege.\(^\text{33}\) Instead, the defendant’s attorneys faced issues of not reporting that they had mistakenly received another attorney’s privileged communication.\(^\text{34}\) This case suggests

\(^\text{18}\) ISBA Comm. On Prof’l Conduct, Advisory Op. 96-10 (discussing the rules of South Carolina and Iowa).


\(^\text{20}\) Ill. R. of Prof’l Conduct 1.6, Comment 17.


\(^\text{27}\) Id.

\(^\text{28}\) Id.


that any private e-mailing between attorney and client where no company policy is known would be privileged. This is consistent with the ABA opinion on e-mail communication, which also states that it believes e-mail communication carries a reasonable expectation of privacy and does not conflict with the attorney-client privilege.\textsuperscript{35}

**The ABA Opinion.** The 1999 ABA opinion describes four separate types of e-mail communication and how they work, discussing how each in turn should be considered secure enough to carry confidential information between attorney and client without needing to take special precautionary measures such as encryption or consent of the client. As the ABA found a reasonable expectation of privacy in these e-mail types, it held that e-mail does not waive the attorney-client privilege. In 1999, when this opinion was written, the majority of electronic communication was still transferred through telephone land lines, and thus was considered to be just as secure as a typical telephone conversation.\textsuperscript{36} With all of the advances in technology, even cell phones can send and receive e-mails today. It will be interesting to see if these changes will alter the way e-mail communication is viewed through the rules of professional responsibility.

**Need for Clarification.** As set forth in the Preamble of the Illinois Rules of Professional Responsibility, the practice of law is regulated in order to maintain the legal profession as one of a public trust with a high degree of integrity.\textsuperscript{37} These rules are enforced by the power to discipline attorneys that do not follow the rules. If it is to be a complete set of rules, it must be updated to include modern circumstances and instruction on how to deal with new problems attorneys face as technology develops.

As can be seen with the many court decisions and ethics opinions on the topic of electronic communication in various jurisdictions, this is a large area of contention today in which the rules are not clear.\textsuperscript{38} The Illinois State Bar Association has taken a stand in its opinion on electronic communication that it considers such exchanges to be just as secure as a standard telephone call.\textsuperscript{39} Illinois case law supports this decision, and it is consistent with the ABA opinion on the matter.\textsuperscript{40} Because of the conflict in other jurisdictions, Illinois attorneys may not be aware of the stance that has been taken on the matter and may be unsure of how to deal with e-mail communication. To solve this problem, and to make clear the very important rules of professional responsibility, rule 1.6 on confidentiality should contain a comment about the current stance on electronic communication.

Not only would specifying the Illinois position on electronic communication in the rule provisions help attorneys decide what actions to take in their day-to-day interactions with clients, but it would also guide the courts in future cases involving issues of confidential information. E-mail use is more prevalent today than ever before and nearly everyone sends information in this format on a regular basis. Future litigation based on this issue could be avoided if the state rules were clear on what is expected of attorneys and clients when handling confidential materials. The ease of simply putting in a comment regarding a prevalent issue makes it seem strange that most states would not have done so already. In keeping the rules of professional responsibility current with the issues that are the most prevalent, the rules will better serve practicing attorneys and make it easier for them to protect the interests of their clients in practical ways.\textsuperscript{39}

\textsuperscript{37} Ill. R. of Prof'l Conduct, Preamble.
\textsuperscript{39} ISBA Comm. On Prof'l Conduct, Advisory Op. 96-10.
Illinois Supreme Court Clarifies Owner’s Payment Obligations under the Mechanics Lien Act

BY BENJAMIN W. MEYER

Typically speaking, a property owner enters into an agreement with a general contractor in order to complete a project on or for the owner’s property. Depending on the nature of the project, the general contractor then enters into agreements with certain subcontractors for specific services to be rendered, such as electrical services, framing services, plumbing services, mechanical services, etc. Throughout the course of the project, the general contractor oversees the subcontractors to ensure that they are completing the project in an acceptable manner. Periodically, the general contractor requests partial payment from the property owner to cover his own expenses and to cover the services and expenses of the subcontractors up to that point. Subsequently, the property owner and the general contractor then examine the partially completed work to ensure it is in keeping with the original agreement. If the work is acceptable, the owner pays the general contractor the partial payment, and the general contractor pays the subcontractors.

At the end of the project, barring any unforeseen costs or agreed upon changes to the contract, the property owner pays the general contractor the remaining amount of money originally agreed upon by the parties. In turn, the general contractor then pays the subcontractors the amount of money they originally agreed to in their respective contracts. In this way, the property owner typically is not required to pay more than that for which he bargained. According to the recent Illinois Supreme Court decision in Weather-Tite, Inc. v. University of St. Francis, however, uninformed, careless property owners who contract for services and improvements to be made to their property may find themselves paying up to twice the original contract price.

An Overview of the Mechanics Lien Act. Separated into various sections, the Act prescribes a set of guidelines and procedures that the property owner, general contractor, and subcontractor should follow in order to receive the full protection the Act affords. For example,

1 233 Ill. 2d 385, 909 N.E.2d 830 (2009).

2 See Weather-Tite, Inc. v. U. of St. Francis, 383 Ill. App. 3d 304, 308, 892 N.E.2d 49 (3rd Dist. 2008) (indicating that while compliance with the Act is not mandatory, following the terms of the Act results in the protection of owners, general contractors, and subcontractors).
section 5 of the Act dictates that during the course of the project, a property owner is required to request from the general contractor (who, in turn, is required to provide to the property owner) a sworn statement listing all the subcontractors who have provided services for the property owner, and the amount due or to become due to those subcontractors.\(^3\) In the event that the sworn statement is incorrect, section 24 of the Act instructs the subcontractor on how to protect his financial interests.\(^4\) Section 24 states that a subcontractor may, at any point from his signing the contract with the contractor to within ninety days after completing his work on the project, submit to the property owner a written notice that states the work to be completed and the amount due or to become due to the subcontractor. In *Weather-Tite, Inc.* v. *University of St. Francis*, the Illinois Supreme Court held that a section 5 sworn statement is essentially the same as a section 24 subcontractor’s ninety-day notice—an owner who receives either document is thereby put on notice, and is ordered to segregate a sufficient amount of funds shown as due or to become due the subcontractor.\(^5\)

Once the property owner receives a section 24 or section 5 notice of the subcontractors’ claims, section 27 of the Act dictates that the property owner “[s]hall retain from any money due or to become due the contractor, an amount sufficient to pay all demands that are or will become due such sub-contractor, tradesman, materialman, mechanic, or worker of whose claim he is notified, and shall pay over the same to the parties entitled thereto.”\(^6\) If the owner fails to retain such funds and pays the general contractor the full amount listed in the sworn statement, the owner’s payment to the general contractor is considered illegal and made in violation of the subcontractors’ rights.\(^7\) At this point, section 21(d) activates, stating that the subcontractor, “[s]hall have a lien therefor to the extent of the amount named in such statements or notice,”\(^8\) against the owner’s property, materials, fixtures, apparatus or machinery furnished, etc.\(^9\) In effect, the lien will force the property owner to again pay the subcontractor the amount owed even if the property owner already paid the general contractor the full contract price.\(^10\)

**Facts of Weather-Tite, Inc. v. University of St. Francis.** In March of 2005, The University of St. Francis (St. Francis) hired Stonitsch Construction, Inc. (Stonitsch) as the general contractor to remodel one of its dormitories. Stonitsch then subcontracted with Excel Electric, Inc. (Excel) to perform the necessary electrical work. As work progressed, St. Francis, in accordance with section 5 of the Act, requested periodic sworn statements from Stonitsch listing the amounts owed to the subcontractors for work completed and the amount of money due to the subcontractors after that particular payment was made; Stonitsch, in turn, provided St. Francis with the sworn statements.\(^11\)

Relying on the sworn statements, St. Francis paid Stonitsch the full amount listed. After receiving payment in full according to the first four sworn statements, Stonitsch paid the subcontractors their respective portions. Upon completion of the project, Stonitsch submitted in December of 2005 its fifth and final sworn statement listing the remaining amount of money due: $458,237.56, of which $130,948.48 was due to Excel. Relying on this sworn statement as it had done the previous four times, St. Francis submitted full payment electronically to Stonitsch’s bank in January of 2006. Upon receipt of the money, however, Stonitsch’s bank exercised its right of setoff, and applied the money to an outstanding debt of Stonitsch, thus effectively preventing Stonitsch from paying the subcontractors.\(^12\)

Realizing that they were not going to receive their payments from Stonitsch, several subcontractors served

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\(^3\) 770 Ill. Comp. Stat. 60/5(a) (West, Westlaw through 2009 P.A. 96-875).

\(^4\) See § 60/24


\(^6\) § 60/27.

\(^7\) § 60/27.

\(^8\) § 60/21(d).

\(^9\) § 60/21(a).

\(^10\) *Weather-Tite, Inc.*, 383 Ill. App. 3d at 307.


\(^12\) *Weather-Tite, Inc.*, 383 Ill. App. 3d at 306.

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notices and claims for mechanics liens on St. Francis for the work they had completed on the project. Excel served notice and claim for a lien on St. Francis in February of 2006, and in June of that year moved to foreclose the lien.

At the trial level, St. Francis focused on section 5 of the Act to the exclusion of the other sections, and argued that, pursuant to section 5, St. Francis rightly relied on the general contractor’s sworn statement when it paid the remainder of the money owed. The trial court agreed with St. Francis’ arguments, and granted St. Francis’ motion for summary judgment, holding that Excel did not have an enforceable mechanics lien.

In reaching its decision, the trial court relied on Luczak Brothers, Inc. v. Generes, concluding that Excel was only entitled to a lien in the amount shown to become due on the last sworn statement for which payment was made. In St. Francis’ case, the sworn statement at issue was the last one, therefore, there was no amount to become due after St. Francis paid the total amount to Stonitsch. Moreover, because St. Francis did not receive Excel’s section 24 notice of lien and claim until after St. Francis had made final payment to Stonitsch, the court held Excel did not have an enforceable mechanic’s lien against St. Francis, and therefore must look to Stonitsch for its payment.

The appellate court reversed the trial court’s judgment, however, and remanded the case back down for entry granting Excel’s motion for summary judgment, holding that Excel did have an enforceable mechanics lien against St. Francis. In so doing, the appellate court pointed out that the trial court had misquoted Luczak. The trial court quoted the Luczak court as stating that the subcontractor was, “[E]ntitled to a lien only in the amount shown to become due on the last statement for which payment was made. . . .” The appellate court pointed out that the Luczak court had actually stated that the subcontractors were, “[E]ntitled to a lien only in the amount shown to become due on the last statement for which payment was made.” In this way, the appellate court held that Excel was entitled to a lien for $130,948.48 as shown to become due on the last sworn statement, as opposed to a lien for $0 as shown to become due on the last sworn statement.

Additionally, the appellate court relied on Contractors’ Ready-Mix, Inc. v. Earl Given Construction Company, Inc. in which First Midwest Bank (First Midwest) contracted with Earl Given Construction (Given) to build a Wal-Mart. Given then subcontracted with Ready-Mix, Inc. (Ready-Mix) for services and materials. After Ready-Mix delivered materials and services to the building site, Given submitted a sworn statement to First Midwest indicating that Ready-Mix was owed $127,25, when in reality, Ready-Mix was owed $77,102.77. Relying on the sworn statement, First Midwest paid Given the full amount listed. Ready-Mix subsequently submitted to First Midwest a section 24 notice listing the actual amount due. The appellate court held that Ready-Mix was only entitled to a lien in the amount listed on the sworn statement--$127,25--because it was this amount that First Midwest had failed to withhold. The court additionally held that since Ready-Mix’s section 24 notice came after First Midwest’s payment had already been made, the payment was not rendered wrongful by that notice.

The Illinois Supreme Court’s Decision. Pointing out that the Mechanics Lien Act should be “[R]ead as a whole and construed so that no part of it is rendered meaningless or superfluous,” the Illinois Supreme Court affirmed the decision of the appellate court. The supreme court stated that, “The purpose of the Act is to permit a lien on premises when the owner has received a benefit, and the furnishing of labor and materials have increased the value or improved the condition of the property. . . . In other words, the purpose of the Act is to protect contractors and subcontractors providing labor and materials for the benefit of an owner’s property.” In this way, the Act

13 Weather-Tite, Inc., 233 Ill. 2d at 388.
14 Weather-Tite, Inc., 233 Ill. App. 3d at 306.
15 See, e.g., 770 Ill. Comp. Stat. 60/24(a) (West, Westlaw through 2009 P.A. 96-875) (stating that “Such [section 24] notice shall not be necessary when the [section 5] sworn statement of the contractor or subcontractor provided for herein shall serve to give the owner notice of the amount due and to whom due . . . .”).
16 Weather-Tite, Inc., 233 Ill. 2d at 30.
17 Id. at 388.
19 Weather-Tite, Inc., 233 Ill. App. 3d at 306.
20 Weather-Tite, Inc., 383 Ill. App. 3d at 306-07.
21 Weather-Tite, Inc., 383 Ill. App. 3d at 306-07.
22 Weather-Tite, Inc., 383 Ill. App. at 310.
24 Weather-Tite, Inc., 383 Ill. App. 3d at 310.
26 Id. at 452-53.
27 Id. at 454; see 770 Ill. Comp. Stat. 60/24(a) (West, Westlaw through 2009 P.A. 96-875) (stating “[W]here such [section 5 sworn] statement is incorrect as to the amount, the subcontractor or material man named shall be protected to the extent of the amount named therein as due or to become due to him or her.”).
29 Weather-Tite, Inc., 233 Ill. 2d at 390.
30 Weather-Tite, Inc., 233 Ill. 2d at 387.
31 Weather-Tite, Inc., 233 Ill. 2d at 391.
balances the rights and duties of owners, general contractors, and subcontractors alike.\textsuperscript{32}

Based on the Illinois Legislature’s original intent in framing the Act, the Illinois Supreme Court then prescribed an orderly method to follow during the course of the project to protect subcontractors’ claims. First, the owner and general contractor enter into an agreement for the work to be completed. Second, during the course of the project, the general contractor submits a section 5 sworn statement to the property owner that must list all subcontractors and the amount due or to become due to them. Third, section 24 requires that when the section 5 sworn statement lists an amount due or to become due to a subcontractor, the property owner must retain sufficient funds to pay the subcontractor. Finally, in accord with section 27, a property owner must make payment to the subcontractor upon notice of a subcontractor claim as listed in a section 5 sworn statement.\textsuperscript{33}

The court went on to hold that a section 5 sworn statement does not simply require an owner to pay the general contractor and the listed subcontractors. Rather, section 5 states that the owner has a duty to require the sworn statement before paying the general contractor, which puts the owner on notice of any subcontractor claims.\textsuperscript{34}

\textbf{How a Property Owner May Protect Himself.} In light of the \textit{Weather-Tite, Inc.} decision, it is apparent that a property owner needs to make informed decisions when undertaking a project. On the one hand, it doesn’t seem realistic to expect a property owner to request a credit report from every prospective general contractor to be sure that the contractor is diligently paying his bills. Nor does it seem reasonable that a property owner should, when taking out a bank loan for the planned project, request double the portion of money actually needed for the project in order to protect himself against the possibility that the contractor will fail to give the subcontractors their portion of the payment.

On the other hand, it wouldn’t be practical to completely get rid of the role of the general contractor; the general contractor is the liaison between the property owner and the subcontractors. The general contractor monitors the quality and substance of the subcontractors’ work, and relays to the owner when the subcontractors are entitled to another portion of earnings. It would be somewhat dangerous for the property owner—a layperson—to take on this role of overseeing the subcontractors’ work; the property owner doesn’t have the expertise to be sure the subcontractor is doing that which he claims. Yet, how should a property owner proceed in order to protect himself from having to pay more than the contracted price for the project?

The simple solution to the problem would be for the property owner to pay the subcontractors directly as opposed to relying on the general contractor to responsibly pay them. The property owner would still employ a general contractor to manage the project and oversee the subcontractors; however, the general contractor would no longer be the conduit for payment. This procedure would still be in accordance with section 5 of the Act, which dictates that the owner is required to request from the general contractor a sworn statement listing all parties who have furnished services to the project, and the general contractor is required, in turn, to furnish that statement to the owner.\textsuperscript{35} Moreover, contrary to St. Francis’ argument, the purpose of section 5 is not simply to prescribe an orderly method for the property owner to pay the general contractor the money owed to the subcontractors.\textsuperscript{36} In fact, nowhere in section 5 does it say that the property owner \textit{must} or \textit{should} pay the general contractor the money owed to the subcontractors. Rather, section 5 states that before the property owner pays to the contractor or his order any moneys or consideration due or to become due, the owner shall request the statement

\begin{itemize}
    \item \textsuperscript{32} \textit{Alliance Steel, Inc.} v. \textit{Piercy}, 277 Ill. App. 3d 632, 635, 660 N.E.2d 1341 (4th Dist. 1996).
    \item \textsuperscript{33} \textit{Weather-Tite, Inc.}, 233 Ill. 2d at 393.
    \item \textsuperscript{34} \textit{Weather-Tite, Inc.}, 233 Ill. 2d at 390.
    \item \textsuperscript{35} 770 Ill. Comp. Stat. 60/5(a) (West, Westlaw through 2009 P.A. 96-875).
    \item \textsuperscript{36} \textit{Weather-Tite, Inc.}, 233 Ill. 2d at 393.
\end{itemize}
and the general contractor shall provide the statement.\textsuperscript{37} Additionally, an owner can adequately protect himself from having to pay double by following the instructions of the Act and the court.\textsuperscript{38} For instance, the appellate court has made it clear that the property owner acts at his own peril who, after being put on proper notice, pays the general contractor the full amount due without retaining sufficient funds for the subcontractors’ claims.\textsuperscript{39} Should the property owner insist on paying the general contractor the money owed the subcontractors, section 21(c) of the Act and the supreme court instruct the property owner to ask for lien waivers from the subcontractors before making payment to the general contractor.\textsuperscript{40} The supreme court’s phrasing of the instruction—“[T]he owner can require a lien waiver by every subcontractor when paying the contractor”\textsuperscript{41}—suggests an arms-length transaction—the property owner hands the check to the general contractor as the general contractor hands the lien waivers to the property owner. Note, however, section 21.02 of the Act mandates that whoever requests the lien waiver in exchange for payment must hold in trust the funds subject to that lien waiver.\textsuperscript{42} Therefore, it would seem prudent for the property owner to request lien waivers from the general contractor who would then request lien waivers from the individual subcontractors. Otherwise, it would again seem necessary for the property owner to retain sufficient funds in case the general contractor fails to pay the subcontractors.

Furthermore, property owners should know that subcontractors have duties to the property owner under the Act. Section 21 and 25 both require a subcontractor working on an owner-occupied single family residence, to inform the property owner within sixty days of his first day on the job that he, the subcontractor, is performing services for the property owner.\textsuperscript{43} In this way, the property owner is notified that the subcontractor’s name should appear on the section 5 statement provided by the general contractor. Those same sections of the Act also require the subcontractor to inform the property owner that he should request lien waivers from the general contractor before making any payments for services rendered. Should the subcontractor fail to do so within sixty days of the start of work, he is still entitled to a lien against the property owner, but only to the extent that the property owner has not been prejudiced by payments made before he received notice of the subcontractor’s provision of services to his property.

In the same vein, section 27 of the Act and the appellate court answer the question regarding what would happen if the general contractor submits to the property owner a section 5 sworn statement that either omits a subcontractor’s name or mistakenly lists the wrong amount due to the subcontractor.\textsuperscript{44} In such a case, the appellate court stated that, according to section 24 of the Act, the subcontractor must notify the owner in writing of its outstanding claim no later than ninety days after the subcontractor completes his work,\textsuperscript{45} and before the property owner makes payment according to the mistaken sworn statement.\textsuperscript{46} If the property owner receives a section 24 notice before making payment, the property owner must retain enough funds to pay the subcontractor, otherwise, the subcontractor may rightfully foreclose its mechanic’s lien against the owner.\textsuperscript{47}

\textbf{Conclusion.} The goal of the Mechanics Lien Act is to reach a fair result in each case. Losses are not always

\textsuperscript{37} See § 60/5(a).
\textsuperscript{38} See Weather-Tite, Inc., 383 Ill. App. 3d at 308.
\textsuperscript{40} § 60/21.02(a); Weather-Tite, Inc., 233 Ill. 2d at 393.
\textsuperscript{41} Weather-Tite, Inc., 233 Ill. 2d at 393.
\textsuperscript{42} § 60/21.02(a).
\textsuperscript{43} See § 60/5(b)(ii) & 21(c).
\textsuperscript{44} 770 Ill. Comp. Stat. 60/27 (West, Westlaw through 2009 P.A. 96-875) (providing “[S]uch omission is not made with the knowledge or collusion of the owner.”); Weather-Tite, Inc., 383 Ill. App. 3d at 307.
\textsuperscript{45} § 60/24(a); Weather-Tite, Inc., 383 Ill. App. 3d at 307.
\textsuperscript{47} See Weather-Tite, Inc., 383 Ill. App. 3d at 308.
placed on property owners, nor are losses always placed on subcontractors. However, it is important for a property owner to protect himself by knowing and understanding his rights and responsibilities under the Act, particularly when the property owner is about to make payment to the general contractor. Weather-Tite, Inc. v. University of St. Francis made clear how a property owner should proceed when he receives a section 5 sworn statement from the general contractor. Unless the property owner receives lien waivers from the general contractor and/or subcontractors, the property owner is required to keep sufficient funds in reserve for the subcontractors’ claims; failing to retain these funds would be illegal and against the rights of the subcontractors, and allows the subcontractor to foreclose its mechanics lien against the property owner.

48 Contractors’ Ready-Mix, Inc., 242 Ill. App. 3d at 459 (Cook, J., concurring).
49 Weather-Tite, Inc., 233 Ill. 2d at 393.
50 Weather-Tite, Inc., 233 Ill. 2d at 392-93.

**Sidebar: Criminal Law**

**8 U.S.C. §1324 Applies to Employees.** U.S. v. Yu Tian Li, 2010 WL 3001215 (7th Cir. 2010): Restaurant owner conviction for harboring aliens for commercial advantage or private financial gain affirmed. The Seventh Circuit found that “[A]lthough [8 U.S.C.] §1324 is used to prosecute people who smuggle aliens into the United States for financial gain, it also covers those who realize financial gain by hiring illegal aliens.” Moreover the court found the forfeiture of the defendant’s home in light of a sentence for two concurrent 15-month terms of imprisonment and $10,000 fine “not so grossly disproportionate to the gravity of his convictions as to be excessive.”

**DWLR/DUI.** People v. Nunez, 236 Ill.2d 488, 925 N.E.2d 1083, 338 Ill. Dec. 877 (2010): 625 ILCS 5/11-501(b-1)(2) specifically provides that the penalty for a DWLR conviction is in addition to any penalty for an aggravated DUI conviction, noting that the legislature clearly expressed separate penalties for DWLR and DUI convictions. Consequently, the “one-act, one-crime” theory is not applicable. Moreover, the court held that DWLR is not a lesser-included offense of aggravated DUI. The fact that the defendant’s driver license was revoked when he drove under the influence of drugs is not an element of the DUI offense. Rather, this fact served to enhance the sentence classification applicable to the DUI offense from a misdemeanor to a Class 3 Felony.

**State’s Attorney Conduct/Fair Trial.** People v. Bickerstaff, 2010 WL 3063184 (2nd Dist. 2010): Defendant claimed State’s Attorney candidate’s extrajudicial statements about the case prejudiced his ability to obtain a fair trial. The Second District found the States Attorney’s conduct was “directed entirely at criticizing his predecessor, and there is no evidence, or argument, that [he] personally instigated the case or entangled himself in it to an extent that exceeded his role as a prosecutor.... the trial court did not abuse its discretion when it determined that defendant did not demonstrate that [his] conduct created an appearance of impropriety sufficient to compel appointment of a special prosecutor.”
Douglas Coupland, author of Generation A, a new book concerning the unprecedented burst of technology and America’s reaction, commented:

I remember the seventies; all we really did in society was go from rotary phones to push-button phones. And then the eighties came and we had music videos. And then the nineties and the Internet. We have absorbed so much in the last three years; it’s crazy. It’s almost like we want a year out to absorb it all, but we can’t. And it’s probably going to get thicker and faster.¹

Indeed, technology has brought us portable, private and instant information. One glance at an iPhone, Blackberry or other handheld Internet device can bring us an answer to a legal question, allow us to post a rant about politics, or receive a “tweet” from a friend. The quick, unnoticeable “glance” happens while we are waiting for the bus, standing in line at the grocery store, and even while we are sitting in the jury box.

Portable, handheld Internet devices are a new technology that could quickly threaten the centuries of careful thought which has slowly shaped our justice system. Paired with the rush of popularity of social networking sites such as Facebook, MySpace, and LinkedIn, these pocket-sized devices have a literal world of information contained within them. First, attorneys have new windows into their jurors’ instantly updatable personal information. Second, juror Internet use brought us the first “Google mistrial,” which allowed damaging hearsay into the courtroom. And third, the small, silent devices have allowed the modern juror to communicate anywhere, effectively opening the protected deliberation room to the world’s influences.

Attorneys now have a powerful and portable tool to access jurors’ personal information during voir dire. Trial consultant Jeffrey Frederick scours Facebook and MySpace during voir dire to garner personal information about potential jurors to accompany his more traditional written and oral questionnaires.² Now that Facebook has reached 500 million users,³ it is easier than ever to find very personal information about prospective jurors – such as their race, religion, politics, and philosophy – which might otherwise be off-limits during traditional voir dire.⁴ Since Batson v. Kentucky, courts are very hesitant to allow attorneys to even ask about such taboo topics.⁵ However, social networking users often display badges of political parties, list their practicing religion, and detail their ethnicity.

While preparing for one trial, for example, Frederick ran a quick search and within minutes, found one juror had been involved in an accident almost identical to the plaintiff’s accident.⁶ In another case, an Internet search revealed a juror had won the lottery.⁷ Since Frederick thought the juror could subsequently “treat the case like a lottery,” he recommended the defense counsel strike the juror for cause.⁸ Furthermore, personal information found on social networking sites could potentially rehabilitate or contradict the dishonest juror.⁹ As Frederick discovered, sites like Facebook

³ Just a year ago, the total was less than half of that. Shane McGlaun, Juror Removed from Jury Over Facebook Post, Daily Tech, Feb. 2, 2009, http://www.dailytech.com/Juror-Removed-From-Jury-Over-Facebook-Post/article14125.htm
⁹ See also Gregoire v. City of Oak Harbor, No. 58544-4-I, 2008 WL 3138044 (Wash. App. Div. 1 Oct. 29, 2007) (although finding no juror misconduct, an Internet search after voir dire revealed a blog by a juror which detailed specific experiences that he lied about in the jury questionnaire).
and MySpace are indeed powerful tools, which quickly allow attorneys and trial consultants access into jurors’ private life and candid thoughts. Even in a courtroom, an attorney equipped with the popular iPhone can simply open the free Facebook “app” and instantly and discreetly discover a potential jury member is a cancer survivor of Chinese descent, adopted by African American parents, involved in the N.R.A. and a practicing Buddhist who posts Fox news stories on his personal “feed” – an interesting juror indeed!

As attorneys and trial consultants search for hidden biases among prospective jurors, they should be aware that many of the questions they need answers to are right there in their pocket, and on their cell phone.

The “Google mistrial” has the potential to become a major problem in tomorrow’s courtroom. While the Sixth Amendment guarantees a trial by an unbiased and unprejudiced jury,10 the use of a handheld Internet device is a new form of misconduct because it could produce prejudice.11 Recently, some jurors using handheld Internet devices have crossed the line and disrupted the delicate Federal Rules of Evidence12 when they “Google-searched” relevant aspects of the case while at trial.13 Judges must now worry about what the New York Times has dubbed the “Google mistrial.”14 Curious jurors are beginning to use iPhones during the proceedings to search defendant’s names, crime scene locations, and news archives about the case.15

In a particularly disturbing instance from the Eastern District of New York, in March of 2009, a mistrial was declared after nine of twelve jury members admitted to doing research on the case.16 When asked about why they were “Googling” the case during trial, one juror simply said, “I was curious.”17 This curiosity could be hard to kill.18 Internet searches are now a common occurrence in life; information and answers — often unverified — are one click away.19 Handheld Internet devices opened a “Pandora’s box” that jurors will find hard to close.

As Douglas L. Keene & Rita R. Handrich from The Jury Expert report: “[I]nstructing jurors to avoid internet activity that touches on the case issues is no more effective than a court instruction to be fair-minded.”20 Professor Olin Guy Wellborn from the University of Texas and author of Courtroom Evidence Handbook shares their fears: “The rules of evidence, developed over centuries of experience are intended to ensure the facts presented to the jury have been scrutinized by both parities of the lawsuit. That is how the adversary system is designed. You lose all that when the jurors go out on their own.”21

Keene & Handrich have suggested some solutions to this problem, which include: revised jury instructions, jurors’ signed declarations, emphasized instructions indicating it is against the law and punishable to “Google” during trial, and even allowing juror questioning to satisfy their curiosity.22 In fact, the San Francisco Superior Court is proposing a rule to take effect January 1, 2010, which reads: “You may not blog, Tweet, or use the Internet to obtain or share information.”23 This rule is in response to almost 600 jurors

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10 U.S. CONST. amend. VI.
12 See Fed. R. Evid. 403 (prohibiting otherwise relevant evidence if outweighed by substantial prejudice).
17 Douglas L. Keene & Rita R. Handrich, Online and Wired for Justice: Why Jurors Turn to the Internet (the “Google mistrial”), THE JURY EXPERT, 21(6), 14, 16 (Nov. 2009).
18 See also United States v. Siegelman, 561 F.3d 1215 (11th Cir. 2009) (finding juror’s exposure to court’s Web site listing a second unredacted indictment against the defendant was harmless).
20 Douglas L. Keene & Rita R. Handrich, Online and Wired for Justice: Why Jurors Turn to the Internet (the “Google mistrial”), THE JURY EXPERT, 21(6), 20 (Nov. 2009).
22 Douglas L. Keene & Rita R. Handrich, Online and Wired for Justice: Why Jurors Turn to the Internet (the “Google mistrial”), THE JURY EXPERT, 21(6), 20-21 (Nov. 2009).
23 Eric Sinrod, Jurors: Keep Your E-Fingers to Yourselves, TECHNOLOGIST: THE
being excused at once, after many admitted to doing Internet research about the case.24

Only time will tell how effective San Francisco’s limiting instruction will be, in the meantime courts must simply watch for the “surfing juror” and remind them it is unlawful to seek outside information. Should jurors continue to ignore this fundamental rule, there could be a major breakdown of the jury system and the Federal Rules of Evidence.

“Live feed” features, found in sites like Facebook and Twitter, influence jurors’ decisions. In today’s world the jury deliberation room is merely closed symbolically to the outside world. In reality, every juror with a handheld Internet device is open to the influence of the world, and sometimes in active conversation with the community.25 Some jurors have actually been using the “live feed” feature of sites like Facebook and Twitter to post up-to-the-minute “status reports” regarding their personal experiences.26 In fact, during a recent child abduction and sex abuse trial in England, an undecided juror actually posted details about the case and then created an online “poll” where the public could vote for a verdict!27

Blogging jurors often do not think they are even doing anything wrong. In United States v. Fumo – a Pennsylvania state senator corruption trial, covered extensively by the media – a juror posted via Twitter and Facebook, stating: “Stay tuned for the big announcement on Monday everyone!”28 Even though the juror was in a Philadelphia “network” with 600,000 subscribers potentially viewing his update, the Eastern District of Pennsylvania held these blogs amounted to harmless conduct because they were mere ramblings and a unilateral conversation with the outside world.29

In a similar case, The Supreme Court of New Hampshire found a harmless error when a juror posted: “I get to listen to the local riff-raff try and convince me of their innocence.”30

The comments posted were too vague and again did not solicit an answer or opinion from someone outside the jury box.31

It seems the present blogging cases have been mostly unilateral, meaning nobody has responded to the jurors’ postings.32 However, as trial blogging becomes easier due to handheld Internet devices, the time will inevitably come when Facebook “friends” or Twitter “followers” will start blogging back. When juror communication becomes bilateral, and the juror is actually getting input from an external source, those cases should be decided differently. These bilateral blogs could produce the type of prejudice, bias, and outside influence the Sixth Amendment protects a defendant against.33

In the meantime, the courts are lenient for reasons perhaps best summed up by Supreme Court of California Justice Arabian: “Jurors are not automatons. They are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias.”34

Conclusion. Blackberries, iPhones, and other handheld Internet devices compounded with social networking sites and live feeds are changing voir dire and juror behavior at trial. Courts are trying to contend with the influx of instant, portable, and discrete information, while the world is trying to “find new ways of surviving – psychologically – during all this change and turmoil.”35

Of all of the solutions suggested – at least for the time being – one may stand out. Simply ask jurors in voir dire if they could honestly turn off their iPhone throughout the duration of the entire trial.36 As Peter Carter, partner at Dorsey & Whitney, discovered in a recent voir dire: “Probably six to ten potential jurors said they could never abide by that.”37 Perhaps it is comforting to know, that as complex as the future may be, there will still be one simple question that will find legitimate challenge for cause before the trouble ever starts. □

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25 Douglas L. Keene & Rita R. Handrich, Online and Wired for Justice: Why Jurors Turn to the Internet (the “Google mistrial”), The JURY EXPERT, 216(6), 16 (Nov. 2009). Of all of the solutions suggested – at least for the time being – one may stand out. Simply ask jurors in voir dire if they could honestly turn off their iPhone throughout the duration of the entire trial.36 As Peter Carter, partner at Dorsey & Whitney, discovered in a recent voir dire: “Probably six to ten potential jurors said they could never abide by that.”37 Perhaps it is comforting to know, that as complex as the future may be, there will still be one simple question that will find legitimate challenge for cause before the trouble ever starts. □
26 Douglas L. Keene & Rita R. Handrich, Online and Wired for Justice: Why Jurors Turn to the Internet (the “Google mistrial”), The JURY EXPERT, 216(6), 16 (Nov. 2009).
27 Douglas L. Keene & Rita R. Handrich, Online and Wired for Justice: Why Jurors Turn to the Internet (the “Google mistrial”), The JURY EXPERT, 216(6), 16 (Nov. 2009).
29 United States v. Fumo, No. 06-319, 2009 WL 1688482, at *64 (E.D. Pa June 17, 2009).
32 See also People v. McNeely, No. D052606, 2009 WL 428561 (Cal. App. Feb. 23, 2009) (nonpublished/nonciteable opinion ultimately finding no prejudice after a juror lied during voir dire and the truth was discovered on a blog).
33 U.S. Const. amend. VI.
36 Douglas L. Keene & Rita R. Handrich, Online and Wired for Justice: Why Jurors Turn to the Internet (the “Google mistrial”), The JURY EXPERT, 216(6), 20 (Nov. 2009).
ILLINOIS SENIORS DESERVE A “FORGIVENESS FACTOR”

Throughout history, our culture has lauded senior citizens who help their families and charities. Suddenly, in 2005, the federal government—and soon, Illinois—began to punish “good senior citizens” who have helped their children, grandchildren, and religious organizations. During this ongoing recession, Illinois senior citizens have given millions of dollars to provide help and support to the younger generation to pay for medical expenses, mortgage payments, and grocery bills. Illinois seniors should not be punished for “doing the right thing”!

Illinois seniors need a “forgiveness factor” built into any new Medicaid regulations.

Long-term care has always been a woman’s nightmare, because women typically outlive their spouses by about seven years. The nightmare could get worse if the Illinois Department of Healthcare and Family Services chooses to adopt new and unfair “DRA rules” for Medicaid and nursing homes. As background: The DRA imposes harsh penalties against seniors who gift money to family members and charities. The penalty period for ineligibility for Medicaid services will exist for five years AFTER the date of a gift. Five years is a very long time in the life of a senior citizen! A gift of money today could cause a senior citizen to be penalized and be ineligible to receive Medicaid nursing home payments until late 2015—how frightening!

Consider this typical story. During our current and ongoing recession, an adult son of Henry and Betty Senior faces the foreclosure of his family’s home. He comes to Henry and Betty and asks for $10,000 to help pay the mortgage that is in default. Henry and Betty, who love their son and daughter-in-law and grandchildren, choose to give them $10,000 to save their home. Unfortunately, if either Henry or Betty for some reason needs nursing home benefits prior to June of 2015, they will be denied at or more months of nursing home payments. They will be ‘punished’ for saving their son’s home—even if Henry and Betty have become broke and incapacitated!

We ask that Governor Patrick Quinn and Illinois Healthcare and Family Services Director Julie Hamos work diligently and transparently with elder law attorneys, The Alzheimer’s Association (and other long term care groups), and religious organizations to do the right thing for Illinois’ frail senior citizens.
The Elusive Doctrine of Stare Decisis

BY WILLIAM HUTUL AND JOSEPH P. CALLAHAN

Oliver Wendell Holmes once quipped: “It is the business of lawyers to know the law.” Abraham Lincoln was someone who seemed to know the law. Yet Lincoln once argued a case before the Illinois Supreme Court during its morning session and then argued another case in the afternoon session, advocating a completely diametrical and contrary position to the stance he had taken earlier that day. The justices asked Mr. Lincoln how he could support two such opposing positions between the two sessions. Lincoln’s response was “The beauty of the law is its flexibility.”

Given the dichotomies between these two legal truisms, the task of being a lawyer (or a judge) is much more overwhelming and difficult than most members of the public could ever imagine. One of the most difficult tasks of being a lawyer is keeping current with, and maintaining a good working knowledge of, “the law” as it develops. The proverbial term “the law” is used here in its broadest sense, as it includes many things beyond case law and statutes. Anyone practicing law will acknowledge that staying abreast of the many-faceted and changing nature of the law is a very difficult task. In any particular area of the law there are a few distinguished and talented members of the bar (both lawyers and judges) who rise above the others, chiefly by their comprehensive knowledge of the law and by their practical skills applying that knowledge. It is refreshing to encounter a lawyer who actually knows what he or she is talking about and/or writing about. But why is this? One of the chief reasons is that the law is elusive, and understanding “the law” in any area of practice is much easier said than done. The lawyers (and judges) who succeed in staying knowledgeable about the law are those we admire most and call upon most often for help, when it’s needed.

Many lawyers become cynical over the years and find that the grind of reading case law continuously to learn the law’s nuances and finer points seems useless, tiresome, and a waste of valuable time. The legal system often appears to run like a bull dozer anyway, grinding out cases with “broad stroke” applications of the law. So why waste time with all the finer points of the law?

Given the ever-changing nuances of the law, one of the fundamental principles the practicing lawyer can take comfort in is the doctrine of Stare Decisis. Stare Decisis is translated “to abide by, or to adhere to, decided cases.” Stare Decisis expresses the policy of the courts to stand by precedent and to not disturb settled points. It is also the means the courts use to ensure that the law will not change erratically but will develop in a principled and intelligible fashion.

A general review of the doctrine of stare decisis and its primary rules can help the practicing lawyer and sitting judge to have an easier time of: reading the case law; understanding it better; and actually enjoying it more, as many of us enjoyed learning the law through the case law system back in law school. Although stare decisis provides that “the decision” may stand, the question becomes what does the decision stand for and more importantly for whom?

What Is Stare Decisis? The doctrine of stare decisis is one of the bedrocks of the law, and we learned early in law school that the law is founded on the belief that people are entitled to place reliance on established principles of the law found in the case law decisions with “assurance that

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they will not be overruled from one term of the court to the next term,” and that the courts “will not arrogate to themselves legislative powers.”

Oliver Wendell Holmes wrote in *M.K & T Railroad Co. v. May:* “It must be remembered that legislatures are ultimate guardians of the liberties …of the people in quite as great a degree as the courts.” The statutory law and the case law precedents cannot be ignored by the courts, or judicial review is inevitable. As such, “the law” is not merely the personal opinions of the judge a case is heard before, but a system of “objective rules and standards” that removes the system of justice from “a chaotic exercise of judicial discretions and indiscretions.” This is an accepted principle in our concept of law in our society. When lawyers urge judges to simply ignore the law, or to overrule the law, and re-write case law precedent, the doctrine of *stare decisis* is there and requires “strict adherence to prior decisions” such that the courts “will not depart from well-settled principles of law absent “good cause” or “compelling reasons.”

However, the doctrine of *stare decisis* is not an inflexible rule, requiring blind adherence to case precedent. When compelling reasons require the court to deviate from precedent, the court should not adhere to prior decisions.

The doctrine of *stare decisis* means that: “A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.” “*Stare decisis* then is the policy to stand by precedent, and term is but an abbreviation of *stare decisis et non quieta movere*—to stand and adhere to decisions and not disturb what is settled. Consider the word *decisis.* The word literally means, literally and legally “the decision.” Nor is it the doctrine of *stare decisis,* “it is not to stand by or keep to what was said.” Nor is the doctrine *stare rationibus decidenti*—“to keep to the rationes decidendi of past cases.” Rather under the doctrine of *stare decisis* a case is important only for what it decides—for the “what” and not for the “why” nor the “how.” Insofar as precedent is concerned, *stare decisis* is important only for the decision, i.e. for the detailed legal consequence following a detailed set of facts.”

The doctrine of *stare decisis* is at the core of the case law system, and it is at the core of knowing and understanding “the law” in its broadest sense, as all of “the law” comes to bear in the cases tried in the courts. If a lawyer is to predict what a judge is likely to do, and what will determine the outcome of the case, he must have a working knowledge of the doctrine of *stare decisis*.

**An Illinois Perspective.** The Illinois Supreme Court recognizes the doctrine to “express the policy of the courts to stand by precedents and not to disturb the settled points.” The court held that “[w]hen a question has been deliberately examined and decided, it should be considered settled and closed to further argument.” Yet the Illinois Supreme Court recognizes that the doctrine is not an “inexorable command.” The Court stated “Good cause to depart from *Stare Decisis* also exists

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3 Chicago Title and Trust Co. v. Shellberger, 399 Ill. 220, 77 N.E.2d 675 (1948).
4 194 U.S. 267, 270 (1904).
6 Molitor v. Kaneland Community Unit District No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1960).
7 Allegheny General Hospital v. NLRB, 608 F.2d 965, 969-970 (3rd Cir. 1979).
8 United States Internal Revenue Service v. Osbourne, 76 F.3d 306 (9th Cir. 1996).
11 Colon, 225 Ill.2d at 146.
when governing decisions are unworkable or badly reasoned.\textsuperscript{12}

There are also other exceptions to the concept of \textit{Stare Decisis}. For instance, the concept of \textit{Stare Decisis} will not stand if it can be shown to cause serious detriment of prejudice to the public interest.\textsuperscript{13} With that in mind, established (previous) decisions can be overturned only on a showing of good cause.\textsuperscript{14} \textit{Stare Decisis} is not an absolute barrier to reconsideration of prior decisions or principles where adequate cause is shown or compelling conditions exist.

Illinois recognizes how such a decision can be overturned. Once the Illinois Supreme Court has spoken upon a particular subject or issue, its pronouncement is compelling. Only the Supreme Court can overrule or modify its previous opinions and lower courts are bound by such decisions.\textsuperscript{15} Yet the application of this concept as seen below is anything but uniform.

\textbf{For What Does the Decision Stand?} In analyzing the doctrine of \textit{stare decisis} and how it applies to a particular holding of a court, the basic tenet provides that “where the Supreme Court has declared the law on any point, it alone can overturn and modify its previous opinion, and the lower judicial tribunals are bound by such decision and it is the duty of such lower tribunals to follow such cases in similar cases.\textsuperscript{16}

The doctrine of precedent, or \textit{stare decisis}, requires that subsequent courts, faced with a set of facts indistinguishable in any material particular from those in the precedent case, must apply the \textit{ratio decidendi} of a case, or the principle of law which is the basis of the actual decision of the case.\textsuperscript{17}

Of course, there is much debate about when the facts of a case are materially indistinguishable or distinguishable from the precedent case, and this is a source of much argument on the application of case law to any particular situation.

Some would argue that there are no two cases that are truly similar or identical in their material facts and that all cases are unique, involving differing factual circumstances in one manner or another. These practitioners will argue strongly against a case cited to pin them down on the law that “a judicial opinion can only be read as applicable to the facts involved, and it is authority only for what was actually decided.”\textsuperscript{18} This is a true statement of the law. However, all case precedent is not distinguishable. The precedent case does not have to be identical in every manner to be binding precedent or persuasive precedent.

It is also well settled that “the precedential scope of a decision is limited to the facts before the court.”\textsuperscript{19} This rule of law in the doctrine of \textit{stare decisis} renders comments by the court in a case precedent, as to facts not essential to the decision, as \textit{obiter dictum}. “A court may not speak authoritatively upon questions not involved in the litigation.”\textsuperscript{20} An expression or statement by a court on a matter not integral to the case, nor necessary to a decision, is \textit{obiter dictum}- a mere passing comment which is not binding authority or precedent within the rule of \textit{stare decisis}. However, it is interesting to watch such jaundiced and cynical lawyers argue that the precedent case they have cited is identical and on “all fours” with the case before the court, and therefore controlling case precedent.

It is clear from any review of the cases on the doctrine of \textit{stare decisis} that all inferior Illinois courts are bound to follow the decisions of the Illinois Supreme Court.\textsuperscript{21} Illinois Supreme Court decisions are binding on all lower courts in the State of Illinois.\textsuperscript{22} This indicates that every practitioner or judge should read and digest all of the rulings of the Illinois Supreme Court, and especially the rulings that relate to their area of practice or concentration.

If your reading is limited due to lack of time, concentration, or disability, it is clear that reading the Illinois Supreme Court opinions is crucial to any practitioner in Illinois. Therefore, if anything is going to be read, and if much is

\textbf{Only the Supreme Court can overrule or modify its previous opinions and lower courts are bound by such decisions.}

\begin{itemize}
  \item \textsuperscript{12} Colon, 225 Ill.2d at 146.
  \item \textsuperscript{13} People v. Gersch, 135 Ill.2d 384, 553 N.E.2d 281, 142 Ill.Dec. 767 (1990).
  \item \textsuperscript{14} Schenk vs. Schenk, 100 Ill.App.2d 199, 241 N.E.2d 12 (4th Dist. 1968).
  \item \textsuperscript{15} People v. Nitz, 533 Ill.App.3d 978, 820 N.E.2d 536, 289 Ill.Dec. 760 (Ill. App. 5th Dist. 2004).
  \item \textsuperscript{17} Panchinsin v. The Enterprise Company, 117 Ill.App.3d 441, 72 Ill.Dec. 922, 453 N.E.2d 797, 802 (1st Dist. 1983).
  \item \textsuperscript{18} People v. Flatt, 82 Ill.2d 250, 261, 412 N.E. 2d 509(1980).
  \item \textsuperscript{20} Boddiker v. McPartlin, 379 Ill.567, 577, 41 N.E.2d 756 (1942).
  \item \textsuperscript{22} Agricultural Transp. Ass'n v. Carpenter, 2 Ill.2d 19, 116 N.E.2d 863 (1953).
\end{itemize}
going to be ignored, the highest priority should be on staying current with Illinois Supreme Court case law decisions.

Justice McLaren of the Second District Illinois Appellate Court, in discussing what the Doctrine of Legal Precedent means, succinctly wrote in his dissent in People v. Trimarco:23 “Precedent simply means that like cases should be treated alike. Stare decisis requires that the holding of a case with facts sufficiently similar to the case at issue, be applied by courts of equal or lesser position in the hierarchy within the same jurisdiction.”24

Justice McLaren’s guidance in this regard on legal precedent is very helpful, but even he points out in the Trimarco dissent that it is difficult to know exactly when a case is “identical to” or “reasonably similar” to those in a compared case. When the material facts in the compared case do not line up with all the facts (“on all fours”) in the putative precedent, the job of determining whether a case precedent is binding or not, can become “the most difficult job in the judging business.”25

For Whom Does the Decision Stand? In surveying judges on this issue, it appears that one of the common errors of many attorneys is to believe certain case law means more than it decided, and that cases are often cited for propositions of law for which they do not exactly stand. As such, many cases that are distinguishable on their facts, procedural settings, legal context, and actual holdings are cited liberally and improperly.

For instance, it is important to remember that a precedent case tried on its merits may not be precedental on the elements required to state a cause of action on a motion to dismiss. Even a precedent case which ruled upon a motion to dismiss brought under Section 2-615 may not be precedent and may be completely distinguishable in determining a pending motion to dismiss brought under Section 2-619. The procedural settings and the material facts in case precedents should be considered carefully before liberally citing a case as a binding legal precedent.

An exact formula for ‘how close the facts in a precedent case must be’ cannot be set down with any certainty. This is largely a matter of the skill and analysis of the individual attorney, but it is not wise to extend, twist and stretch the facts of a putative case precedent far beyond its factual borders and procedural legal setting. A court is not likely to find a case binding precedent when the facts are totally

SIDEBAR: APPELLATE PRACTICE

Personal Jurisdiction / eBay. MacNeil v. Trambert, 2010 WL 222805 (2nd Dist. 2010) (McLaren): Trial Court dismissed case against seller of automobile purchased on eBay due to lack of personal jurisdiction. The Appellate Court held that the seller of item on eBay, without further ties to a forum, is not subject to specific jurisdiction in that forum, where transaction is in the nature of a one-time deal. Relying on Foley v. Yacht Management Group, Inc., No. 08–C–7254 (N.D. Ill. July 9, 2009), the Appellate Court held that “a seller of an item on eBay, without further ties to a forum, is not subject to specific jurisdiction in that forum.” Thus the seller, who did not regularly sell on eBay was not subject to personal jurisdiction in Illinois. Moreover the eBay website was held to be non-interactive, rendering a finding of jurisdiction pursuant to the test set forth in Larochelle v. Allamian, 361 Ill.App.3d 217 (2nd Dist. 2005), appeal denied, 217 Ill.2d 603 (2006), inapplicable.

Scope of Appellate Review. People v. Givens, No. 107323, 237 Ill.2d 311, ____ N.E.2d ___, 2010 WL 1497518 (April 15, 2010) (Thomas): “The appellate court erred in sua sponte considering whether trial counsel was ineffective in not arguing that the leaseholder of the apartment lacked authority to consent to the search of her bedroom where the issue was not raised by the parties and there was no obvious answer to the issue that was controlled by clear precedent. Illinois law is well settled that other than for assessing subject matter jurisdiction, a reviewing court should not normally search the record for unargued and unbriefed reasons to reverse a trial court judgment....while this court will examine the record for the purpose of affirming a judgment it will not do so for the purpose of reversing it.” (citations omitted).

Standard of Review / § 2-1401 Petitions. Rockford Financial Systems, Inc. v. Borgetti, 2010 WL 2927442 (2nd Dist. 2010) (“We are aware that our supreme court has recently held that ‘when a trial court enters either a judgment on the pleadings or a dismissal in a section 2-1401 proceeding, that order will be reviewed, on appeal, de novo.’ People v. Vincent, 226 Ill.2d 1, 18 (2007). The court explained that the abuse-of-discretion standard, which had been emphatically affirmed as the appropriate standard of review just months before in Paul v. Gerald Adelman & Associates, Ltd., 223 Ill.2d 85 (2006), “does not comport with the usual rules of civil practice and procedure” if applied in cases where either a judgment on the pleadings or a dismissal has been entered. Vincent, 226 Ill.2d at 16. While the issues of a meritorious defense and the timeliness of a section 2-1401 petition are clearly amenable to a de novo review, we do not understand how the issue of due diligence, both in presenting the defense originally and in filing the section 2-1401 petition, can be given a de novo review. Due diligence in all its aspects is a mixed question of law and fact.”).

25 Trimarco, 364 Ill.App.3d at 557.
dissimilar to the facts alleged in the complaint pending before the Court.

It is important to note what type of case the alleged precedent is, in terms of its legal theories and allegations. A frequent error and temptation among attorneys (including your writer) is to cite a case which contains a doctrine from the law in another area of the law, as being applicable to the case before the court (not the same area). For instance, the parol evidence rule is a fundamental doctrine of the law of contracts, which prohibits modification of contracts through prior oral agreements made but not reduced to writing. This rule is a bedrock of the law in contract actions, and is a vitally important legal doctrine in contract claims. This same rule though has little bearing, if any, to oral misrepresentations made (not reduced to writing in the contract) in a fraud claim arising out of the same transaction. Yet, contract case precedents are frequently cited in fraud cases by experienced lawyers. The setting of a case precedent and the claims made are important to its precedential value.

One rule of stare decisis which is steadfast in Illinois is that a Circuit Court is also not allowed to ignore the decisions of the Illinois Appellate Court, and is bound to follow the decisions of the Illinois Appellate Court in rendering decisions.27 It is the absolute duty of the Circuit Courts to follow the decisions of the Illinois Appellate Court.28

One of the strange oddities of the law of stare decisis is that there are occasionally conflicts between the rulings in different appellate districts. The Supreme Court of Illinois is called upon to resolve these conflicts from time to time. Much legal debate has arisen from this, as case law decisions have held that the Circuit Court is bound to follow the case precedent of the Appellate Court in the judicial district in which it sits, and not to follow the Appellate Court ruling of another district. This case law has received much criticism as the Illinois Supreme Court has also ruled that there is only one Appellate Court in Illinois.29 As such, in theory, there should never be “a conflict” between the Appellate Courts in different geographical districts, and the last case decided should control.30 Alas, we do not live in a theoretical world, and there are several glaring examples of how this theoretically precluded conflict of law effects practitioners in Illinois.

Example One: Magnuson Moss. One strange area of the doctrine of stare decisis relates to the often complicated impact of federal court decisions on Illinois Courts. While all the complicated details of these rules are beyond the scope of this short article, some of the general rules are amusing. While it is well settled that federal decisions are not binding on Illinois state courts, they may be cited as “persuasive authority” and may be followed if the state court believes the federal analysis to be “reasonable and logical.”31 This “reasonable and logical” limitation also has troublesome implications.

However, Illinois courts and federal courts have long taken different views on various subjects, such as whether a consumer can sue a car manufacturer for breach of implied warranty under the federal Magnuson Moss Warranty Act.32 The federal courts have ruled that a consumer cannot sue a manufacturer for breach of implied warranty, while the Illinois courts have not chosen to follow the federal court’s interpretation of the federal statute.33 In Mekertichian v. Mercedes-Benz USA, Inc.,34 the defendant argued that the Illinois courts should follow the rule of law as adopted by the federal courts in interpreting the federal Magnuson Moss statute, and prohibit consumer actions directly against a car manufacturer for breach of implied warranty, based on a lack of privity. The Illinois Appellate Court ruled that the doctrine of stare decisis required the Appellate Court to follow the Illinois Supreme Court’s holding in Szaja v. General Motors Corp. and allow the action, thereby disregarding the federal court’s rulings even on the federal statute. As such, the impact of federal decisions on Illinois law, and on what Illinois judges might do, is more complicated than one might think, but the rule of stare decisis still exists in the midst of these complicated issues.

Example Two: Use of Photographs at Trial. If indeed there is only one appellate court in Illinois, the doctrine of stare decisis is further skewed by disparate rulings between different appellate districts. Depending upon where one is located in the state, one might have very different expectations on what type of holding is likely in a case. For instance, crossing from one appellate district

31 Werderman v. Liberty Ventures, LLC, 368 Ill.App. 3d 78, 84, 857 N.E.2d 320 (2nd Dist. 2006).
The Law Firm of Momkus McCluskey, LLC has served the DuPage County community for the past twenty years. The firm accepts referrals and co-counsel relationships in the following areas:

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to another can often result in significant ramifications in evidentiary rulings.

An example of this inter-district dissonance relates to the use of certain photographs in personal injury cases. The issue generally arises in rear-end collisions in which the defense attorney seeks to introduce accident photos, which generally depict minor or no damage to the vehicles, to support the proposition that there was only minor damage to the automobile and that the plaintiff’s injuries could not be that significant. The issue becomes whether these photos are relevant for showing a correlation between the amount of damage and the alleged injury without some form of expert testimony. The issue has been addressed by three different appellate districts—with no clear consensus between them. Remarkably, all of the districts begin at the same starting point as to the determination of what is relevant evidence. All agree that relevant evidence is that which has “any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.”

Based on its prior decision in Wojick v. City of Chicago, the Illinois Appellate Court for the First District thus held that there needs to be expert testimony to support such a correlation. While not mandating such a hard and fast rule in every case, the court did not want the jury to engage in “unguided speculation” to “infer” such a connection. It would later revisit the issue in Baraniak vs. Kurby, at which time the court held that there needed to be expert testimony to show a connection between the degree of damage and the degree of injury. Without such expert opinion, the photographs are not relevant.

On the opposite side of the state, Fifth Appellate District in two separate decisions declined to decree the need for such expert testimony. The Fifth Appellate District would leave the decision of relevance to the discretion of the trial judge. It felt that a jury could assess the relationship between the automobile’s minor damage and the plaintiff’s injuries without the aid of an expert. The Fifth Appellate District was not concerned with “unguided speculation”, and held that the photographs were relevant to prove the plaintiff’s injury was more or less probable.

The Third Appellate District would also leave the decision of the pictures’ relevance to the trial judge’s discretion. Instead of an expert, the Third Appellate District would allow the trial judge to decide whether the admission of the photographs were of such a nature as to assist a jury in determining whether the plaintiff’s injuries were more or less probable. The photographs would be relevant if the judge felt a lay person could assess the relationship between the damage to the vehicles and the alleged injury. Interestingly, the court stated that its decision was in line with the First Appellate District’s DiCosola decision, as it interpreted the decision to stand for the proposition that while expert testimony may be necessary in some occasions, this was not a rigid rule absolutely requiring an expert. Rather, it construed the holding to defer to the trial court’s discretion as to whether such expert testimony would be needed. The defense attorney who seeks the admission of post accident photographs may better served relying on a map of the state’s appellate boundaries than by a reliance on the principles of stare decisis.

Conclusion. The lawyer who desires to practice well in an area of the law in Illinois is well advised to read all the cases published by the Illinois Supreme Court in that area, and to keep a running dialogue with other well-read practitioners in that area of the law. The cases published from the Illinois Appellate Court should also be followed carefully in any area of concentration or specialty. The law of stare decisis would encourage a lawyer who is avid in a particular area to keep a running flow chart of the case law, and of the direction the Illinois Supreme Court and Appellate Courts are taking in the area a practitioner has chosen, so that the potential rulings of the Circuit Courts can be better predicted and gauged.

A reading of the federal court decisions in a particular area can also be helpful to the Illinois state court practitioner. This is perhaps the most fascinating area in the doctrine of stare decisis, as the two different level of government court systems can literally have very divergent precedents on key issues of law and procedure.

A frequent review of the doctrine of stare decisis is a useful and helpful tool to the Illinois practitioner. This doctrine is not often reviewed by the Courts when rendering decisions, but is implicit in every decision a Court makes. The actions of a Court are almost without exception based on prior rulings, rules, regulations, statutes and case decisions, whether or not the litigants, practitioners, or judges realize it at the time. If the business of lawyers is knowing “the law” as Justice Holmes quipped, given its flexibility, it is a tough job for lawyers and an even tougher one for judges.

37 371 Ill.App.3d 310 (Ill.App. 1st Dist. 2007).
Steve Ruffalo’s focus is constantly on people. When he talks about the future of the bar association, he talks about the people involved, his gratitude for the support of his family, friends and colleagues, and the people he sees playing key roles in the organization. What comes through from that is concern with what people think, what people can or want to do, and how, at least he thinks, the organization can better serve the people that make up its membership, its clients, and the community at large. That made interviewing him both a challenging and interesting endeavor. Whatever was asked of him, whatever ended up written about him here, I knew one thing for sure. Steve Ruffalo would take it all very personally.

“I was asked by a fellow bar leader to get more involved in the DCBA,” he said as we first sat down in the firm’s conference room. “Neil Cerne, when he was President Elect, asked me if I’d serve as Associate Counsel. I did, and then I was counsel during his year. As Assistant Counsel, and then as Counsel, I was in the Board meetings. I was involved. So I got a really good chance to be exposed to how the Bar Association functions.”

As he answered my next few questions, I noticed Ruffalo’s gaze dart back and forth from the tape recorder to me to the window behind me and then back to the tape recorder. It looked like we weren’t likely to spend a lot of time talking about his life story. There was something else he wanted to talk about.

“Through the years,” he continued, “I’ve been involved with work as a
The DuPage Legal Assistance Foundation is proud to announce that in the last twelve months more pro bono cases than ever were accepted and completed by attorneys in DuPage County. Accepting pro bono cases is encouraged by the tenets of the legal profession and the Illinois Supreme Court Rules, and the Foundation is a very active proponent of these ideals. The Foundation oversees a program, the DuPage Bar Legal Aid Service, which refers qualified persons needing free legal assistance either to a lawyer member of the DCBA or one of the three staff attorneys employed by the project.

During the period July 1, 2009 to June 30, 2010, 545 cases were referred to attorneys and 535 cases were completed, most of them involving courtroom representation. We estimate this to mean as much as $1,500,000.00 in pro bono legal hours. These cases concerned not only consumer, bankruptcy and guardianship cases, but also domestic relations matters involving orders of protection, child custody, dissolution of marriage, child support, paternity and children’s rights issues.

Through their Bylaws, the DCBA, founded in 1879, encourages their members to accept pro bono cases in their area of concentration. The current Foundation President, Jeff York, who happens to be the DuPage County Public Defender as well as a member of the DCBA Legal Aid Committee, stated recently, “Providing access to the legal system to those who cannot afford it is our duty as lawyers in this society. Recognition of the importance of this responsibility is what sets the DuPage Legal Assistance Foundation and the DCBA apart from other legal groups.”

DuPage County Bar Association Annual Golf Outing. We want to thank those attorneys who successfully “Beat the President” during the DCBA’s July 1, 2010 Golf Outing at the beautiful Naperville Country Club. Choosing “bragging rights” over double-your-money stakes, the following duffers managed to beat President Steve Ruffalo’s shot and donated their winnings back to Legal Aid. Win or lose, the Beat the President’s hole brought in close to $500! Thank you to the following supporters: Don Ramsell, Paul Krentz, Dick Kuhn, Judge Robert Kleeman, Mark Kawinski, Henry Kass, Bob Rohm, Judge C. Stanley Austin, Gary Fernandez, George Thomas, Mike Hennessy, Matt Kallberg, Mitch Peskin, Mark Mathys, Jim Harkness, Gerry Cassioppi and Mike Kenny.

Kane County Cougars Game. The DuPage Legal Assistance Foundation again wishes to express its gratitude to everyone who purchased tickets to our Kane County Cougar’s Fundraiser which took place on July 16, 2010 at Elfstrom Stadium in Geneva. As usual, the weather was great, the company very fine and fun was had by all. Many of you brought your families who really enjoyed the game and we all cheered Public Defender Jeff York’s daughter as she was chosen by Ozzie T. Cougar to be chased around the bases in the Mascot Dash. The Cougars won
against the South Bend Silver Hawks 8 to 0, so we must have brought luck for the home team. A big thanks goes out to our sponsors for the ice cream, **Jim Reichardt** and **Sean McCumber** and for soda pop, **CeeCee Najera**.

**Congratulations and Farewell to Eric Delgado.** Many of you know **Eric Delgado**, the LRS Administrator of the DCBA. You may know him as the DCBA’s Liaison for the Speaker’s Bureau, the Social Hour, the Modest Means Program, or as one of the Driver School Instructors. You may also have been aware that he handles the telephone calls from Spanish speaking people when they need assistance from the DCBA. What you may not know is that he has recently been accepted to Northern Illinois University College of Law, Class of 2013!

Eric has always been a tremendous supporter of Legal Aid and a big help to our staff with the work he has done on the Modest Means Program. In fact, Eric once worked with us at Legal Aid. He grew up in Chicago and received his B.A. in Business Management from Benedictine University. He and his wife, Angelina, live in Bolingbrook. Eric has promised to stay in touch.

**Prairie State Legal Services Move to Wheaton.** Prairie State Legal Services, Inc. has moved its DuPage Office from Carol Stream to 400 West Roosevelt Road in Wheaton. Prairie State continues to prioritize their cases to protect eligible persons from serious risk to health or safety including, but not limited to certain utility shut-offs and denial of essential medical care. Their next priority is to address basic human needs such as housing and access to needs-based governmental benefits and other income benefits, including Social Security. In addition, PSLS has many projects that target populations with special problems such as those with HIV/AIDS and the elderly. Their DuPage telephone number remains (630) 690-2130. The Foundation is always glad to spotlight the great work done by Prairie State in their 36 offices throughout northern and central Illinois. □

**Brenda Carroll** has been the DuPage Legal Assistance Director since 1988 and on the DCBA Board of Directors since 2004. She earned her JD at IIT-Chicago Kent College of Law in 1986. She was admitted in Illinois and the Northern District in 1986 and to the U.S. Supreme Court in 2005. She serves as an Officer/Secretary of the Child Friendly Courts Foundation and is a Past President and current Board Member of the DuPage Association of Women Lawyers.
An Irv Kupcinet and Michael Sneed for the DCBA? As you peruse this edition of the Brief, you will have noticed many format changes including the lack of a restaurant review. While I know most of you will miss my scintillating reviews, I am not leaving, only changing beats. Attorney Tom McClow and I have volunteered to be the roving reporters for the happenings in the DuPage County Bar so stay alert, you might see us lurking with paper, pen and camera at the ready.

–Raleigh Kalbfleisch

Our congratulations to the DCBA’s own Eric Delgado who has been accepted to Northern Illinois University Law School and starts classes in the Fall. Eric has been the LRS Administrator for the past five plus years as well as one of the Driver Improvement School instructors, for both English and Spanish classes. He will continue to teach DIS classes, but we will miss his cheery smile at the ARC. We wish him well.

Congratulations as well to Herb J. Bell, Dennis W. Hoornstra, John C. North, Arthur W. Rummler, Angel M. Traub and Daniel Walker, Jr, who received Distinguished Service Awards from the DCBA Board of Directors this year, and Joseph M. Laraia, who was awarded the Ralph A. Gabric award for his lengthy service to the association and his community. Our own Sean McCumber, this year’s Judicial Profiles Editor, was named Lawyer of the Year. Last year’s President, Kent Gaertner, insists that Sean was chosen for his many contributions to the DCBA and not because of his later putting in the successful bid for a painting at the President’s Ball. We’re also sure Sean’s success is due in part to his work as a Lead Articles Editor for the DCBA Brief, particularly in 2008-09.

Retired Judge Kenneth A. Abraham has joined the Oak Brook and Chicago law firm of DiTommaso-Lubin as Of Counsel to head the firm’s arbitration and mediation practice group and to act as a litigation consultant to the firm on complex business cases and consumer class action lawsuits. Ken brings to DiTommaso-Lubin nearly forty years of legal experience, including a decade and half on the bench as a trial judge.

Cynthia Y. Cobbs, Director of the Administrative Office of the Illinois Courts, recently announced that John M. Madonia, received a majority of the votes cast by the circuit judges in the Seventh Judicial Circuit and is declared to be appointed to the office of associate judge.

We also recently received notice of the Illinois Supreme Court’s appointment of Robert G. Gibson as Circuit Judge of the Eighteenth Judicial Circuit. Gibson is filling the position held by the Honorable Perry R. Thompson, who retired from judicial office on July 30, 2010.

Samuel G. Wieczorek, an associate with Fuchs & Roselli Ltd., won second place in the Illinois Bar Association’s 2010 Lincoln Award Legal Writing Contest for his article “The Outside Sales Exemption: Does It Really Apply to Your Client?” Wieczorek accepted his award plaque from ISBA President John O’Brien at the ISBA’s annual awards luncheon in St. Louis on June 25. In addition to the plaque, Mr. Wieczorek received a $1,000 cash prize.

Congratulations, finally, to Tracy
A. Ries (of the Law Office of Tracy A. Ries), her husband, Nathan, and their 2 ½ year old daughter, who welcomed a new addition to the family, a baby boy, on June 18, 2010.

Our thanks to the sponsors who provided coffee and refreshments for the Attorney Resource Center at the DuPage Judicial Center these last few months, including Win Wehli (August), Gregory J. Martucci of the Law Office of Gregory J. Martucci, P.C. (September); and Michael O’Brien (October).

We were saddened to hear of the passing of former Circuit Court Clerk, John Cockrell, who died on June 28, 2010. Cockrell served in the Army in World War II in the Asian Theatre. He was elected as Downers Grove Township Justice of the Peace in 1958 and later as Magistrate of the DuPage County Circuit Court. He began working in the Circuit Court’s office in 1962 and was instrumental in introducing computers to streamline the court filing system. In 1971, he was elected Clerk of the Eighteenth Judicial Circuit and held that position until his retirement in 1991.

Charles F. Rohde, father of Charles A. Rohde, also passed away in July of this year. Mr. Rohde was a veteran of the U.S. Navy who served on a destroyer escort ship in the late 1950’s and early 1960’s. He was born and raised in Hammond Indiana and loved spending time with his children and grandchildren.


A number of new members joined from the Office of the State’s Attorney, including Anthony Hayman, David Friedland, Joseph Baumann, James Scaliatine, and Todd Fanter.

Eric Sirota and Tiffany Harvey, both of Prairie State Legal Services are new members as are Philip Santell of Roberts and Associates, Danya Shakfeh of Shakfeh Law, Ltd., Gordon Sindelar of Sindelar & Hauser, Ltd., John Madden of State Bank of Illinois, and Meghen Pitts of Sullivan Taylor & Gumina, P.C.

We have two new members from The Chawlaw Group, Christina McCLOW and KALBFLEISCH CONTINUED ON PAGE 62 »

Raleigh Kalbfleisch is an attorney in Carol Stream who concentrates in domestic relations law. She received her undergraduate degree from Purdue University and her J.D. from Quinipiack University School of Law.

Thomas A. McClow is the principal of the Law Office of Thomas A. McClow in Winfield, Illinois and an adjunct professor with Judson University in Elgin. He received his B.S. from Michigan State University and his J.D. from Loyola University Chicago School of Law.
Malecki and Nagajyothi Pallapothu, and also joining the fold are Constance Walsh of Walsh Financial, K. F. Kitchen, II of Self/Business Development, and Edward Januszkiewicz of Woodruff & Johnson Law Offices. We also want to welcome our two new student members, Andrew Dziuk and Janet DeFilippis and the host of other new lawyers who recently joined, including: Adnan Kagalwalla, Ameya Patankar, Anthony Puleo, Anupama Pal, Ashley Berman Kinney, Blair O’Keefe, Bonnie Simran Bhatia, Cari Cauffman, Eileen Collins, Feisul Khan, Jack M. Shapiro, Jason Kunowski, John Kyle, Julietta Favela, Lindsay Stella, Mark Tison, Megan Hayes, Natalie Lange, Peter Nigrelli, Sarah Mahloch, Stephanie Kemen, Stephanie L. Smith, Stephen Blecha, Michael Chalcraft, II, and Wesley Zaba.

We hope all of you, including both these new and the roughly 2400 established members of the DCBA will let us know what you’re doing in the months ahead so we have an opportunity to report it here. Have you recently changed law firms? Received an award? Have something else you want to let the membership know you’re doing? Send your news to us at features@dcbabrief.org or at the DuPage County Bar Association, 126 S. County Farm Rd, Wheaton, IL 60187. Please, no shameless self-promotion unless it involves a gift of fine chocolates!

One last thought. Fellow bar members, before your fall schedule becomes too full, now is the time to find an hour or two to give back to your community and those in need. We’re sure you’re all familiar with Lawyer’s Lending a Hand but did you know that the DuPage County Juvenile Diversion program needs attorneys to help get kids back on the path to success? The program is a cooperative effort of the Three Fires Council of the Boy Scouts of America, DuPage County Probation Department and the DuPage County Bar Association. It provides an alternative to formal court processing for first-time misdemeanor juvenile offenders. Contact the Diversion Executives at (630) 584-9250 if you are interested in volunteering.

Lawyer Referral & Mediation Service Posts Over 2,000 Referrals for May-July

The Lawyer Referral & Mediation Service received a total of 2,161 referrals (1,372 by telephone & 789 by Internet) for the months of May, June and July. The Lawyer Referral and Mediation Service provides referrals to participating attorneys and serves the community by putting people in contact with a local attorney. Clients call (63) 653-9109 where the DCBA maintains someone to answer the phones from 9:00 a.m. to 4:30 p.m. Monday through Friday (excluding holidays).

By area of practice, the referrals for May-July break out as follows: Administrative (6); Appeals (6); Bankruptcy (123); Business Law (64); Civil Rights (30); Collection (96); Consumer Protection (34); Contract Law (2); Criminal (427); Elder Law (25); Employment Law (157); Estate Law (58); Family Law (521); Federal Court (10); Government Benefits (24); Health Care Law (0); Immigration (8); Insurance (30); Intellectual Property (9); Mediation (15); Mental Health (3); Military Law (0); Personal Injury (135); Real Estate (321); School Law (20); Social Security (4); Tax Law (13); and Worker’s Compensation (14).
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Chair or Vice Chair, I’ve worked with other Chairs and Vice Chairs, and I’ve gotten increasingly more involved in the Bar Association. That eventually led to another bar leader asking if I might consider putting my name in for Third Vice President, which had never occurred to me. At the time, I had run for the Board and been elected to the Board and I was in my first year as a Director. I was content to serve my term as a Director. I didn’t have any agenda to become more than that. It was a good spot to be in. But then someone said, ‘you should consider running for Third V.P. You do a good job. You’d have the right focus and you’d add value.’ I was flattered.”

Ruffalo got that support in spades, he explained, and was quickly convinced to submit his name for consideration. “I put my name in,” he said, “I passed around my own petitions, I had some help. I got a lot of people’s support but I did a lot of the petition gathering myself and got a lot of feedback. From that, I felt that this was something that I ought to pursue. The time was right for me to do it.”

Meeting with other people to ask for their support was an exercise that both encouraged him and informed how he proceeded. “I think it’s a lot better to do it yourself,” he said, “than to draft others to do it for you, because when you do it, you look people in the eye. You bring your materials with you to the courthouse and you make a point of shaking hands and saying ‘I’m doing this, would you support me?’ You get a lot more of the personal side of the process that way and I think it’s intended to work that way, because if someone doesn’t like you, or someone says, ‘no, you’re not who I think I’d vote for,’ you can also open up the discussion on that level and learn from whatever constructive criticism you get.”

As Ruffalo told me what it was like for him to work in that mode, asking people for their support, and thinking to himself, ‘yes, I want to eventually be the President of the DCBA,’ I couldn’t help wondering. “You’re making a conscious decision that this is something that’s important to do,” I pointed out,
“so I have to wonder why? What’s so important about it?”

“It’s an opportunity in our profession,” he said, “an opportunity to give back — which is the kind of thing that presents itself to us at various times in our career, and through various means and methods and opportunities. You know, we all do pro bono work. All of us, we give back when opportunities arise that allow us to give something back. This, though, was for me a much bigger opportunity because it meant I would be taking myself out of production. We bill by the hour, our firm doesn’t do work on a contingency basis. We bill our clients by the hour and we need to be available to them when they call. We pride ourselves in providing that level of service. I pride myself on providing that level of service, so I knew this was a conscious decision that would involve an above average contribution, but one that would be well worth pursuing. This was an opportunity to do more than just contribute. It was and is an opportunity to make a difference, to represent my constituents in the Bar Association on a broader level.”

Once again I watched his eyes wander from the tape recorder to the window to me and then back to the tape recorder. I was trying to get some insight into who our new President is. He was anxious, still, to talk about something else altogether. Still, he stayed with me, answered my questions and talked about the things I wanted to talk about. When I asked who he saw as “his constituents,” Ruffalo emphasized that, as President, he represents “not just the folks that practice on the second floor, not just folks who do commercial work for their clients, but the whole spectrum, PDs, SAs, Corporate Counsel, In House Counsel, the folks who practice family law on the third floor, attorneys and legal professionals, whether they’re members or not, if they’re in this community, they’re among this constituency. They’re all part of the same picture. They’re either members or there’s a reason they’re not members. From this position, you have to maintain a broader perspective, in terms of what we are and who we serve.”

“This position gives me an opportunity,” he added, “to leave the Bar Association better than I found it. It’s an old Irish saying. If you have Irish parents or Irish grandparents, one of the things they say and hand down to their kids and their grand kids is, ‘you’ve got to leave every place that you visit better than when you found it. Don’t leave it the same, don’t leave it in worse condition, but leave it better than when you found it. Don’t leave it the same, don’t leave it in worse condition, but leave it better than when you found it.’ I have a great opportunity here to leave this Bar Association in a much better position then when I found it... and that’s not to say that the Bar Association isn’t in a great spot already. But that’s what makes it challenging. When you find something like this, like the Bar Association, that’s already in a good spot, you have to be ready to accept the challenge of leaving it in an even better spot. That requires some planning, and some thought, and something of an agenda.”

Then I made the mistake of asking Ruffalo about his agenda. He told me about how his agenda had “percolated” over the four year period between when he first decided to run and now. He told me about how much he had learned from the various committees he’d been part of and the various projects he’d been involved in. For as much detail as he was giving me, though, the one thing he kept coming back to, which I finally realized was what mattered most to him, was people. “To me, the year before your year as President is the one that matters,” he said. “That’s when you really work on the infantry line. You are at ground level and you get to know the people that you put into the position to be chairs of their committees when it’s your year.”

“I’ve had such good experience with lawyers exceeding my expectations,” he said. “When I’ve asked people to take on these positions, they’ve understood going in that I’m not asking them to occupy a position of fluff. It is more to occupy a substantive, meaningful position, that they’re willing and able to commit the time to, because that’s what it takes to do it correctly. That’s what I’m asking them for, in advance. I level with them. I tell them this is not going to be an average year. This is going to be a year in which we make a difference, we work together, we work in coordination, and we actually deliver on what we plan on delivering. I had that conversation with all of the vice chairs that I selected. I had that same conversation with the Planning Committee, and with everyone else. I firmly believe that you have an opportunity to make a difference if people are impassioned and if they’re engaged.”

As he said it, I remembered our early discussions about the DCBA

**PROFILE**

CONTINUED ON PAGE 66 >
very insightful that didn’t escape me. He said that, when this association started, it was controlled by a group of those in power. Over time, he said, the upstarts, the younger, ambitious attorneys who wanted the Bar Association to be more than just an exclusive, elite club, or playhouse for the boys, began to make their mark on the Association and seize control. What they did they did in a good way, because it opened up the Association to the thousands of members we have today. That sort of thinking, that sort of drive and determination, that’s what makes someone a leader, I think. That’s Joe Laraia. That’s a leader who’s leaving his association better than when he found it.”

“so the key it seems, is in getting people involved. “I’ve talked to a lot of people who have similarly expressed how glad they are that we have an Association that has a focus on diversity, that over time it has gone from a boys club to a club that welcomes all, that is over inclusive, and not exclusive, and not designed to be run by the few. One that’s transparent, one that leads by example, and one that welcomes everybody. That, to me, is extremely important. When I hear people say this may be ‘change for change’s sake,’ I want to point out, we are not playing around under the hood pulling wires just to make change.”

“It’s my hope,” he said, “that through the course of this year, we will establish, not by narrative discussion, not by promises, but by deeds and actions, that we’re going to make good on these promises, that we’re going to actually improve the Bar Association in a positive way that the members can appreciate. I’m not looking to just throw around anecdotes.”

“We all need to understand that we are the ones that can make the difference,” he said as we started to wrap up our discussion and I realized that he had not been looking at the tape recorder for a long time. He was talking to all of us now, everyone reading this magazine who has even the slightest involvement with the Association. “we’re the ones who either do it or don’t do it,” he concluded. “if we say we’re going to do it, we better do it, we’re going to need to lead by example. we’re going to need to show the membership that this is different than anything they’ve seen in the past.”

Next Issue:

We kick off a series of interviews with the presiding judges at the DuPage Judicial Center, starting with the Honorable Judge Riggs, in honor of the courthouse’s pending anniversary in July, 2011. Also, in honor of that event, our new “Looking Back” feature will debut in this space, featuring interviews with people who were working in and around the courthouse in those days, 20 years ago, but whom you may not have heard from in awhile. We’ll also take a first look at this year’s Mega Meeting, now scheduled for January 22, 2011, and see what’s on the agenda for this year’s President’s Trip, now scheduled for March 3-6, 2011.
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If there is one annual event that brings out the strangest in the DCBA’s membership, it’s the annual Halloween party, now in its third year. With an open buffet and open bar in one room and the Judge’s Nite Band playing all evening in another (complete with an interesting assortment of singers performing in character), the DCBA’s annual Halloween party has quickly joined the Association’s “must attend” events.

This year’s Halloween party will be at Seven Bridges, One Mulligan Drive in Woodridge, Illinois and will run from 7:00 p.m. to 11:00 p.m. on Friday, October 29, 2010. The cost is $65.00 per person. The DCBA would appreciate R.S.V.P.s a week before or by October 22, 2010.

Yes, you want to come in costume. It may be interesting to see the Devil, Mary Poppins, Drew Peterson, and Steve Armamentos all at one party (yes, someone came as Steve Armamentos, which fascinated the real Steve Armamentos no end). But you’ll likely find it a lot easier to fit in - and a lot more fun - to come as someone other than yourself.
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