

DCBA BRIEF

The Journal of the DuPage County Bar Association

**Law Day Speaker
& Guantanamo
Detainee Attorney
H. Candace Gorman**

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May 2012

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DCBA BRIEF

The Journal of the DuPage County Bar Association

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May 2012

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The Case for Abolishing Motion Presentment

By Eric R. Waltmire



Lost time is never found again
—Benjamin Franklin

Law Day on May 1st —“a day of national dedication to the principle of government under laws”¹—is an appropriate time to consider how our legal system can be improved. To that end, today I propose to abolish what appears to be an antiquated procedure that survives under the force of its own inertia and unnecessarily increases litigation costs—in-court motion presentment in civil cases. Motion presentment should be replaced with a local rule that automatically sets a written response or briefing schedule and a time frame for a hearing. Below I will explain the purposes of and problems with the presentment appearance and then I will explain the local rule proposal.

Presentment. The general procedure for requesting the court to take some action in a civil case is by filing a motion and providing a notice of motion. The notice of motion generally states that the motion will be offered up by the moving party for presentment at a particular date and time in court where the non-moving party is invited to appear. At presentment, the parties will show up to court and either settle the issue of the motion or request a briefing schedule allowing a response period, e.g. 21 days, for the non-moving party to file a written response to the motion, and, in some cases, a reply period, e.g. 7 days, for the moving party to reply to the non-moving party's response.

Purposes of Presentment. There

are at least three purposes that presentment serves: (1) to obtain a briefing schedule allowing the non-moving party to respond in writing and the moving party to reply to the response; (2) to put the issue in a procedural position for the movant to obtain a hearing or otherwise obtain relief on the motion; and/or (3) to bring opposing attorneys together face-to-face on the movant's issue possibly facilitating talks, settlement, and an agreed order on the issue. Each of these purposes can be accomplished by an automatic local rule that substitutes for the presentment appearance.

Presentment is Wasteful. If in most cases the presentment appearance simply serves as a means to obtain a briefing schedule and a hearing date, the presentment appearance is a very inefficient way of doing so. Consider the time cost of this scheduling. Any court appearance requires time for (a) attorney travel to the courthouse, (b) waiting in court for the given case to be called, (c) agreeing on dates and writing out a briefing order, and (d) travel time back to the attorney's office. As most attorneys bill their clients by the hour and some have a minimum charge for any court appearance, all of this time and travel is an unnecessary scheduling tax on the client's access to redress in the courts.

The Proposal. The proposed rule would automatically set written response or briefing deadlines when a motion is served and requires that the movant include a hearing date in the movant's notice of motion rather

than a presentment date. In the case of a contested motion, the proposed rule sets a written response deadline a given number of days after the motion is served on the opposing party, e.g. 14 or 21 days.² The rule also sets a written reply deadline a given number of days after the response is served, e.g. 7 days. The rule requires that the movant include a hearing date (not a presentment date) in the notice of motion that is at least 7 days after the last date a reply could be filed under the rule.

The court would need to allow moving parties to schedule hearing dates by calling the judge's clerk or scheduler. Alternatively, scheduling could be performed over the Internet if the court adopts e-scheduling.

If the non-movant needs more time to file a response that party could file

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Eric Waltmire is a registered patent attorney at the Erickson Law Group in Wheaton, where he handles matters in the areas of patents, trademarks, intellectual property strategy, brand protection strategy, and anti-counterfeiting strategy. While handling a range of patent subject matter, he focuses on the areas of Internet, computer science, and electronic technologies. Eric is a member of the ISBA IP Section Council and has served as the chairman of the Internet & Computer Law Subcommittee. Before joining the Erickson Law Group, he was a staff attorney for the judges of the Eighteenth Circuit Court of Illinois.

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All I'm Askin' is for A Little R.E.S.P.E.C.T.

By Colleen M. McLaughlin



Past DCBA President Jack Donahue was honored in March as the New Lawyer's Committee's 2012 Criminal Lawyer to Look Up To. Jack is definitely a worthy recipient of this tribute. He is amongst the most respected criminal attorneys in the state. While there are many adjectives that would fittingly describe Jack, I use the word "respected" very deliberately. It seems to me that

if there is one professional legacy an attorney should aspire to obtain, it is that he/she is well respected by his peers, the judges she appears before and the clients he/she serves.

Not to belittle Jack's achievement, but it seems to me that being respected by one's peers is something *all attorneys* can achieve. Jack talked about how the camaraderie of the members of the bar, on both sides of the aisle, is what has made his 50 plus years as a lawyer so rewarding. He reminded the audience that your opponent is not your enemy, but rather your adversary, and if we treat our adversaries with respect and civility, everyone benefits - the legal system, the people we serve, and ourselves. So I have to ask, as we celebrate Law Day 2012 this month, why aren't more attorneys "respected."

Jack's remarks really hit home with

me. Just that week I met with an opposing counsel (mercifully, he is not from this area) who treated me as his "enemy," rather than his "adversary." He was an "older" man; white hair, distinguished looking. I would like to believe he thought he could stomp

all over me during my client's deposition because of my youthful appearance (no matter how old I get, my hair will

NEVER be white) but after 30 years in this business, while I may still be a Pollyanna at times I'm not that delusional. That leaves me with two other possible explanations for this man's beastly behavior; either he is sexist or he thinks he is doing his job by behaving like a complete jerk. Personally, I think it is a little of both. In any event, he has definitely lost my "respect."

It saddens me to think that sexism is alive and well in 2012, but the truth is I still encounter it, although much less frequently than in my early years as an attorney (when I was referred to as "this little girl" by opposing counsel and "sweet young thing" by the judge in one case). Most times, like in this most recent instance, I'm of the opinion that the disrespectful behavior might not have been so outrageous if I was a man, but truthfully, I think the majority of the male attorneys I meet

nowadays who display chauvinistic tendencies, would likely act boorishly with any opponent, male or female. I'm not sure how one changes incivility that stems from a person's ingrained chauvinism or bigotry, but for those who just act boorishly because they think it is the way to get an advantage over their opponent, or to show their opponent or their clients how "tough" they are—Jack's words—if they are a

President's Message
Continued on Page 6 »

Colleen is the 3rd woman to serve as president of the DCBA in its 134 year history. Her commitment to the legal profession is evidenced by her active involvement and the leadership roles she has undertaken in the DCBA, the ISBA and DAWL. Colleen has served as a member of the DCBA's Board of Directors since 1999. She is a past president of DAWL (1994-95) and a past chair of the ISBA's Labor and Employment Section Council and its Committee on Law Related Education to the Public. She is a current member of the ISBA Assembly and Assembly Agenda Committee. After serving 16 years as an Illinois Assistant Attorney General, Colleen started her own Wheaton law firm in 1996, where she concentrates her practice on employment law matters, representing primarily employees in state and federal court and before administrative agencies.



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rational, thinking person, should resonate.

Webster's Dictionary uses "adversary" as a synonym for "enemy." But, as any good lawyer should be able to figure out, the two words are distinguishable. Webster defines "adversary" as one who is turned against another or others with a design to oppose or resist them." An "enemy" also opposes or resists but there is an added component as well; *hostility*. "Enemy" is defined as "one hostile to another, one who hates and desires or attempts the injury of another...." Take the "hostility," the "hatred," the desire to "injure" out of the equation and what you're left with is two opposing counsel

who can *respect* one another for the job they are doing for their client, despite their feeling about the clients or the legal theories presented on their behalf.

I get involved in a lot of hotly contested legal disputes. It's sometimes challenging not to take things said by the other side personally. I may not always succeed but, at the end of the day, win or lose, I want to walk away from a case knowing I've earned my opponent's respect for a job well-done. That's the legacy the "Lawyers to Look Up To" like Jack Donahue and Ed Walsh (the 2012 Civil Attorney to Look Up To) have achieved. Isn't that the legacy we all want? And all it (should) take is a little **R.E.S.P.E.C.T.**□

» **From the Editor Continued from Page 3**

a motion for an extension of time, which could be heard without briefing. If the movant's issue is such that relief is needed before a hearing could be had under the contested motion procedure, then the motion could be filed as an emergency motion and handled accordingly.

If the motion is uncontested, the movant can obtain a date on the court's uncontested motion call without briefing. If the movant does not know whether the motion will be contested, then the motion must be filed and treated as if it was a contested motion.

The proposed rule substantially achieves the settlement function that might exist under the present presentment procedure. The non-movant will be incentivized to contact the movant on settlement before the written response deadline. If a settlement is reached, it can be presented to the court on the hearing date or the parties can contact the court and move the motion to the uncontested call on an earlier date if desired. If the court accepts the parties' agreement, then it can be entered. If the court rejects it, additional time can be provided for briefing and the hearing can be continued to a future date. If the settlement requires no court order, then the movant

can withdraw its motion and strike the hearing date.

The proposed rule reduces the court's work load because under the current system when there is a contested motion that requires a written response, at least two court appearances are required. Under the proposed rule, only one appearance is required. No court appearance is required if the parties settle the issue before hearing without need of a court order.

Conclusion. We should always be careful when seeking to increase efficiency in the courts so justice and fairness are not sacrificed in the process. The present proposal provides litigants the same procedural protections they have under the current presentment system while simultaneously increasing court efficiency, reducing client costs, and freeing the attorney to spend time on work that substantively advances the client's case. Clients deserve a modern and efficient scheduling system.

- 1 Proclamation No. 3221 (May 1, 1958) (Pres. Dwight D. Eisenhower).
- 2 See e.g. U.S. Dist. Ct. E.D. Tex. R. CV-7(e) (2012), available at <http://www.txed.uscourts.gov/page1.shtml?location=rules:local>



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Photo by Jeffrey Ross

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Over 300 Attend Judge's Nite at New Venue

By Ted A. Donner

If there was one item on this year's DCBA agenda that probably kept President **Colleen McLaughlin** from getting a good night's rest from time to time, that item would be Judge's Nite. After years at the Abbington in Glen Ellyn, where the actors performed on a make-shift stage with the band set up stage right, McLaughlin moved the event to the MAC Theater at the College of DuPage. The MAC, a venue more familiar to such artists as Ramsey Lewis, Hubbard Street Dance and The Second City, gave the Judge's Nite performers a more grandiose but potentially intimidating stage on which to work. Nevertheless, as McLaughlin said in her column in the December edition of the DCBA Brief, "Every so often we need to shake things

up.... and Judge's Nite is no exception."

Most all of the over 300 people that attended Judge's Nite on February 24, 2012 seemed to agree, McLaughlin's experiment was a rousing success. From her opening song (yes, McLaughlin's opening song) to **Patrick Edgerton's** final appearance (as Second Vice President **Pat Hurley** dressed as Carmen Miranda), if one thing was clear it was that the Judge's Nite cast and crew stepped up to the occasion, delivering an unforgettable look at events which may have (but probably didn't) led to **John Elsner** being selected as the new Chief Judge in DuPage County.

"From a production standpoint, it was an incredible challenge for everyone involved," said Judge's Nite Director and Lead Writer, **Kevin Millon**. "The cast

and the crew -- everybody stepped up and handled themselves fantastically and we are sure grateful for what they did. They worked hard at overcoming every challenge. We're a group of lawyers, remember, we're not a Broadway company so, as far as the cast and crew is concerned, it was a challenging but also really upbeat and rewarding experience. Certainly being on a real stage with professional sound and light systems in an auditorium setting like that, it was something many of us had never gone through before. It was a lot of fun." This year's show was produced by **Angel Traub** and written by Millon, **Brent Christensen**, **Patrick Hurley** and **Steve Armamentos** (who also continued, with **Dave Winthers**, in his long-held role as Music Director). □







DCBA to Hold Annual Law Day Luncheon

The DCBA's annual law day luncheon will be held on Thursday, May 3rd in Cantigny's Red Oak Room in Wheaton. The theme of Law Day 2012 is "No Courts, No Justice, No Freedom." The program will feature a keynote presentation by **H. Candace Gorman**. Ms. Gorman is a Chicago based attorney who represents several detainees housed at the U.S. military

base in Guantanamo Bay, Cuba. Turn to the Features section of this edition to read our interview with Gorman.

The law day luncheon program will also include presentation of the DCBA Liberty Bell Award and presentation of the Legal Assistance Foundation Pro Bono Awards. Members are invited to register for the luncheon online at dcba.org or by calling **Liz Whitney** at the DCBA. □

Students Help Celebrate Law Day With Mock Trial Presentations

By Jonathon Hoag

The script for this year's DCBA Law Day Mock Trial Presentations involves a criminal hit and run case. The scripted trials will be performed by middle school and high school students on **Friday, May 4, 2012 from 8:30 a.m. to 12:00 p.m.** in the courtrooms at the Court-

house. This event provides an exciting opportunity for students to play the role of prosecuting attorney, defense attorney, witness, deputy, or juror. Volunteer attorneys will judge the performances and will have the opportunity to provide participants with valuable feedback and guide students

through the trial process.

Please contact **Liz Whitney** at the DCBA to volunteer as a judge for this event. The DCBA expects a large turnout for this popular Law Day event, as it already has 7 schools and over 500 students registered to participate. □

Volunteer Attorneys Needed For "Ask a Lawyer" Program

By Jonathon Hoag

The DCBA will participate in the national "Ask a Lawyer" program on **Saturday, April 28, 2012 from 9:00 a.m. to 2:00 p.m.** This program provides callers an opportunity to call the DCBA Bar Center to speak directly with volunteer attorneys and obtain free legal guidance.

Interest in this particular Law Day activity has increased over the years, so the DCBA anticipates its volunteer attorneys will receive a steady flow of calls. If you are interested in volunteering to take calls, or if you need additional information, please contact **Liz Whitney** at the Bar Center. □



A History of Law Day in America

By Terrence Benshoof

May! Thoughts of Spring, the warm summer months ahead; the world around us coming back to life! As the song lyric from *Camelot* proclaims, "It's May..., the lusty month of May"! So how did the month of May, and particularly its first day, become synonymous with the American tradition of Law day?

Over the centuries, the coming of Spring brought with it festivals to mark the renewal of life: the Celtic Beltane festival; the German Walpurgis Night. These are but a few. In many American communities, children danced around the ribbon-festooned May Pole, as the air warmed and the days grew longer. But it was a darker connection, from Chicago, that over time gave birth to what we now commemorate as an annual reminder that America lives under and by the rule of Law.

The year is 1886. Labor union movements are on the rise. In Chicago, as in many other cities around the nation and the world, workers are rallied by their unions to perform a complete work stoppage- a general strike- to protest ten-hour workdays, generally six days a week. The police are called in to disperse strikers from the Haymarket area; there's an explosion; shots ring out; many, including police officers, are killed.¹ The labor movement viewed the Haymarket riot as a martyrdom event, and called for its commemoration as part of the International Workers' Day.²

In the earlier days of the labor movement, there were often blurred lines between organized labor and its goals, and the Communist-inspired la-

bor movements.³ The Second International, a Communist-oriented group, called for commemoration of the Haymarket Massacre to be a part of the Communist May Day celebrations.⁴

Then came World War II, followed by the Korean Conflict. The Communist government of Russia, our ally against Germany and the Axis Powers, quickly became our enemy. The Cold War began: the McCarthy era; the Red Menace; Communism attempting to take over the world. Dwight Eisenhower, the Allied Supreme Commander, was now in the White House, and he was concerned about the Communist threat. Meanwhile, the USSR proudly displayed its military might in huge parades in Red Square, each year, on May Day, the first of May.

Prior to 1957, one of Ike's legal advisors was Charles Rhyne. Mr. Rhyne served as the President of the American Bar Association from 1957 to 1958. It was he who came up with the idea of countering the Communist world's May Day celebrations with a commemoration of America's concept of the Rule of Law and its importance to the United States as a free society.⁵ President Eisenhower liked the idea, and on February 3, 1958, he issued Presidential Proclamation 3221, declaring the establishment of Law Day, to be celebrated on May 1 annually. On April 7, 1961, Congress passed P.L. 87-20, which codified Law Day under 36 U.S.C. §113.

Although Law Day is not a national holiday, and is celebrated and remembered primarily through the legal community, it continues to serve as a reminder to the American public that our concept of the Rule of Law is paramount to the Communist way of life, or to any form of rule by tyranny. □

1 Avrigh, *The Haymarket Tragedy*, 208-209.

2 Foner, Philip S., *May Day: A Short History of the International Workers Holiday, 1886-1986*, 27-40 (New York International Publishers, 1986)

3 *Id.*

4 *Id.*

5 *ABA Journal*, May, 2008

The First Presidential Law Day Proclamation: Proclamation 3221

LAW DAY, 1958

WHEREAS it is fitting that the people of this Nation should remember with pride and vigilantly guard the great heritage of liberty, justice, and equality under law which our forefathers bequeathed to us; and

WHEREAS it is our moral and civic obligation, as free men and as Americans, to preserve and strengthen that great heritage; and

WHEREAS the principle of guaranteed fundamental rights of individuals under the law is the heart and sinew of our Nation, and distinguishes our governmental system from the type of government that rules by might alone; and

WHEREAS our Government has served as an inspiration and a beacon light for oppressed peoples of the world seeking freedom, Justice, and equality for the individual under laws; and

WHEREAS universal application of the principle of the rule of law in the settlement of international disputes would greatly enhance the cause of a just and enduring peace; and

WHEREAS a day of national dedication to the principle of government under laws would afford us an opportunity better to understand and appreciate the manifold virtues of such a government and to focus the attention of the world upon them:

NOW, THEREFORE, I, DWIGHT D. EISENHOWER, President of the United States of America, do hereby designate Thursday, May 1, 1958, as Law Day.

I urge the people of the United States to observe the designated day with appropriate ceremonies and activities; and I especially urge the legal profession, the press, and the radio, television, and motion-picture industries to promote and to participate in the observance of that day.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this third day of February in the year of our Lord nineteen hundred and fifty-eight, and of the Independence of the United States of America the one hundred and eighty-second.

DWIGHT D. EISENHOWER

DCBA Member Umberto Davi Elected as Third Vice President of ISBA

By John J. Pcolinski, Jr.

Longtime DCBA member, **Umberto Davi**, of Western Springs was recently elected third vice president of the Illinois State Bar Association (ISBA). He will serve one year in each of three vice presidential offices and then become president of the statewide organization in 2015.

Davi, has served several terms as a member of the ISBA Board of Governors starting in 1998 and member Assembly and been active on numerous ISBA committees. He was unopposed for the position. ISBA bylaws provide for the office of the Third Vice President to alternate every other year between Cook County lawyers and those from downstate.

Davi received his law degree from The John Marshall Law School, with Distinction, in 1982. As a member of

the DCBA he has been a Sustaining Member; Chair of the Family Law Committee 2005-2006; Chair of the Real Estate Committee 2003-2004; Panel Member of the Expedited Matrimonial Fees Arbitration Program; and Chair of the Custody Evaluations Rules Revisions Committee.

Umberto has also been an active Member of the DuPage Association of Women Lawyers and President of the DuPage Society of Justinian Lawyers. DCBA board member **Jay Laraia** said of Davi "Umberto Davi upholds the highest level of civility and integrity in our profession. I have been fortunate to be able to call upon him for advice and counsel throughout my career. I look forward to the great contributions Umberto will provide to the Illinois State Bar Association in the

future, and I am honored to congratulate him on his nomination as Third Vice President of the ISBA. I know he will make the members of the DuPage County Bar Association proud."

Current Third Vice President, Illinois State Bar Association, **Richard D. Felice** said "I am pleased to see my good friend Umberto Davi has been elected to the prestigious leadership position of Third Vice President of the Illinois State Bar Association. He brings with him a high degree of knowledge, insight and integrity and truly cares about the practicing bar. He and his lovely wife Janet will be a fine addition to the Illinois State Bar Association family. I look forward to serving with him in the years to come." □

Veterans Track Comes to Drug Court and MICAP

By Clarissa R.E. Myers and Sean McCumber

In a process that began, after years of legislative discussion and action, under the tenure of retired **Chief Judge Steven Culliton**, and now under the tenure of **Chief Judge John T. Elsner**, the Veterans Track will begin this year in Drug Court and the Mental Illness Court Alternative Program ("MICAP"), two court wellness programs that currently exist in the Circuit Court for the Eighteenth Judicial Circuit. Authorized by the Veterans and Servicemembers Court Treatment Act,¹ the goal is to help veterans and military personnel, who have been charged with certain

crimes, receive services and treatment available to them through federal programs, rather than immediately placing them in the criminal justice and corrections systems.

In Illinois, military veterans compose approximately 9.5% of the population.² While serving their country, many veterans experience physical trauma, psychological trauma, and severe emotional distress. Upon returning home, veterans suffer from a

variety of difficult issues including addiction and mental illness, which can then lead to secondary effects such as divorce, alcoholism, and homelessness.³ To combat these issues, many programs have been developed to help veterans that have returned home after completing their military service. Specifically, in the criminal justice system, criminal courts are now focusing on special alternative courts for veter-

1 730 ILCS 167/1 et seq. (West 2012).

2 *Percent of the Civilian Population 18 years and Over Who are Veterans, 2004*, at <http://www.statemaster.com/graph/peo_per_of_civ_pop_who_are_vet-percent-civilian-population-who-veterans> accessed January 26, 2012.

3 Schiffman, Jason, *The Invisible Suffering of War*, Trauma Informed Behavioral Healthcare, The National Council Magazine (Issue 2 2011), at <http://www.thenationalcouncil.org/cs/about_us/national_council_magazine> accessed January 26, 2012.

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CLASS ACTION LITIGATION

In our prosecution and defense of class actions throughout the United States in Federal and State Courts, we are proud of our recent accomplishments, which include the following:

Recent Class Actions

Walczak v. Onyx Acceptance Corporation

Class certification order affirmed by the Appellate Court, 355 IllApp3d 664. Represent class with co-counsel in claims involving alleged violations of Illinois automobile repossession laws. Case settled with each of the over 7,600 class members able to claim up to \$2000. In addition to damages payment, debt totaling \$6.5 million was forgiven as to all class members.

S37 Management, Inc. v. Advance Refrigeration, Inc.

Court certified claims involving allegedly deceptively labeled, non-tax charges called government processing fee in the tax line of customer bills. Class certification order affirmed by Appellate Court, 2011 WL 5456808.

Terrill v. Hilton

Court certified a class of all customers of Hilton's Oakbrook Terrace Hotels. Following successful interlocutory appeal (788 NE2d 789), judgment in favor of the class for millions of dollars in damages, prejudgment interest and all attorneys' fees. Affirmed on appeal in Rule 23 Opinion. Class received in excess of 90% of overcharges with monies being mailed to each class member following win on appeal. Settled identical cases on a class-wide basis against Marriot and three other national hotel chains.

Morales v. Verve Global

Court certified class of all students who took a medical sonography course but did not obtain jobs in the field. Class alleges violations of Illinois vocational school and consumer fraud acts for school's alleged failure to disclose that very few students obtain jobs in the field.

Municipal Booking Fee Class Actions

Representing putative class members against a number of cities and towns. The cities and towns require the putative class members to pay booking fees in conjunction with being arrested. Seeking refunds of the booking fees as allegedly unconstitutional.

Boudas v. Abercrombie & Fitch

Representing consumers that received a \$25 purchase reward card that did not contain an expiration date but which defendant claims should have contained an expiration date and will no longer honor.

Unpaid Overtime Class Actions

Representing putative class members in a number of cases against employers seeking repayment of alleged unpaid overtime.

Erickson v. Ameritech

Court certified consumer fraud claims for failure to disclose hidden voice mail charges. In 2005, Crain's Chicago Business listed the settlement as the third highest settlement/verdict in Illinois.

Defense

Defended national marketing company in four Fair Credit Reporting Act class claims seeking over \$100,000,000 brought in federal court in Chicago and Maryland. Defended national residential mobile home rental chain in consumer fraud claims. Defend a number of large to mid-size companies in class claims throughout the country including defending a landlord in class claims alleging violations of Illinois security deposit laws and a municipality in claims involving alleged illegal fines. Also act as advisors and co-counsel with attorneys who have asked us to assist them in defending their clients in class-claims.

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Manufacturers, retailers and advertisers who materially misrepresent how a product works or performs.

Vocational Schools where students don't obtain work as a result of the course and the school fails to provide the poor job statistics in the enrollment agreements.

Excessive late fees charged by rental apartment complexes, including late fees on common area utility bills, rent payment bills and assessments.

Violations of Federal and state Wage claim laws by failing to pay overtime to salaried employees.

Violations of automobile repossession laws.

Areas of Interest:

Healthcare Product Fraud
Defective Car and Vehicle Products
Insurance Fraud
Fair Credit Reporting Act-FCRA
Fair Debt Collection Practices Act-FDCPA
Privacy Violations
Violation of Car Repossession Statutes
Vocational School Deception
Excessive Late Charges
Wage and Hour Overtime Violations
Infomercials and Deceptive Advertising
Federal and State Wage Claim Laws



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ans with addiction issues and mental illness. Veterans Track programs in the criminal justice system have been discussed in various states in cooperation with state court systems and veterans services programs.

To understand the Veterans Track, a brief overview of Drug Court and MICAP is beneficial. MICAP, as authorized by statute,⁴ is a diversionary program for persons who suffer from an Axis I mental illness. It is intended to reduce the stigma of a criminal record for persons with mental illness, improve the participants' overall quality of life, increase their productivity, reduce the time and cost of incarceration and psychiatric hospitalization, and reduce police involvement by redirecting those with mental illness to community-based treatment. The

4 730 ILCS 168/1 *et seq.* (West 2012).

court structure in this program is designed to be non-adversarial. To be eligible, the defendant must apply to the program, and the prosecutor must agree to accept the defendant for consideration in the program, in addition to the Court granting its approval. If the defendant demonstrates an unwillingness to participate in the program, or is charged with certain crimes,⁵ or has previously completed or has been discharged from a mental health court program within three years of completion or discharge, that defendant is not eligible.

5 The crimes include: first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, armed robbery, aggravated arson, arson, aggravated kidnapping, kidnapping, stalking, aggravated stalking, or any offense involving the discharge of a firearm. 730 ILCS 168/20(b)(3). (West 2012).

In the Eighteenth Judicial Circuit, in order to be eligible for MICAP, the defendant must also meet the following requirements: 1) be charged with a misdemeanor or non-violent felony; 2) be diagnosed or reasonably believes she or he would be diagnosed as having a DSM IV TR Axis I Major Mental Illness/Disorder; 3) demonstrate a nexus between the defendant's mental illness and the crime; (4) obtain victim consent if the crime is a crime of violence; and 5) be amenable to treatment and appropriate for treatment. In DuPage County, an applicant must also: 1) be 17 years of age or older; 2) be a legal resident of the United States and DuPage County, Illinois; and 3) intend to remain in the county for the length of MICAP supervision. For veterans entering the Veterans Track of MICAP, the requirements will include the foregoing. In addition, the

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applicant will need to show that she or he has served in the United States military and received an honorable or a general discharge.

Drug Court, the other court wellness program, is designed to reduce the incidents of drug use, drug addiction, and crimes committed as a result of drug use and drug addiction.⁶ Again, the defendant must apply to the program, and the prosecutor must agree to accept the defendant for consideration in the program, in addition to the Court granting its approval. A defendant is excluded from eligibility for the program if s/he denies use or addiction to drugs, demonstrates an unwillingness to participate in treatment programs, has completed or been discharged from a drug court program previously, or has been charged with certain crimes.⁷ In the Eighteenth Judicial Circuit, a defendant is also not eligible for Drug Court if one or more of the following exists: 1) the defendant has felonies pending in other jurisdictions that will result in a commitment to the Illinois Department of Corrections, 2) the defendant has a pending Class X felony charge for a crime of violence or for delivery of a controlled substance or cannabis, 3) treatment is unavailable for the defendant, 4) the defendant has a conviction for reckless homicide, arson, certain sex offenses, a violent crime, or 5) if the offense applied is a driving offense. As with MICAP, for veterans entering the Veterans Track of Drug Court, the requirements will include the foregoing. In addition, the applicant will need to show that she or he has served in the United States mili-

tary and received an honorable or a general discharge.

Additionally, numerous financial and social service resources are available to veterans. Unfortunately, many veterans have not taken advantage of these resources due to lack of knowledge about the programs and resistance to seeking help. Veterans commonly do not seek assistance for addiction and/or mental health issues for several reasons: 1) veterans want to protect their families from the veterans' addiction/mental health issues, 2) veterans must "stay strong" and ignore the problem, and 3) veterans are afraid of the stigma and subsequent repercussions of admitting problems with addiction and/or mental illness.⁸ However, it is these resources and services for veterans that make the Veterans Track unique within these established programs. Drug Court and MICAP staffing includes probation, the prosecutor, the defense attorney, clinicians, treatment personnel, the Court, and other key personnel. For the Veterans Track, the addition of **James Seminaroti**, a licensed clinical social worker and a Veteran Justice Outreach Specialist with the Department of Veterans Affairs at Edward Hines Jr. VA Hospital, is invaluable. With Seminaroti's presence at staffing, the programs will be better equipped to direct and guide veterans through appropriate treatment programs specific to their needs. **Judge Jane Hird Mitton**, who presides over Drug Court and MICAP, welcomes Seminaroti to the programs, seeing this as an opportunity to help the veterans benefit from the excellent services that are available, while reducing the impact and stigma of criminal charges for our veterans. □

6 730 ILCS 166/1 et seq. (West 2012).

7 The crimes include: first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, armed robbery, aggravated arson, arson, aggravated kidnapping, kidnapping, stalking, aggravated stalking, or any offense involving the discharge of a firearm. 730 ILCS 166/20(b)(4). (West 2012).

8 *Why Veterans May be Resistant to Seeking Help*. Veterans' Families United Foundation. Updated 2007. <<http://veteransfamiliesunited.org/2011/06/06/consequences-of-facing-war-related-illness>> accessed January 26, 2012.

Helicopter Fundraiser to Cap Off DCBA Golf Outing in June

The DCBA will hold its annual golf outing at the Willow Crest Golf Club in Oak Brook on Thursday, June 28. Participants will enjoy lunch, golfing, a cocktail hour, and dinner. The entry fee for each participant is \$200. There are also options for golf only at \$160 and for the cocktail hour and dinner only at \$65.

This year's golf outing will include a helicopter ball drop fundraiser benefiting DuPage Legal Aid. After golfing is complete a helicopter will fly over a designated green and drop a number of balls. The balls dropped from the helicopter will each carry a unique number. Before the ball drop, DCBA members and golf participants will be able to purchase ball numbers. The person purchasing the number corresponding to the ball that lands closest to the hole will win fifty percent of the funds raised by the sale of the ball numbers. The other fifty percent will go to benefit the DuPage Legal Aid. Ball numbers may be purchased for \$20 each or 3 for \$50.

Sponsorships are also available and include: *Double Eagle* (your logo included on Golf Umbrellas to be given to all golfers at the event) \$2000; *Eagle* (sponsoring the drink cart) \$1000; *Birdie* (lunch sponsor) \$750; *Par* (helicopter ball drop sponsor) \$500; *Hole* sponsor \$175; and *Raffle* sponsors \$150. All sponsors will be recognized in the program book and on certain signage at the event. Please register online at the dcb.org or contact **Sue Makovec** for additional information or to be a sponsor. □

Illinois Law Update

Civil Law & Practice:

Non-Competes

Reliable Fire Equipment Co. v. Arredondo, 2011 IL 111871 (December 1, 2011) In a much anticipated decision, this past December, the Illinois Supreme Court issued its ruling in *Reliable Fire Equipment Co. v. Arredondo*. At issue was the correct test for assessing the enforceability of a covenant not to compete. Significantly, in *Reliable Fire*, the Court adopted for the first time a “totality of the circumstances” test, which in effect overturned 30 years of precedent in this area.

Over the past 30 years, the Illinois Appellate Court adopted what is known as the “legitimate business interest” test, which provides that, in addition to geographic and temporal reasonableness, an employer seeking to enforce a non-compete must be able to establish a “legitimate business interest.” A “legitimate business interest” was narrowly defined as either the existence of “near-permanent customer relationships” or the protection of confidential information.

In late 2010, the Illinois Appellate Court (2nd District) released its decision in *Reliable Fire Equip. Co. v. Arredondo*.¹ The decision consisted of three separate opinions. The lead opinion seemed to adopt the “legitimate business interest”

test, but expressed a willingness to broaden it. The concurring and dissenting opinions agreed with the court in *Sunbelt Rentals, Inc. v. Ehlers*,² which observed that the legitimate business interest test was not valid and proposed a totality of the circumstances approach. This fractured decision led to the Supreme Court taking the case.

The Illinois Supreme Court first adopted the “three[-]pronged reasonableness” test, which courts in other jurisdictions have used. Under this test, a non-compete is reasonable and enforceable if it: (1) is no greater than is required for the protection of a legitimate business interest of the employer; (2) does not impose undue hardship on the employee; and (3) is not injurious to the public. However, with respect to the first prong of the test, the Court held that the “legitimate business interest” test that had been developed by the Appellate Court was invalid and too restrictive. Accordingly, the Court instead adopted a “totality of the circumstances” test for assessing enforceability of non-competes. The Court stated that “[f]actors to be considered in this analysis include, but are not limited to, the near-permanence of customer relationships, the employee’s acquisition of confidential information through his employment, and time and

place restrictions.” The Court further noted that no “factor carries any more weight than any other, but rather its importance will depend upon the specific facts and circumstances of the individual case.” Beyond this, the Court did not provide any specific guidance.

Accordingly, how lower courts will apply this new test remains to be seen. On the one hand, on its face, the totality of the circumstances test benefits employers as it allows them to assert grounds other than customer near-permanence and confidential information as bases for enforcement of a non-compete. Given this, it would be expected that it should become easier for employers to enforce such agreements. On the other hand, a “totality of the circumstances” standard arguably vests lower courts with more discretion to assess enforceability, which could lead to courts refusing to enforce agreements that otherwise would have been enforceable under the previous, and more rigid, “legitimate business interest” test.

Family Law & Practice:

Child Support

In re Marriage of Kolessar, 2012 IL App (1st) 102448 (January 17, 2012) In *Kolessar*, the ex-wife appealed the circuit court’s decision that she was not entitled to interest on child support arrearages and that the ex-husband’s actions were

1 405 Ill. App. 3d 708 (2nd Dist. 2010), rev’d by 2011 IL 111871.

2 394 Ill. App. 3d 421 (4th Dist. 2009), overruled by *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871.

not willful. The Appellate Court held that the ex-wife was entitled to interest on the ex-husband's child support arrearages, and that the ex-husband's unilateral reduction of his child support obligation was not willful.

Upon entry of the divorce judgment, the ex-husband was ordered to pay the ex-wife \$2,000 in child support each month. The ex-husband filed a petition to modify his child support obligation and, while the petition was pending, the ex-husband unilaterally modified his support payment. The parties entered an agreed order with regard to the first petition to modify, but the order was silent as to arrearages and interest to be paid on the arrearage. The ex-husband later filed a second petition to modify support, and while the petition was pending, he again unilaterally modified the amount of his support payment. The ex-wife filed a petition for rule to show cause and, after hearing, the ex-wife contended that: (1) the trial court erred in denying her request for statutory interest on past-due court-ordered support due by the ex-husband; (2) the trial court erred in finding that the ex-husband's first unilateral modification of his support obligation was not willful or contumacious; and (3) the trial court erred in failing to find that the ex-husband's second unilateral modification of support was without cause or justification. The Appellate Court reversed the court's determination as to statutory interest but affirmed the court's findings regarding the ex-husband's unilateral modifications.

The Appellate Court held that even though the ex-wife entered an agreed order that was silent as to child support arrearages and interest on the arrearages, she did not

explicitly waive her right under the IMDMA to interest on the amount of the ex-husband's child support arrearages, and thus she was entitled to interest on the arrearage. With regard to the unilateral modification of child support, the Court held that a mere absence of compliance with child support obligations is not sufficient to find the violating party in contempt, unless the evidence shows the failure to comply was willful and contumacious. The Court found that the ex-husband's unilateral reduction was not willful because at the time of modification, one of the two children had reached the age of majority, the ex-wife had remarried, and the ex-husband began working at a new job with a reduced salary.

Removal

In re Coulter, 2012 IL App (3d) 100973 (January 13, 2012) On appeal, the court affirmed the lower court's decision granting the ex-wife's petition for removal of the minor child.

The parties divorced in 2005, and the mother was given sole custody of the minor child subject to the father's visitation rights of two nights per week, every other weekend and alternating holidays. In 2010, the mother filed a petition for removal citing that she had obtained employment as a Foreign Service officer for the State Department and that her post would consist of time in Washington, D.C. and time overseas. The petition contained a proposed parenting schedule and information with regard to different schools.

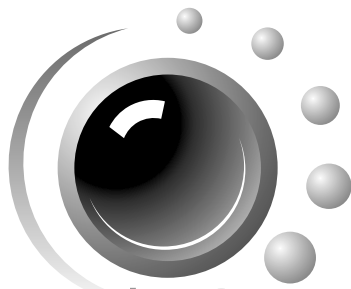
In *In re Marriage of Eckert*³, the Illinois Supreme Court identified

several factors that the circuit court should consider in assessing a child's best interest when deciding a removal case: (1) whether the move will enhance the quality of life for the custodial parent and for the child; (2) whether the custodial parent is motivated by a desire to hinder or defeat the noncustodial parent's visitation rights; (3) the noncustodial parent's motives for challenging removal; (4) the effect the move would have on the noncustodial parent's visitation rights; and (5) whether the move would still allow for a reasonable and realistic visitation schedule for the noncustodial parents.

Here, the Court found that removal was in the best interest of the child because the evidence presented demonstrated that the quality of life for the custodial parent and the child would be greatly enhanced. The mother's salary was nearly doubled, the health insurance was more comprehensive, the residence was an upgrade and the schools were better or comparable to the child's current school. With regard to the remaining factors, the court held that a reasonable visitation schedule could be achieved and that although the father would have less parenting time with the child, he would have ten uninterrupted weeks in the summer with the child. Also, the family would receive financial assistance from the State Department for traveling expenses. Therefore, visits would be affordable. □

Civil Law & Practice updates by ProBrian LaFratta of Huck Bouma, PC; Family Law & Practice updates by Victoria C. Kelly of Grunyk & Associates, P.C. Michael R. Sitrick of Best, Vanderlaan & Harrington is the Illinois Law Update Editor. Please send your law updates to Michael at sitrick.m@gmail.com.

3 119 Ill.2d 316 (Ill. 1988).



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From this month's
Articles Editor

Court Funding, Judicial Independence, Open Government, & Attorney Fee in Bankruptcy

By Arthur W. Rummler



Welcome to the articles section of the May edition of the DCBA Brief. This month is special in our legal community as we celebrate Law Day.

Law Day is a day of recognition of the rule of law in America. It was created by President Eisenhower during the height of the Cold War, in part, as a juxtaposition to the communist May Day celebrations in the former Soviet Union. The national theme for Law Day this year is *No Courts, No Justice, No Freedom*. The focus is on the judicial system and its role in protecting our liberty.

In the last few years, the May issue of the Brief has focused on Law Day, with articles about the importance of the legal system in our society, the contributions of lawyers to the community and the integral part we all play in maintaining the freedoms we sometimes take for granted.

In this issue we have an article by **Sean McCumber** who writes about the importance of an independent judiciary. The article surveys the various methods in which judges are selected or elected in the United States. **Jon Crannell** brings us an article about the crisis in judicial funding across the nation. This trend is not yet affecting Illinois, but the budget squeeze may soon mean

hard choices for the management of our judicial system. **Maryam Judar** and **Terry Pastika** author an article about the importance of “sunshine” laws on the goal of open government. The article examines the myriad of challenges to then open dissemination of information that exist when the public and private sectors combine to engage in economic development projects. Least related to any Law Day themes, but of importance to many readers, is my own article about the dischargeability of attorney fees in bankruptcy cases, especially when those fees are related to a family law matter.

I thank the authors for their hard work and dedication. We all hope you enjoy this edition. □

Arthur Rummler is a sole practitioner with an office in Glen Ellyn, Illinois. He concentrates his practice in all phases of bankruptcy, including consumer, business and trustee cases. Mr. Rummler is a 1987 graduate of the University of Michigan Ross School of Business Administration and a 1991 graduate of the Chicago-Kent College of Law. Actively participating in the DuPage County Bar Association, he is currently serving as a member of the DCBA Brief Editorial Board, Vice Chair of the Law Day Committee and has appeared in Judge's Night for the past four years.

Articles from Lawyers & Paralegals

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 Editor, Eric Waltmire, at email@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.

Insolvent Judiciaries: Illinois is Not Immune

By Jonathan P. Crannell

Financial woes are plaguing state courts across the nation forcing cutbacks and drastic cost-saving efforts and Illinois courts, including DuPage County, may be next. Although our court system has remained relatively unaffected, other states' crises present a cautionary tale foreshadowing things to come for our great state if we do not undertake proactive measures to create a more stable, recession-proof funding system for our courts. The failure to act now will put our feet in the tracks of those states who have fallen before us.

Other States: A Cautionary Tale. Judiciaries across the nation are enduring the consequences of their underfunded, overcrowded, and overwhelmed courts. The 2008 recession caused the courts to be inundated with foreclosures, evictions, credit card collection cases, and bankruptcies. Despite the increase in judicial demand, state courts' budgets have been cut by 10-15%.¹ This is particularly troubling in light of the fact that a fully funded judiciary would comprise a mere 1-2% of a state's budget.² Because 90% of a judiciary's budget is personnel, we are seeing hiring freezes, layoffs, pay cuts, and even court closures as a

result of these budget cuts.³ California, Florida and Georgia are on the frontline of the funding crisis enduring the worst of the symptoms of underfunding. What can be learned from these states could vaccinate Illinois courts from catching the underfunding flu.

The Los Angeles Superior Court in California is the largest trial court system in the nation, housing 600 courtrooms and employing 5,400 personnel.⁴ Los Angeles has watched the average disposition of a case go from less than two years in 2009 to more than four in 2012.⁵ Notwithstanding those delays and associated economic costs, the

1 American Bar Association Report, "Crisis in the Courts: Defining the Problem" at p. 4

2 *Id.* at 3.

3 *Id.* at 4.

4 *Id.* at 7.

5 *Id.*

Los Angeles Superior Court announced in early March that it would lay off 300 employees, and close more than 50 courtrooms.⁶ Over the past two years, the Los Angeles Superior Court has already cut nearly \$70 million in annual spending by laying off more than 500 employees.⁷ The more recent cuts will save an additional \$48 million.⁸ California's proposed budget for 2012-13 calls for more cuts and puts any hope of relief for the strained judiciary far out of reach.⁹

In Florida, an uncontested divorce now takes about six months and criminal cases now routinely take more than a year before a trial is had.¹⁰ This delay incarcerates the guilty and innocent alike for up to a year before liberty is restored to the latter. Florida had a \$3.8 billion budget shortfall in 2011 which made it particularly tough to solicit funds from the state coffers when the filing-fee funded court system was hit with a lull in foreclosure filings.¹¹ As the scrutiny on lenders increased with regard to robo-signed foreclosure documents the number of foreclosure filings dropped precipitously resulting in Florida's judiciary fund dropping from a \$100 million surplus to a \$78 million deficit in the blink of an eye.¹² Hon. Joel Brown, Chief Judge of the 11th Judicial Circuit of Florida and Budget Committee Chairman JD Alexander agree that a fee-based system leaves the judiciary too vulnerable to economic ebbs and flows.¹³

"During the past ten years, the Legislature has enacted \$66.3 million in increased costs while only increasing the Court's appropriation \$18.8 million," Alabama's Chief Justice, Sue Cobb, said in her resignation statement, "...[the decision to resign] has been infinitely more difficult because of the inadequate funding budgeted by the Legisla-

ture for our judicial system. I desperately wanted to depart leaving the system on better financial footing than when I came."¹⁴ Alabama is facing forensic backlogs, severe courtroom delays, and a 95-to-1 inmate to prison guard ratio.¹⁵ A \$13.1 million decrease in state funding for state courts from 2011 to 2012 caused more than 400 employees to

be laid off in 2011 and 29 prison facilities are 191 percent over capacity.¹⁶

The State of Illinois. The Illinois legislature appropriates funding for salaries, benefits, office expenses, and support staff for all judges in Illinois.¹⁷ Circuit clerks, their employees and operations are funded by local revenues such as property taxes, filing fees and court-ordered fines and costs.¹⁸ In 2010 it cost \$214 million to operate the 102 circuit clerk's offices in Illinois.¹⁹ In 2010, more than \$60.2 billion was appropriated to state agencies

— only \$326 million made its way to the Illinois judiciary.²⁰ In 2011 the state allocated \$310 million and 2012, \$304 million.²¹ Despite the decreases in funding, the National Center for State Courts states that 8 judgeships will be added in Illinois in response to census data and the number of staff positions will remain untouched.²² Illinois is tightening its belt, echoing the demands of other state legislatures to their judiciary, "Do more with less."

Cutting expenditures on non-essential services and implementing technology solutions to streamline document management and processes will help bridge the gap, but to what extent? If the Illinois legislature continues to squeeze the judicial branch at the current rate, no amount of technology will prevent the bottom from falling out on us as it did in California, Florida, Georgia and other states.



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7 Sanchez, MarieSam, "Los Angeles Superior Court to Eliminate 300 Staffers." *Cerritos-ArtesiaPatch*, March 7, 2012.

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12 Benton, Shannon. "Fall in Foreclosures Hurts Courts." *Tampa Bay Online*. March 27, 2011.

13 *Id.* see also Pillow, Travis, "Lawmakers vow to put judicial system on steady financial ground", *The Florida Current*, November 1, 2011.

14 Bell Cobb, Sue. "Resignation Statement from Alabama Chief Justice Sue Bell Cobb." Supreme Court of Alabama, Montgomery. June 29, 2011. Address. Available at <http://www.wakacbs8.com/news/8100-resignation-statement-from-alabama-chief-justice-sue-bell-cobb.html>.

15 Steele, Cameron, "Delays and Dilemmas: Budget Cuts Slow Down the Wheel of Justice in County Courts," March 4, 2012.

16 *Id.*

17 State of Illinois, Welcome to Illinois Courts. "State and Local Funding for the Illinois Courts." <http://www.state.il.us/court/General/Funding.asp>

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 National Center for State Courts, Illinois. <http://www.ncsc.org/information-and-resources/budget-resource-center/states-activities-map/illinois.aspx>

The Cause of the Crisis. A glaring common thread between the three hardest-hit states is that each of them share a spot in the top ten states hit hardest by foreclosures. In 2011, Florida had the 6th most foreclosure filings, Georgia 4th, and California 2nd.²³ It could be that these states became too dependent on foreclosure filing fees to subsidize their respective state funding and began budgeting as if the increase in foreclosures would go on forever. Illinois, by the way, was 9th on the list of states hit hardest by the foreclosure crisis.²⁴ In 2003, DuPage

²³ *States with the Highest Foreclosure Rate in 2011*. 2011. Graphic. CNBC.comWeb. March 19, 2012. http://www.cnbc.com/id/29655038/States_With_the_Highest_Foreclosure_Rates
²⁴ *Id.*

County received just under \$22 million in court fees, fines and forfeitures. In 2010, DuPage County saw \$35.3 million in revenue derived from court fees, fines and forfeitures and our County Board budgets for about the same in expenses. The 60% increase can only be explained by the foreclosure boom. We, too, have become reliant on a volatile revenue source - what happens if/

Judiciaries across the nation are enduring the consequences of their underfunded, overcrowded, and overwhelmed courts.

when the filing fees stop rolling in? Our reliance on a variable funding source for primarily fixed operating costs puts us on track to become the next cautionary tale.

But dependence on filing-fees is not the only problem. Legislative underfunding is undeniable and the failure to adequately fund state courts has left the counties to fend for themselves. Property taxes can only go so far and the



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county boards have had little choice in deciding how to fund our courts. On the one hand the courts must expand to accommodate the influx of lawsuits and time-sucking pro se defendants, and on the other the courts must remember that the housing crisis is temporary and dependence on the filing fees to fund an inflated judiciary is a recipe for disaster.

The state's funding of our judicial system is limited to Judges' salaries, benefits, support staff and office expenses. Our government is comprised of checks and balances – three independent branches of government that perform unique roles in our society with just enough overlap to keep the other branches honest. Our general assembly is well funded. Our executive branch is well funded. A mere .5% of the general funds to an entire branch of government entrusted with the paramount responsibility of the administering justice and protecting our freedoms.

Solutions. Ignoring filing fees and court fines will not solve the problem either. But just because the revenue is there this year does not mean it will be there next year. Now is the time to invest in infrastructure that will allow our courts to operate efficiently with significantly less funding. Now is the time to tell our legislature that the judicial branch of our government is too important to allow it to be sacrificed in favor of the legislative and executive branches. Allowing our judiciary to be weakened by underfunding is not an option – the costs, financial and otherwise, are too great.

We must do more with less until the state recognizes its responsibility to properly fund our courts. Technology is one way to do this. In DuPage County 85% of cases are filed online while Cook County boasts a mere 3% filed online.²⁵ Technological solutions can be implemented to increase efficiency, reduce the need for human capital, and provide improved access to justice. Online filing, fine paying, and case access have increased timely disposition of cases from 74.1 percent in Boston, Massachusetts to 89.8 percent in 2 years.²⁶ Replacing court reporters with digital audio recording equipment, as seen in DuPage County, is another way courts can do more with less.

Alternative dispute resolution is another way our courts can do more with less. Cases with pro se parties will often times require more attention and time from the court than cases where both sides have legal representation. Pro se cases, small claims, and less complicated matters are particularly good candidates for alternative dispute resolution,

like mediation and arbitration. These programs can encourage parties to explore settlement early on rather than dragging the case out through litigation.

By reducing restrictions on state funding, or line items, state courts will be able to allocate the funds where they are needed most. Some counties need additional facilities, while others need to add judges to help spread out the caseload. Making state funding more flexible allows local governments an opportunity to employ solutions to problems that may be unique to their locale.

Finally, the Illinois judiciary needs you. The Illinois legislature needs to know that taxpayers care about the judicial branch. We need to let our representatives know that we have seen what an underfunded judiciary looks like in places like Florida and California and that we refuse to allow Illinois to follow in those footsteps. Shirking the responsibility of funding off on the county boards has put our court system in a vulnerable position where our ability to administer justice is contingent on the continuation of a foreclosure crisis. The failure of our state to fully fund a branch of its own government will be more costly in the long-run than any short-term savings. □

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25 Pallasch, Abdon M. and Donovan, Lisa. "Brown, Munoz battle over who best to modernize circuit courts," *Chicago Suntimes*. March 12, 2012

26 American Bar Association Report, "Crisis in the Courts: Defining the Problem" at p. 15

The Importance of an Independent Judiciary: An Essay on Judicial Selection in Illinois

By Sean McCumber¹

When the founding fathers began the arduous task of creating a government for this nation, arguments and discussions and debates ensued about the who, the what, the how, the why, and the where. It was decided that the powers of the government would be divided into three separate branches, the legislative, the executive, and the judicial. It was decided that no one branch would have greater power than the other two branches.

Alexander Hamilton opined that the Judicial Branch might possibly be the weakest of the three branches, noting that it had neither the power of the sword, like the Executive Branch, nor the power of the purse, like the Legislative Branch.² However, in reality, the Judicial Branch may be the most important branch to the people; the reason why stems from what the judiciary is called to do.

The Judicial Branch is the one branch of government that every citizen likely has some contact with, be it serving on a jury, or dealing with traffic or minor infractions, or going through personal litigation, such as divorces, estates, and other civil disputes. The Judicial Branch is bastion of liberty for the people from the abuses or encroachments of government. To understand that statement, one need only turn to such landmark decisions as *Brown v. Board of*

Education,³ *Miranda v. Arizona*,⁴ *Griswold v. Connecticut*,⁵ and *Tinker v. Des Moines Independent Community School District*.⁶ In each of these cases, as well as countless other federal and state court decisions, the Supreme Court of the United States protected the fundamental rights of the people from abuses of police power, from restrictions on marital privacy, from restrictions on speech, and even from its own past decisions that formed the basis for legislative segregation.

However, just as people likely have more regular contact with the Judicial Branch, how the judges, who hear their cases, protect their rights, and resolve their disputes, are selected remains part mystery and part misunderstanding. The Illinois Code of Judicial Conduct addresses this concern of judicial independence in Canon 1: “An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing,

1 The author would like to thank Justice Ann Jorgensen, Presiding Justice of the Illinois Appellate Court for the Second District, for her invaluable assistance in reviewing, revising, and preparing this article.

2 The Federalist No. 78 (Alexander Hamilton) (The Judiciary Department).

3 347 U.S. 483 (1954).

4 384 U.S. 436 (1966).

5 381 U.S. 479 (1965).

6 393 U.S. 503 (1969).

maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.”⁷ Yet this rule speaks only to how a judge should conduct himself or herself, not how those judges are selected, nor how that selection process promotes judicial independence.

Judicial Selection. Across the 50 states, there are four primary methods of judicial selection: 1) appointment selection; 2) partisan elections; 3) nonpartisan elections; and 4) merit selection. Currently, four states (South Carolina, Missouri, New Jersey, and Virginia) use an appointment system for selection of judges, from trial court to state supreme court.⁸ When judges are selected by appointment, either the governor, or sometimes the state legislature, appoints a judge to the bench. Sometimes these appointments are made after receiving input from a committee of reviewing members; sometimes the appointment is made when a list of the governor’s choices are selected by the reviewing committee.⁹ In some circumstances, the appointments must be approved by the state legislatures and may be made directly by the state legislatures.¹⁰

In approximately 32 states, including Illinois, trial (or circuit/district) judges are selected by popular election contests, either partisan or non-partisan.¹¹ In a partisan election judicial selection system, judges run in contested party primaries and contested general elections. In other words, voters first nominate candidates for the judiciary under one political party whom the voter affiliates with. In the general election, the opposing candidates run against each other for the judgeship in which the candidates are aligned with the political party that nominated them and voters select from among these remaining candidates. In a nonpartisan election, judicial candidates run initially on the general election ballot, unaffiliated with any party. Thus, they are not exposed to a party primary election and are not assigned implicit bias according to the party affilia-

tion with which they choose to align.

The remaining states use a merit selection process to place judges on the bench.¹² The merit selection plan, also known as the Missouri Plan, began in 1940 as a response to the question of qualified judges serving on the bench.¹³ This plan involves a special commission that reviews applicants for the bench, who are then rated and sent to the governor for selection; the selected judge must then run for retention in the general election one year later.¹⁴

Proponents for merit selection plans are typically in favor of stronger campaign finance laws or disclosure laws. Opponents of merit selection state that the system is less democratic than an elective based system wherein the voice of the people is the strongest. As a result of differing options, the selection, appointment, or election, of judges is a perennial political firestorm among politicians, lawyers, judges, and members of the public.¹⁵

Judicial Selection in Illinois.

The climate in Illinois is no different, especially after judicial candidates in Illinois raised over \$1.15 million for their campaigns.¹⁶ In Illinois, the public elects Circuit, Appellate, and Supreme Court judges in a partisan process. Supreme Court and Appellate Court Judges are elected for ten-year terms, while Circuit Judges are elected for six-year terms.¹⁷ There are currently 23 Circuits in the Illinois Court System.¹⁸ In the circuit courts, Associate Judges are selected and appointed by the circuit judges of that circuit.¹⁹ Associate Judges never face the voters. Vacancies in the Supreme and Appellate Courts are not filled by the governor, but again by appointment by the Illinois Supreme Court. Those appointed candidates must face the voters in a partisan election in the next general election cycle after appointment in order to remain in office.²⁰ Illinois, while primarily operating under the partisan election

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7 Ill. Sup. Ct. R. 61 (West 2012); see also American Bar Association Model Code of Judicial Conduct, R. 1.1 & 1.2 (2007).

8 California uses the appointment system for appellate and supreme court judges. Only Virginia uses the appointment system for renewal terms for judges, as well.

9 Ware, Stephen J. “The Missouri Plan in National Perspective.” 74 Missouri L. Rev 751, 753 (2009).

10 *Id.* at 754.

11 *Id.* at 756.

12 *Id.* at 758.

13 *Id.* at 759.

14 *Id.*

15 Schouten, Fredericka, “States Act to Revise Judicial Selection,” USA Today, March 31, 2010.

16 *Id.*

17 Ill. Const. Art VI, Sec. 10 & Sec. 12 (1970).

18 However, effective January 1, 2013, there will be 24 Circuits, when the Sixteenth Judicial Circuit is divided. Kane County will comprise the new Sixteenth Judicial Circuit and DeKalb & Kendall Counties will comprise the newly created Twenty-Third Judicial Circuit.

19 Ill. Const. Art VI, Sec. 8 (1970); see also Ill. Sup. Ct. R. 39(b) (West 2012).

20 Ill. Const. Art VI, Sec. 12 (1970)

method of judicial selection, maintains a public control of the judiciary: voters select the judges; associate judges and vacant elected judicial offices are filled by appointment by the Illinois Supreme Court; and retention elections are held for elected judges and judges appointed to fill vacancies.

Judicial Campaigns and Influence. With that background in mind, the question becomes, “whom to vote for?” or “why are judges elected anyways?” or “where is the information

about these candidates?” During a campaign, candidates for judicial office will do many of the things associated with other candidates seeking

political office. They will likely do most if not all of the following: appoint a treasurer and campaign committee; raise and spend money; file the required D-2 forms;²¹ issue and distribute campaign literature; host fundraisers and meet-n-greets; display signage in every conceivable location; get to know the electorate in public events; and disseminate candidate information by email, mail, or even Facebook. All of this costs money, and money sometimes calls influence and impartiality into the election process. Another often-cited evil of elections – campaign contributions was the subject of a recent United States Supreme Court case. As noted previously, in 2008, Illinois judicial candidates raised over \$1.15 million for their campaigns, with money coming from lawyers, businesses, and yes, even members of the public, some with more money than others.

While the case involved recusal of a judge who received substantial campaign contributions, *Caperton v. Massey Coal Company, Inc.*²² raises the specter of what money means to the issue of judicial independence. In *Caperton*, there was a dispute between two companies in West Virginia, Harman Mining Company and A.T. Massey Coal Company. The trial court found in favor of Harman Mining Company (its President was Hugh Caperton) and awarded \$50 million in damages. While the case was mired in the appellate court, West Virginia Supreme Court Justice Warren McGraw faced a contested election against lawyer Brent Benjamin. One of the executives for Massey Coal created

a non-profit corporation that contributed approximately \$3 million to Benjamin’s judicial campaign. Benjamin won the election before the trial court verdict came to the West Virginia Supreme Court on appeal. Despite a request for recusal, Benjamin refused to recuse himself, and was part of the majority decision that overturned the \$50 million dollar verdict.²³ In vacating the decision of the West Virginia Supreme Court, Justice Anthony Kennedy, writing for the majority, held that Justice Benjamin’s failure

to recuse himself brought the due process provisions of the 14th Amendment to an unconstitutional level.²⁴

Free Speech in Judicial Campaigns. Cam-

paigns also bring issues to the forefront. People often want to know where candidates stand on particular issues. Judicial candidates find themselves in a unique position because they are seeking an office where impartiality is one of the fundamental tenets of the office. The Illinois Code of Judicial Conduct states that a judicial candidate may not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues within cases that are likely to come before the court.²⁵ Opponents, the media, or the public may take offense or become confused when a judicial candidate declines to offer a position, or instead of personal position, simply reiterates the state of the law. In *Republican Party of Minnesota vs. White*, the Court held that Minnesota’s announce clause, which prohibited judicial candidates from discussing issues that may come before them, was an unconstitutional restriction on the First Amendment.²⁶ Justice Antonin Scalia stated, “We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest at all, inasmuch as it does not restrict speech for or against particular parties, but rather speech for or against particular issues.”²⁷

But can elections affect the impartiality and independence of the judiciary in other ways?

21 The D-2 form is the campaign contribution and expenditure disclosure form required by each candidate to file at the inception of the campaign, and at specified intervals during an election period. See Illinois State Board of Elections, <http://www.elections.il.gov/DocDisplay.aspx?Doc=Downloads/CampaignDisclosure/PDF/D2.pdf>, accessed March 11, 2012.

22 556 U.S. ____ (2009).

23 Each side sought recusals, and another judge recused himself on rehearing after vacationing with the same executive that funded Benjamin’s campaign. At rehearing, the West Virginia Supreme Court affirmed its decision (and Justice Benjamin did not recuse himself at rehearing).

24 556 U.S. ____, at *15. (And the risk that Blankenship’s influence engendered actual bias is sufficiently substantial that it “must be forbidden if the guarantee of due process is to be adequately implemented.”)

25 Ill. Sup. Ct. R. 67(A)(3)(d)(ii) (West 2012).

26 536 U.S. 765, 122 S. Ct. 2528 (2002).

27 *Id.* at 774.

Electoral Impact on Judicial Independence. But can elections affect the impartiality and independence of the judiciary in other ways? In *Varnum v. Brien*, the Iowa Supreme Court found that the Court's "responsibility, however, is to protect constitutional rights of individuals from legislative enactments that have denied those rights, even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law viewed to be impervious to the passage of time."²⁸ The Court overturned Iowa's marriage laws on the grounds that it violated the Iowa Constitution's provision of equal protection of the law.²⁹ An extensive political campaign ensued to oust three of the Iowa Supreme Court Justices in the retention election the following year. Iowa Supreme Court Justices are selected pursuant to a merit selection program, and then must run for retention.³⁰ All three justices were not retained after the massive publicity campaign.³¹ Just as there is fear that campaigning and fundraising may affect the independence of judges, there is equal fear that reprisals for unpopular decisions may affect the independence of judges.

Vetting the Candidates. Additionally, lawyers in Illinois have a hand in judicial information dissemination. Candidates for associate judge are often vetted by local bar associations in a process that involves an investigation by a select committee of lawyers. In DuPage County, the bar association's Judiciary Committee receives the candidate's application, contacts references, and interviews the candidates. The committee then issues a recommendation as to whether the candidate is highly recommended, recommended, or not presently recommended. Candidates for judicial election often endure the same scrutiny.³² While it might be said that these evaluations do not matter, many members of the public seriously consider what lawyers say about judges before they cast their ballot in a judicial election.

Checks on Judiciary. In light of the concerns of money and opinions raised above, judicial selection in Illinois still has many checks and balances on the judiciary: 1) the retention process; and 2) the Judicial Inquiry Board and the Courts Commission. Retention is the opportunity for voters to determine whether a previously elected judge

should remain in office for another term. The simple yes or no vote determines whether a judge will serve for another term. The inquiry is whether this judge has done his or her job, being a fair, impartial, and expedient dispenser of justice. It is an evaluation of the candidate's record and duties by the public, to whom all branches of government answer. A judge seeking retention in Illinois must receive 60% yes votes of the votes cast in the retention ballot to be retained in office.³³

While in office, whether or not in a retention election, all judges, of all levels of the judiciary are also monitored by the Judicial Inquiry Board, ("JIB"), a constitutional board that handles complaints about any judge in the State.³⁴ The JIB consists of two Circuit Judges selected by the Illinois Supreme Court and seven members (four non-lawyers and three lawyers) appointed by the governor.³⁵ If after investigation, the JIB finds that further action is warranted, the JIB will file a public complaint against the judge in question with the Courts Commission. The Courts Commission consists of one Supreme Court Justice, two Appellate Court Justices, and two Circuit Court Judges (and three alternates, selected by the Supreme Court, as well as two citizens (and two alternates) appointed by the governor.³⁶ The Courts Commission hears complaints filed by the JIB publicly. After hearing, the Courts Commission is authorized to remove from office, suspend without pay, censure or reprimand a judge for willful misconduct in office, persistent failure to perform his or her duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute; or to suspend, with or without pay, or retire a judge who is physically or mentally unable to perform his or her duties.³⁷ This check on the judiciary is very crucial, as it serves as a constant in the judicial independence process, never having to wait for an election, nor a retention, to maintain the integrity of Illinois courts.

Conclusion. Whether judges should be part of the political process and whether they should be elected in a partisan process is a question that will persist *ad infinitum*. The judiciary safeguards the people from abuses of government, and guarantees that order and rule of law endure. However, this branch, like the others, must be watched to ensure that it neither overpowers the other branches, nor the people. Regardless of the debate in Illinois, the system does maintain the founding principles of our country – that our government was created by the people, for the people, and to answer to the people. □

28 763 N.W.2d 862, 876 (Iowa 2009).

29 *Id.* at 906.

30 Iowa Const., Art. V, Sec. 16 & Sec. 17 (1857, as amended 1962).

31 It should be noted that while Iowa permits judges up for retention to speak about their candidacy (Rule 51:4.2), none of the three justices spoke against their detractors.

32 Some of the bar associations that conduct judicial evaluations, to name a few, include: the Illinois State Bar Association, the Chicago Bar Association, the DuPage County Bar Association, the Champaign County Bar Association, the Hellenic Bar Association, the Women's Bar Association of Illinois, and the Puerto Rican Bar Association of Illinois.

33 Ill. Const. Art VI, Sec. 12(d) (1970).

34 Ill. Const. Art VI, Sec. 15 (1970).

35 Ill. Const. Art VI, Sec. 15(b) (1970).

36 Ill. Const. Art VI, Sec. 15 (e) (1970).

37 *Id.*

The Goals of Democracy and Those of Economic Development: Bridging the Two While Valuing Public Participation

By Maryam Judar and Terry Pastika

State, city, and county governments have long pursued the expansion of local economies through the promotion of private sector activity. Government economic development departments, committees, and commissions spur growth through activities such as marketing campaigns, local infrastructure improvement investments, and the establishment of tax increment finance districts. Notably, lucrative economic development subsidies, or the corporate preferred term “incentives,” are increasingly a common tool governments utilize to attract companies to relocate within their borders.

Sunshine laws enable the citizenry to engage in the democratic process (including the process by which economic development decisions are made) through accessing government information and monitoring government meetings to ensure that government activity is conducted in the public interest. In crafting sunshine laws, legislatures balance democratic values of transparency and accountability against protecting corporate profit margins, such as through trade secrets exemptions.¹

As state and local governmental entities navigate how to increase depleted revenues and create jobs, more are turning to economic development corporations (EDCs) to assist in developing economic strategies, luring businesses, and promoting job growth. For example, World Business

Chicago (WBC) is a publicly funded, not-for-profit group of business leaders chosen by the City of Chicago’s Mayor.² As an EDC, it makes economic development decisions including whether to recommend the city give taxpayer subsidies to corporations.³ Recent news reports cite that Mayor Rahm Emanuel pledged to expand the role of WBC in city affairs.⁴ DuPage County has its own EDC that was created by the DuPage County Board in 2007. Originally named “DuPageBiz,” it was a not-for-profit EDC charged with advancing the economy of the County through job creation, among other methods.⁵ DuPage Biz became “Choose DuPage” in 2008 and continues “to maintain and improve the county’s economic vitality and quality of life.”⁶ A major project recently highlighted in the news and by Choose DuPage was the relocation of the Navistar Corporate headquarters to Lisle.⁷

1 The Illinois Freedom of Information Act exempts records evidencing trade secrets and other proprietary information yielded in the economic development negotiations between government and private enterprise. 5 ILL. COMP. STAT. § 140/7(1)(g) & (f) (Lexis 2011).

2 Jeff Cohen & David Heinzmann, “Mayor, business group, shut out of meeting,” CHICAGO TRIBUNE, Nov. 4, 2011.

3 Jeff Cohen & David Heinzmann, “Mayor, business group, shut out of meeting,” CHICAGO TRIBUNE, Nov. 4, 2011.

4 Jeff Cohen & David Heinzmann, “Mayor, business group, shut out of meeting,” CHICAGO TRIBUNE, Nov. 4, 2011.

5 DUPAGE COUNTY BOARD, Res. ED-0003-07

6 www.choosedupage.com

7 “Navistar moving headquarters to Lisle,” Mar. 4, 2011 available at www.choosedupage.com,

The City of Chicago and DuPage County are by no means unique in relying on non-public entities to promote economic development to benefit the public good. A corollary element equally important to the public good, but not often discussed, is the need to safeguard the role of the public in economic decision making through expanding Illinois' transparency laws. In Illinois, most of these entities do not fall under the umbrella of state transparency laws. In Chicago, for example, despite Mayor Emanuel's emphasis on increased transparency, the WBC meets behind closed doors when making economic development decisions, including whether to recommend the city give taxpayer subsidies to corporations.⁸ In DuPage County, a concerned citizen sought information about the proposed Navistar project through a Freedom of Information Act request to DuPage County, which included an inquiry with respect to Choose DuPage. Within the records DuPage County provided in response, Choose DuPage voluntarily produced a substantial amount of documents, including a statement that its cooperation should not be construed as consenting to a FOIA request, including the one at hand.⁹

Often times when a government entity intends to take action on an issue where an EDC is involved, the first details received by the public are through a news release, a specific governmental body agenda, or public notice related to a public hearing. The Illinois citizenry is already plagued with poor civic health due to a variety of reasons¹⁰ but when there is civic interest and motivation to participate in the

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economic development process, systemic barriers present themselves that relate to the lack of information flowing to the public and little time to adequately assess and act on information. By the time the public is provided with information, government, EDCs, and corporations already have made significant investments. Notice to the public, which is supposed to expand public involvement, becomes nothing more than a pro forma activity.

When the public attempts to obtain information to evaluate development decisions that involve EDCs,¹¹ the stark reality hits that meetings are closed, and information disclosure about an EDC's activity is based on the EDC's discretion or through individual Freedom of Information Act requests to the various public bodies with which the EDC liaisons. A civically combustible environment emerges when there is a lack of balance with respect to the free flow of information to the public on clear issues of public concern in favor of economic development and the role of private corporations. When citizens attempt to fully avail themselves of what limited political process may remain to independently determine if the public good is indeed served, the perceptions are polarized as ei-

8 Jeff Cohen & David Heinzmann, "Mayor, business group, shut out of meeting," CHICAGO TRIBUNE, Nov. 4, 2011.

9 DuPage County response to January 8, 2010 FOIA request.

10 MCCORMICK FOUNDATION & CITIZEN ADVOCACY CENTER, ILLINOIS CIVIC HEALTH INDEX 2010 (National Conference On Citizenship 2010). Less than 10% of those surveyed attended a meeting where a public issue was discussed. *Id.* at 1.

11 The citizenry's interest in influencing economic development decisions in their communities is not misplaced. Although governments purportedly pursue economic development as a means to increase the quality of their residents' lives ostensibly through job creation, a recent study has shown that programs in the name of economic development require little if any job creation. GOOD JOBS FIRST, MONEY FOR SOMETHING: JOB CREATION AND JOB QUALITY STANDARDS IN STATE ECONOMIC DEVELOPMENT SUBSIDY PROGRAMS (2011). The report rated 238 subsidy programs, including five in the state of Illinois. It gave Illinois a "D" ranking among 37 states and the District of Columbia, with a score of 29, well below the national average of 40 on a 100-point scale. *Id.* It criticized Illinois for failing to require companies to offer workers health benefits and adequate wages, measures that indicate quality of life, *id.*, but that are sacrificed in the pursuit of increased numbers of low-paying jobs. To further complicate matters, strong performance requirements need to be coupled with aggressive enforcement, on which Good Jobs First will issue a forthcoming report. *Id.* at 4.

ther democracy in action or an inhibition of economic development.¹²

The purpose of this article is to review how private EDCs are treated under Illinois sunshine laws and broadly examine how other states have addressed EDCs and private corporations relative to transparency. As it is the opinion of the authors that the goals of democracy are broader than the goals of economic development, reform recommendations have also been included to restore the balance between transparency and accountability related to economic development against the reliance on EDC to stimulate economic growth.

Illinois Law. Illinois law addresses the question of whether a non-governmental entity is subject to the state's sunshine laws given its government-related activity through the framework of whether the entity meets the definitions of "public body" in the Freedom of Informa-

tion Act (FOIA)¹³ and the Open Meetings Act (OMA).¹⁴ Both statutes contain a substantially identical definition of "public body," which includes all legislative, executive, administrative, advisory, or subsidiary bodies of the foregoing. Economic development corporations, whether non-profit or for-profit, are not legislative, executive, administrative, or advisory bodies of state or local government. The inquiry, therefore, becomes whether such entities fall under "subsidiary bodies" for purposes of FOIA and OMA. Illinois sunshine statutes are absent a definition; and without plain meaning, Illinois courts have ruled to narrowly define the term, making it tremendously difficult to include private corporations created and even funded by a public body under the purview of Illinois' transparency laws. Two appellate cases, *Rockford Newspapers, Inc. v. Northern Illinois Council on Alcoholism and Drug Dependence*¹⁵ and *Hopf v. Topcorp, Inc.*,¹⁶ are controlling.

In *Rockford Newspapers, Inc. v. Northern Illinois Council on Alcoholism and Drug Dependence*, (NICADD), a newspaper publisher attempted to apply the OMA to a not-for-profit organization, the Northern Illinois Council on Alcoholism and Drug Dependence (NICADD), which administered drug and alcohol treatment programs.¹⁷ The newspaper contended that the OMA should apply to NICADD because NICADD was a "subsidiary body" due to the facts that: (1) 90% of its funding comes from government grants and contracts; (2) its activities and programs are regulated and monitored by federal, state, and local governments; and (3) it operates programs that are the statutory responsibility of the Illinois Dangerous Drug Commission.¹⁸ NICADD argued that it should not fall under the statute's scope because of NICADD's formal status as a private, not-for-profit corporation.¹⁹ Also, NICADD argued that its personnel had no direct relationship with the government because its board members were selected according to its own bylaws and not appointed nor elected by government officials, among other things.²⁰

The court started its analysis with the OMA, which allows the public to access meetings of "public bodies."²¹ The OMA provides the definition of "public body," in pertinent part: " 'Public body' includes all legislative, execu-

12 Leonard M. Monson & Gregory W. Jones, "Does the Public Zoning Process in Illinois Inhibit Economic Development? Lessons Learned from Navistar's Move to Lisle," DCBA BRIEF, January 2011, at 24.

13 5 ILL. COMP. STAT. 120/1.02 (Lexis 2011).

14 5 ILL. COMP. STAT. 140/2 (Lexis 2011).

15 64 Ill. App. 3d 94; 380 N.E.2d 1192 (1978).

16 256 Ill. App. 3d 887; 628 N.E.2d 311 (1993).

17 *Rockford Newspapers, Inc. v. N. Ill. Council on Alcoholism & Drug Dependence*, 64 Ill. App. 3d 94, 95; 380 N.E.2d 1192, 1192 (1978).

18 *Id.* at 95; 1193.

19 *Id.* at 95-96; 1193.

20 *Id.* at 96; 1193.

21 *Id.*

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tive, administrative or advisory bodies of the State, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees or commissions of this State, and any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue²²

Noting that the statute failed to define “subsidiary” and that “dictionary definitions of the word [subsidiary] fail to provide any significant guidance,”²³ the court ultimately sided with NICADD, finding that the organization’s formal status and its freedom from direct governmental control were both “extremely significant factors.”²⁴ The general supervision exerted by the government over organizations such as NICADD, as opposed to day to day control, did not meet the direct relationship that “subsidiary body” demands.²⁵ Additionally, branding NICADD’s work performed as a “traditional government function” was not enough to bring it under the definition.²⁶ To deem otherwise, according to the court, would effectuate an intent that the legislature could not have intended, because it would bring within its definition all parties contracting with the state.²⁷

With respect to funding, the court noted that the OMA does not state that public funding alone will make a partic-

ular entity subject to the statute, even if it does provide that a particular entity need not be publicly funded in order to be required to hold open meetings.²⁸ The court reasoned that if it were to extend the definition of “subsidiary body” to include all those entities that receive public funding, too many would fall under OMA’s purview, which also could not have been the legislature’s intent.²⁹

In *Hopf v. Topcorp, Inc. (Hopf II)*, citizens sought to apply Illinois sunshine laws to two for-profit corporations,

The purpose of this article is to
review how private EDCs are
treated under Illinois sunshine laws
and broadly examine how other
states have addressed EDCs and private
corporations relative to transparency.

Topcorp and Research Park, Inc. (RPI), which were formed pursuant to a Statement of Understanding between the City of Evanston and Northwestern University to develop a research park on downtown Evanston property owned

principally by Evanston and Northwestern.³⁰ The project was part of the redevelopment plan adopted by the city, and a tax increment financing district had been established to pay for public improvements in the infrastructure of the redevelopment area.³¹ The agreement stipulated that the corporations were created to (1) enhance the tax base of the Evanston; (2) provide jobs for city residents; and (3) encourage new business development.³² Topcorp was created to acquire the land within the redevelopment area, with assistance from the city when necessary to use eminent domain or otherwise.³³ RPI was responsible for developing the park through negotiating sale or lease, marketing, managing and overseeing operations.³⁴ Among other ties, Evanston appointed half of the initial RPI directors; the three Evanston designated Topcorp directors were Evanston’s mayor, an alderman, and the city manager; and the corporations were created after a series of public debates.³⁵

22 5 ILL. COMP. STAT. 120/1.02 (Lexis 2011). FOIA allows the public to access government records, and it defines records as belonging to public bodies. Essentially identical to the definition in the Illinois Open Meetings Act, it defines “public body,” in pertinent part: “‘Public body’ means all legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof”
5 ILL. COMP. STAT. 140/2 (Lexis 2011).

23 *Rockford Newspapers, Inc. v. N. Ill. Council on Alcoholism & Drug Dependence*, 64 Ill. App. 3d 94, 96; 380 N.E.2d 1192, 1193 (1978).

24 *Id.*

25 *Id.* at 96-97; 1193-94.

26 *Id.*

27 *Id.*

28 *Id.* at 96; 1193.

29 *Id.*

30 *Hopf v. Topcorp, Inc.*, 256 Ill. App. 3d 887; 628 N.E.2d 311 (1993) (*Hopf II*).

31 *Id.* at 889; 312.

32 *Hopf v. Topcorp, Inc.*, 170 Ill. App. 3d 85, 87; 527 N.E.2d 1, 2 (1988) (*Hopf I*).

33 *Hopf v. Topcorp, Inc.*, 256 Ill. App. 3d 887, 880; 628 N.E.2d 311, 313 (1993) (*Hopf II*).

34 *Id.*

35 *Id.* at 891; 331-14.

The *Hopf II* court cited *Rockford* as controlling, stating the test required three factors (1) whether the entity has a legal existence independent of government resolution; (2) the nature of the functions performed by the entity; and (3) the degree of government control exerted.³⁶ The court repeated the findings of fact from a prior case involving the same parties (*Hopf I*), characterizing the functions of RPI “to oversee the private development of real estate” and the functions of Topcorp to purchase land from the city and Northwestern University.³⁷ With respect to the role of the government entity, the court reiterated *Hopf I* that previously characterized the government’s supervision as being limited to its motivation as a shareholder, and stated that the government lacked any other proprietary interest in the corporation’s day to day operations.³⁸ The *Hopf II* court found that the new evidence brought forth to illustrate entanglements between the public and private entities was unpersuasive in demonstrating day-to-day control.³⁹

Hopf II also reiterated the *Hopf I* court’s finding of “significant” factors, citing Topcorp’s and RPI’s legal status as for-profit corporations and the respective independence of the corporations’ boards.⁴⁰ It concluded, “[a]lthough both the City and Northwestern are able to influence the direction and decision of the two corporations through their appointment power, neither the City nor Northwestern can control the two corporations.”⁴¹ The court also found that public funding by itself was not dispositive. The *Hopf II* Court cited *Rockford* for the proposition that “[t]he amount or percentage of governmental funding of a private entity should have no bearing on whether that entity is characterized as a subsidiary for purposes of the [OMA]. Although [OMA] itself provides that a particular entity need not be publicly funded in order to be required to hold open meetings, it does not state that public funding alone will make a particular entity subject to [OMA]. To imply such a statutory intent would affect large numbers of completely private entities that receive a large portion of their funding from the State.”⁴² As such, Illinois court’s overall emphasis on the legal structure of an entity and the day to day control over execution of activities within the entity outweighs the central role that such an entity may play in strategizing and executing plans for economic development or the funding inextricably linked to a public body.

36 *Id.* at 892; 314.

37 *Id.* at 892; 315.

38 *Id.*

39 *Id.*

40 *Id.* at 893; 315.

41 *Id.* at 894; 315.

42 *Id.* at 896; 317 (citing *Rockford*, 64 Ill. App. 3d 94, 96; 380 N.E.2d 1192, 1193).

The Federal Standard and Practices in Other States.

The authors surveyed all fifty states’ statutes that bear on the subject to identify what trends drive transparency and public participation with respect to non-governmental economic development entities that are intrinsically bound with the government sector. To identify the contours of transparency and its intersection with private activity delegated by, funded by, or relied on by the public sector, the authors reviewed the federal standard in determining what constitutes “agency” for federal FOIA purposes, and 22 appellate or state Supreme Court cases⁴³ that answer whether a given entity falls under that states’ sunshine laws or if records of an economic development arm of government should be accessible by the public. The volume of cases indicate that the a particular court’s focus on pure public/private distinctions that favors transparency in the former and privacy and confidentiality in the latter does not provide easy answers in the realm of economic development. Additionally, as the court did in *Hopf II* as outlined *supra*, it is also important to note that the universe of cases considered with regard to this issue expand beyond controversies that affected an EDC, and reach private entities generally.

The value of open government is driven by legislative intent and is purely a creature of statute throughout the nation.⁴⁴ Federal courts have considered the government control factor in determining if an entity falls under the federal FOIA’s definition of “agency” since the United States Supreme Court ruled on *Forsham v. Harris*.⁴⁵ The Court in *Forsham* reasoned that Congress did not intend federal funding and supervision alone to create an agency under the federal FOIA, but rather substantial control by the federal government was imperative to inclusion in the federal FOIA.⁴⁶ Lower federal courts followed suit: For example, in *Rocap v. Indiek*, the court of appeals found that the Federal Home Loan Mortgage Corporation (FHLMC) was an agency under federal FOIA because it met the statute’s definition of “government-controlled

43 See cases cited *infra* notes 53 and 55.

44 But see R. James Assaf, “Mr. Smith Comes Home: The Constitutional Presumption of Openness in Local Legislative Meetings,” 40 CASE W. RES. 227, 241-42 (1990) (arguing that the nation’s tradition of open legislative meetings is rooted in our common law heritage and the public’s interest in government information is constitutionalized in Article 1, 5, cl. 3).

45 *Forsham v. Harris*, 445 U.S. 169 (1980). See also Craig D. Feiser, “Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law,” 52 FED. COMM. L.J. 21, 37 (1999). In the alternative, federal courts will look to the functional equivalent factor to determine whether private entities are subject to the federal FOIA. In this scenario, the entity is functioning independently but making decisions for the government, and in effect, acting as the functional equivalent of the federal government.

46 *Forsham v. Harris*, 445 U.S. 169, 181 (1980).

corporation” due to the following combination of factors: FHLMC was chartered under federal law, it was controlled by federal statute, its employees were federal employees, it operated solely on federal funds, and it was subject to the complete control of federal officials.⁴⁷

States’ laws vary widely in their application of transparency to private entities that undertake the delivery of public services, but there is a clear bifurcation in the states’ legislative approaches, which is reflected in the states’ case law. With respect to cases involving EDCs: on one end of the spectrum, where a state has a provision in its sunshine laws to exempt records and/or meetings of economic development corporations,⁴⁸ or has a provision that expressly protects the confidentiality of the economic development process in the enabling statute for the corporation,⁴⁹ courts have disposed of controversies by ruling that such entities do not fall under state sunshine laws or their records and/or meeting(s) are not subject to public disclosure.⁵⁰ On the other end of the spectrum, where a state lacks such a statutory provision, courts apply the state’s sunshine laws

to economic development corporations citing dedication to the idea that it is in the people’s best interest to thwart secretive meetings and deals.⁵¹ Congruent with the notion that open government is in the people’s best interest, as indicated above, some states also have a public records request laws that specifically include a provision that will reach a non-profit EDC that executes a contract with a public entity.⁵²

The survey of the 22 court cases reveals that the inquiry whether a given EDC or other private entity falls under the state’s sunshine laws is usually fact intensive with no one factor outcome determinative across the nation. The factors considered by the courts varied in number, type, and emphasis, and they all relate to either structure or function of the entity in question. The authors compiled a list of ten variables reflecting structure or function, any of which may have been considered by a given court in its interpretation of a state’s statutes: (a) the formal legal nature of the entity; (b) whether public funding is at issue; (c) whether commingling of private and public funds exists, or wheth-

47 *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976).

48 The following sunshine statutes in 11 states provide protection to EDCs from public record access and/or meeting access: ARK. CODE ANN. § 25-19-105(9)(A) (Lexis 2011); IDAHO CODE § 9-340D(6) (Lexis 2011); IOWA CODE § 22.7(8) (Lexis 2011); IND. CODE §§ 5-14-3-4(b) (5)(A); 5-14-1.5-6.1(b)(4) (Lexis 2011); KAN. STAT. § 45-221(a)(31) (Lexis 2011); KY. REV. STAT. § 61-878-3(d) (Lexis 2011); LA. REV. STAT. § 44:22A (Lexis 2011); ME. REV. STAT. tit. 1, § 405(6)(c) (Lexis 2011); N.C. GEN. STAT. §§ 132-1.11(b); 143-318.11(a)(4) (Lexis 2011); N.D. CENT. CODE § 44-04-18.4(5)(a) (Lexis 2011); OKLA. STAT. § 25-307(C)(10) (Lexis 2011); S.C. CODE § 30-4-55 (Lexis 2011); TEX. GOV’T CODE §§ 551.087(1); 552.131(a) (Lexis 2011); VA. CODE § 2.2-3705.6(3) (Lexis 2011); WASH. REV. CODE § 42.56.270(12)(ii) (Lexis 2011).

49 The following enabling statutes in 15 states for state and/or local EDCs provide varying levels of “confidentiality” behind EDC activity affecting record and meeting access: ALA. CODE § 41-9-202 (Lexis 2011); 1 FLA. STAT. ANN. § 288 (Lexis 2011); MISS. CODE ANN. § 57-1-14 (Lexis 2011); MO. REV. STAT. § 620.014 (Lexis 2011); NEV. REV. STAT. § 18-231.069 (Lexis 2011); N.M. STAT. § 6-25-27(A) (Lexis 2011); OR. REV. STAT. § 26A-285A.075(1)(b) (Lexis 2011); S.D. CODIFIED LAWS § 1-33-19.2; 1-52-3.4 (Lexis 2011); TENN. CODE ANN. § 4-3-730(c)(1) (Lexis 2011); UTAH CODE ANN. § 63M-1-1224 (Lexis 2011); W.VA. CODE § 5B-2-1 (Lexis 2011).

50 *KMEG Television, Inc. v. Iowa State Bd. of Regents*, 440 N.W.2d 382,386 (Iowa 1989) (holding that marketing and production of intercollegiate sports television broadcasts was not a duty or function of government, and therefore records were not accessible under the public record request act), *partially overruled by Gannon v. Iowa State Bd. of Regents*, 692 N.W.2d 31, 40 (2005); *Maready v. City of Winston-Salem*, 467 S.E.2d 615, 629 (N.C. 1993) (finding that defendants did not violate the North Carolina Open Meetings Law where an appropriate exception existed for closed session to discuss matters relating to the location or expansion of business, and the intent to approve land acquisition may be formed in closed session); *Leader v. Hagen*, 739 N.W.2d 475, 480 (S.D. 2007 (finding that the Governor’s Hunt invitation list, which was used in the course of business by the Governor’s Office of Economic Development, was not required by statute to be kept or maintained and therefore not subject to the state’s public record request act); *Evergreen Freedom Found. v. Locke*, 110 P.3d 858, 862 (Wash. Ct. App. 2005) (finding that the requested records’ redacted portions fell under the trade secrets exemption in Washington’s Public Disclosure Act).

51 *Denver Post Corp. v. Stapleton Dev. Corp.*, 19 P.3d 36, 39 (Colo. Ct. App. 2000) (“[W]e note that the failure specifically to include a particular type of agency within the definitional sections of the [Colorado Open Records Act] has not precluded such an agency form being subject to its provisions if exclusion of the agency would be contrary to the General Assembly’s intent in enacting [the Act].”); *Central Atlanta Progress, Inc. v. Baker*, 278 S.E.2d 840, 842 (Ga. App. 2006) (“The Open Records Act was enacted in the public interest to protect the public from ‘closed door’ politics and the potential abuse of individuals and misuse of power such policies entail. . . . The intent of the General Assembly was to encourage public access to information and to promote confidence in government through openness to the public.”); *Northwest Georgia Health System, Inc. v. Times-Journal, Inc.*, 461 S.E.2d 297 (Ga. App. 1995); *Time of Trenton Publ’g Corp. v. Lafayette Yard Community Dev. Corp.*, 874 A.2d 1064, 1071-72 (N.J. 2005) (describing the state’s policy in favor of open meetings as valuing the right of the public to be present at all meetings of public bodies, to witness in full detail all phases of deliberation, policy formulation, and decision making of public bodies, ultimately all being vital to the democratic process) (citing N.J. STAT. ANN. 10:4-7); *Buffalo News Inc. v. Buffalo Enter. Dev. Corp.*, 644 N.E.2d 277, 279 (N.Y. 1994) (“[The Freedom of Information Law] was enacted to provide the People with the means to access governmental records, to assure accountability and to thwart secrecy [and] is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government.”) (citations omitted); *Wisconsin v. Beaver Dam Area Dev. Corp.*, 752 N.W.2d 295, 297-98 (Wis. 2008) (“On the one hand we cannot countenance a government body circumventing the legislative directive for an open and transparent governmental function. On the other hand, we have to be cognizant of the realities of economic development and the need, at times, for flexibility and confidentiality.”). Notably, Illinois strays from this trend: the Illinois courts in *Rockford* and *Hopf*, both of which reflect a highly conservative outlook in favor of secrecy.

52 See, e.g., *News & Sun-Sentinel Co. v. Schwab, Twitt & Hanser Architectural Group*, 596 So.2d 1029, 1031 (Fla. 1992) (noting that Florida’s Public Records Act is defined broadly to include private entities “acting on behalf of any public agency” because “[t]his broad definition serves to ensure that a public agency cannot avoid disclosure under the Act by contractually delegating to a private entity that which otherwise would be an agency responsibility”).

er the government obtains assets in case of dissolution; (d) whether a governmental function is at issue; (e) whether the entity is created by the public agency; (f) whose benefit the private entity was functioning; (g) the level of supervision exerted by the public body over the private entity; (h) whether the entity's annual budget is subject to government access or public disclosure; (i) the composition of the entity's board; and/or (j) the type and breadth of control exerted by the entity's board.

Of the 22 appellate or state Supreme Court cases that bear on the subject, fourteen cases had outcomes in favor of transparency, subjecting the particular entity in question to the state transparency statutes (seven of those involved an EDC);⁵³ however, four of those cases found that despite being subject to the states transparency laws, an exception allowed the non-profit entity to withhold documents.⁵⁴ Eight cases (five of which involved an EDC) found that the totality of the circumstances, or another

test, warranted a finding that the sunshine laws do not apply to the entity in question.⁵⁵ A review of the body of cases quickly highlights that, overall, when courts juggle at the epicenter of the inquiry an analysis of entity structure and function, dedication to the principles of democracy are questionable: results range from inconsistent rulings to an outright emphasis on corporate over public interests. In fact, where a court finds that its analysis of an EDC's structure places the private entity under the state's sunshine laws, an EDC could make structural adaptations to fall outside of the sunshine laws' reach (as demonstrated by cases in New York, outlined *infra*); and yet an analysis emphasizing function could reach a differing outcome regardless of the structure of the entity (as demonstrated by the New Jersey case outlined *infra*).

The structural analysis in determining the mandate of transparency as applied to an economic development agency is lacking when one considers the goals of democracy. One court pointed to the arbitrary distinction between "public" and "private" by acknowledging that economic development activity is pursued by both public and private entities, and each type work toward their economic

53 *Denver Post Corp. v. Stapleton Dev. Corp.*, 19 P.3d 36 (Colo. Ct. App. 2000); *Bd. of Trs. of Woodstock Acad. v. Freedom of Info. Comm'n*, 436 A.2d 266, 270-71 (Conn. 1980) (employing the federal functional equivalent test: whether the entity performs a governmental function; the level of government funding; the extent of government involvement or regulation; whether the entity was created by the government); *Central Atlanta Progress, Inc. v. Baker*, 278 S.E.2d 840 (Ga. App. 2006); *Northwest Georgia Health System, Inc. v. Times-Journal, Inc.*, 461 S.E.2d 297, 300 (Ga. App. 1995) (holding that private hospitals were subject to state's sunshine laws because non-profit corporations that contractually agreed to operate public hospital authority assets for the public good became the vehicle through which the public hospital authorities carried out their official responsibilities); *Harwood v. McDonough*, 344 Ill. App. 3d 242; 799 N.E.2d 859 (2003); *Indianapolis Convention & Visitors Ass'n, Inc. v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208 (Ind. 1991); *Citizens for a Better Env't, Inc. v. Ohio County Indus. Found. Inc.*, 156 S.W.3d 307, 308 (Ky. Ct. App. 2004) (applying bright line definition in state's open records act where public agency includes any body which derives at least 25% of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds). Note that the Kentucky legislature responded by passing legislation protecting such records. KY. REV. STAT. § 61-878-3(d) (Lexis 2011); *City of Baltimore Dev. Corp. v. Carmel Realty Assocs.*, 910 A.2d 406 (Md. 2006) (finding the EDC subject to the state's public information act); *Time of Trenton Publ'g Corp. v. Lafayette Yard Community Dev. Corp.*, 874 A.2d 1064 (N.J. 2005); *Buffalo News Inc. v. Buffalo Enter. Dev. Corp.*, 644 N.E.2d 277, 278-79 (N.Y. 1994) (holding a not-for-profit corporation that administered loan programs and encouraged community development, thought not subject to substantial governmental control over its daily operations, was still a "government entity" performing a governmental function and thus an "agency" subject to New York's Freedom of Information Law); *Maready v. City of Winston-Salem*, 467 S.E.2d 615 (N.C. 1993); *Leader v. Hagen*, 739 N.W.2d 475 (S.D. 2007); *Coleman v. Kisber*, 338 S.W.3d 895 (Tenn. Ct. App. 2010); *Wisconsin v. Beaver Dam Area Dev. Corp.*, 752 N.W.2d 295 (Wis. 2008).

54 *Harwood v. McDonough*, 344 Ill. App. 3d 242; 799 N.E.2d 859 (2003); *Maready v. City of Winston-Salem*, 467 S.E.2d 615 (N.C. 1993); *Leader v. Hagen*, 739 N.W.2d 475 (S.D. 2007); *Coleman v. Kisber*, 338 S.W.3d 895 (Tenn. Ct. App. 2010).

55 *News & Sun-Sentinel Co. v. Schwab, Twitt & Hanser Architectural Group*, 596 So.2d 1029, 1031-33 (Fla. 1992) (setting forth a nonexclusive list of nine factors to be considered in determining whether a private entity was subject to the state's open records act, and finding that none of these factors applied to the private architectural firm); *Rockford Newspapers, Inc. v. N. Ill. Council on Alcoholism & Drug Dependence*, 64 Ill. App. 3d 94; 380 N.E.2d 1192 (1978); *Harwood v. McDonough*, 344 Ill. App. 3d 242; 799 N.E.2d 859 (2003); *Hopf v. Topcorp, Inc.*, 256 Ill. App. 3d 887; 628 N.E.2d 311 (1993) (*Hopf II*); *Perry County Dev. Corp. v. Kempf*, 712 N.E.2d 1020 (Ind. Ct. App. 1999) (finding in favor of Perry County Development Corporation on summary judgment for four factors because: (a) funding by government is fee-for-service, (2) the membership of PCDC's board is not relevant to the question, (c) 100% public funding not dispositive, and (d) PCDC not subject by operation of law to audit by State Board of Accounts); but remanding for two factors in deciding if the public records act applies to PCDC: (e) whether PCDC is a public agency because it exercised delegated governmental powers or (f) have been given the power to direct the expenditure of public funds); *KMEG Television, Inc. v. Iowa State Bd. of Regents*, 440 N.W.2d 382 (Iowa 1989); *In re Ervin v. S. Tier Econ. Dev., Inc.*, 809 N.Y.S.2d 268, 269-70 (N.Y. App. Div. 2006) (distinguishing *Buffalo News*, 644 N.E. 2d 295, because the economic development entity at issue was created by private business persons, none of the board members exercised any financial control over the entity, the government did not control the management of the property in question, the entity's audit was not subject to public disclosure, and the entity did not administer loan programs or disburse funds on behalf of the government); *Safety, Agric., Vills. & Env't, Inc. v. Delaware Valley Reg'l Planning Comm'n*, 819 A.2d 1235, 1242 (Pa. Commw. Ct. 2003) (finding that the economic development entity acts only in an advisory capacity and as such does not qualify as an organization performing an essential government function to qualify as an "agency" under the Pennsylvania Right-To-Know Act).

development goals one way or another whether subject to sunshine laws or not, although both their activities inure to the benefit of the public.⁵⁶ The arbitrary nature of this distinction in a democracy is demonstrated by the contrast in the outcome of two New York court cases that considered whether records from economic development corporations were accessible under New York's Freedom of Information Law (FOIL).

In *Buffalo News Inc. v. Buffalo Enterprise Development Corporation*, a New York court considered whether the Buffalo Enterprise Development Corporation (BEDC) was an agency under FOIL, which defines "agency" as "any state or municipal department, board, bureau division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof."⁵⁷ Although the BEDC urged the court to adopt the Federal precedent to the Federal Freedom of Information Act that requires "substantial governmental control over [] daily operations" of the agency (which was lacking in BEDC's case), the court found that the BEDC's purpose is undeniably governmental because it was created by and for the City of Buffalo to attract investment and stimulate growth in the community, was required to disclose its annual budget that was subject to public hearing, and it described itself as an "agent" of the City.⁵⁸ Thus, it was subject to FOIL.

Twelve years later, the *In re Ervin v. Southern Tier Economic Development, Inc.* court reached a different decision with respect to records requested from another economic development agency.⁵⁹ The city acquired the real estate and loaned the EDC municipal funds to develop the land;

and in the meantime, the city paid the economic development corporation's management fee if it was unable to do so itself.⁶⁰ The court distinguished *Buffalo News*, emphasizing structure over function: that the EDC at issue was created by private business persons; and although three of its nine members were ex officio government officials, the corporation's board did not have financial control over the entity; and it did not hold itself out as an agent of the city or administer loan programs or disburse funds.⁶¹ The city's promotion and financial entanglement in the redevelopment were not considered, and although the economic development corporation was performing a governmental function by fostering the economic development of the City, it is not an agency for the purposes of FOIL.⁶²

When a court bypasses the structural inquiry and instead focuses on or emphasizes the functional inquiry, a given non-profit or EDC might readily fall under the state's sunshine laws. The New Jersey Supreme Court in *The Times of Trenton Publishing Corporation v. Lafayette Yard Community Development Corporation* was not swayed by an economic development corporation's structural argument in claiming that it was not created by a governmental agency but instead by private citizens interested in assisting Trenton in redeveloping a parcel of land.⁶³ "To accept it without further discussion would be to elevate form over substance to reach a result that subverts the broad reading of [the Open Public Records Act] as intended by the Legislature."⁶⁴ The relevant test in the New Jersey case presented two alternatives in finding the EDC a "public body" under the law: whether the entity performs a governmental function or whether it is authorized to expend public funds.⁶⁵ The court was swayed by the municipality's large measure of control over the EDC as evidenced by the incorporation papers and bylaws and agreements with the city, as well as the city's support as a taxing power.⁶⁶ Thus, it held that Lafayette Yard Community Development Corporation was subject to the states' sunshine statutes because it is a public body that performs a governmental function within the meaning of the Open Public Meetings Act and an instrumentality or agency created by a political

56 *Wisconsin v. Beaver Dam Area Dev. Corp.*, 752 N.W.2d 295, 298 (Wis. 2008) ("This opinion should not be read as disfavoring the desire to engage in economic development without being subject to open meetings and public records law. Indeed many private entities operate throughout this state without being subject to those laws and successfully promote economic development to the benefit of us all. Likewise, there are many governmental economic development corporations that have for years operated successfully while being subject to the open meetings and public records laws. We take no position as to what is the best structure for the enhancement of economic development in a particular area."). The Wisconsin Supreme Court emphasized the functional analysis, and in so doing, found that the Beaver Dam Area Development Corporation met the definition of a "quasi-governmental corporation" under the state's sunshine laws in function, effect, and status. *Id.* at 307-08.

57 *Buffalo News Inc. v. Buffalo Enter. Dev. Corp.*, 644 N.E.2d 277, 279 (N.Y. 1994).

58 *Id.*

59 *In re Ervin v. S. Tier Econ. Dev., Inc.*, 809 N.Y.S.2d 268 (N.Y. App. Div. 2006).

60 *Id.* at 269.

61 *Id.* at 270.

62 *Id.*

63 *The Times of Trenton Publ'g Corp. v. Lafayette Yard Community Dev. Corp.*, 874 A.2d 1064 (N.J. 2005).

64 *Id.* at 1074.

65 *Id.* at 1071.

66 *Id.*

subdivision under Open Public Records Act.⁶⁷

Recommendations for Reform. As stated earlier, it is the opinion of the authors that the goals of democracy are broader than the goals of economic development. If we care about the civic health of Illinois residents and are dedicated

to the principle that a democracy functions at its best when the public is informed, active, and engaged, it follows that we thereby value public participation in the realm of economic development. Under current Illinois law, the public does not have an opportunity to learn about issues of public concern related to

⁶⁷ *Id.* at 1072.

The structural analysis in determining the mandate of transparency as applied to an economic development agency is lacking when one considers the goals of democracy.

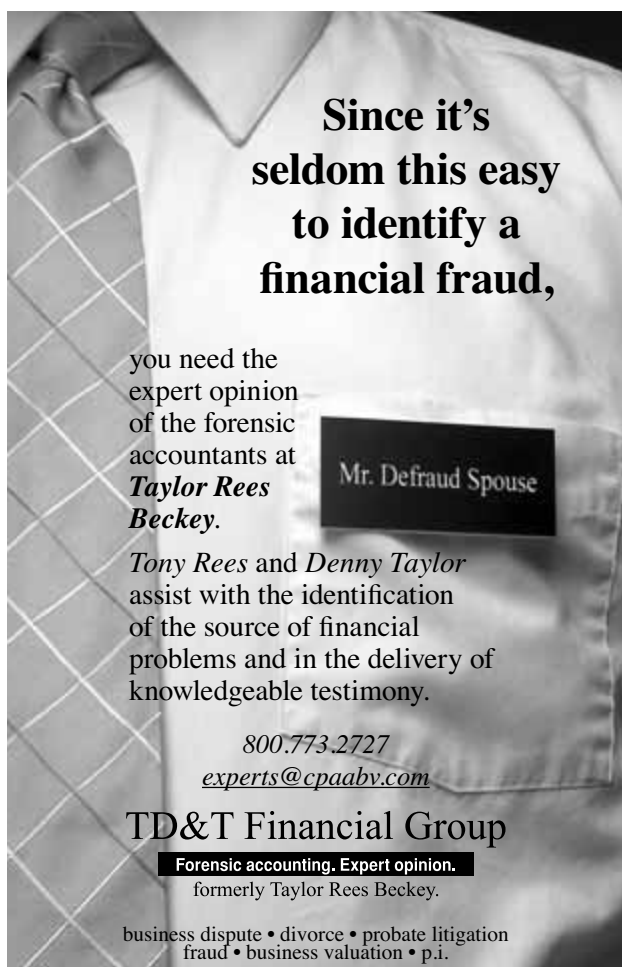
economic development through the avenue of EDCs until the matter is brought before a public body for discussion and or action. This public point of entry is too far down the road for meaningful public engagement.

Additionally, Illinois' focus on the "public" versus "private" distinction is a detriment and reforms need to be made to broaden the scope of our laws. To that end, Illinois' FOIA's ambit is limited by its narrow definition of "public body" and the narrow interpretation

by courts of its definition of "subsidiary body." The intent and effectiveness of FOIA is undermined by the diffusion of the delivery of public services to special purpose agencies that have different relationships to the delegating public body.⁶⁸

The *Rockford* court's concerns with a finding that would overreach to parties that contract with governments has to a certain degree already been addressed by recent amendments to the Illinois FOIA that makes records in the possession of a party that contracts with a government to perform a governmental function, and that are directly related to that function, available to the public. The Illinois FOIA now includes the provision, "[a] public record that is not in the possession of a public body but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under this Act, shall be considered a public record of the public body, for purposes of this Act."⁶⁹ With this recent revision of one factor relied on by the court, now is an opportune time to reassess how Illinois law evaluates the role of EDCs in a functioning democracy.

The emphasis by Illinois courts on day-to-day government control, couched in the structure analysis, does our state a great disservice with respect to our civic health. Rather than asking whether an organization structurally appears to be governmental, the inquiry to be posed is



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⁶⁸ See Alasdair Roberts, "Structural Pluralism and the Right to Information," 51 U. TORONTO L.J. 243 (2001).

⁶⁹ 5 ILL. COMP. STAT. 140/7(2) (Lexis 2011).

whether the entity is performing a governmental function in tandem with “whether an organization’s conduct could cause unjustifiable harm to fundamental interests, and whether transparency requirements might avoid such harm.”⁷⁰

The New Jersey court in *Times of Trenton* had a legislative framework before them that allowed for such inquiry and protected such interests. Its Open Public Meetings Act states a policy: “that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public’s effectiveness in fulfilling its role in a democratic society[;] and [that] it [is] the public policy of the State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business *affecting the public* is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger.”⁷¹

Beyond the policy statement of the statute, New Jersey also explicitly defines “public body” to describe entities that “perform a public governmental function affecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person.”⁷² Conducting the analysis through this framework that involves a functional analysis with a broader inquiry looking at fundamental interests, better safeguards the public’s role in an ever evolving, complex democracy in which governments look to new models of delivering services and performing government activity. As applied to EDCs, that inquiry would consider environmental concerns, including pollution and noise; concerns over the granting of subsidies to corporations; job creation issues; and land use concerns, to name several interests that affect the quality of life of residents.

The approach suggested here recognizes that the “confidentiality imperative” at the local level is wielded at the expense of the citizenry. As one author has written: “[A]t the local level of government, many of the compelling reasons for closure disappear. Whatever reasons remain, such as discussion of personnel matters and real estate transac-

tions, lead to far less dangerous results in the event the information become public. Yet the consequences of closure at the local level are more dangerous. The citizen must rely on his own ability to gather information with regards to local matters, since he does not have the national media and public advocate groups to acquire information for him. Without a government enforced right to guarantee him access to the political process, he could be rendered ignorant of the deliberations that most directly affect him.”⁷³

Recognizing that in balancing the needs of the public against the needs of the corporation, where ultimately corporations have a fiduciary duty to their shareholders first and the public second, legislative language like the following might also achieve that balance: “No public officer or employee shall enter into a binding agreement with any corporation, partnership, or person who has requested confidentiality of information pursuant to [an act regarding Economic Development Agencies], until 90 days after such information is made public.” A ninety day window gives the public satisfactory time to gather, review, and digest information it receives and contribute to the dialogue.

In addition, the following would safeguard public interests: (1) require public hearings on all subsidy deals with adequate protections to ensure meaningful participation; (2) disclose information on all current subsidy applications; (3) require disclosure of subsidy spending by corporations receiving government subsidies and corporate compliance; (4) utilize clawbacks routinely (money back guarantees), and (5) utilize and enforce Community Benefit Agreements (CBAs). A Community Benefit Agreement (CBA) is a project-specific, negotiated agreement between a developer and a broad community coalition that outlines the project’s contributions to the community and ensures community support for the project. Covering a wide range of issues, CBAs are legally binding and are commonly incorporated into the city’s developer agreements

Conclusion. As more public bodies rely on EDCs to promote the economic development of communities in difficult financial times, it is easy to lose sight of bedrock democratic principles under the guise that a healthy local economy equates to a healthy democracy. Now is an opportune time to re-evaluate how competing values might be better balanced through local and state legislative reforms. □

70 Alasdair Roberts, “Structural Pluralism and the Right to Information,” 51 U. TORONTO L.J. 243, 271 (2001).

71 N.J. STAT. ANN. § 10:4-7 (Lexis 2011) (emphasis added).

72 N.J. STAT. ANN. § 10:4-8(a) (Lexis 2011).

73 R. James Assaf, “Mr. Smith Comes Home: The Constitutional Presumption of Openness in Local Legislative Meetings,” 40 CASE W. RES. 227, 255 (1990).

Dischargeable and NonDischargeable Divorce Related Attorney Fees in Bankruptcy

By Arthur W. Rummler

Abraham Lincoln is widely quoted as saying that, “A lawyer’s time and advice are his stock in trade”. As such, it is reasonable to assume that a lawyer should be compensated for providing his or her services.

Juxtapose these maxims with the desire of a bankruptcy debtor to receive a discharge of debt and you have an uncomfortable combination of opposing forces. Such is the reality of many a family law practitioner or other attorney unlucky enough to have outstanding accounts receivable due from a client who is facing financial distress.

Typically, attorney fees are dischargeable in bankruptcy cases. However, attorney fees related to family law matters may not be dischargeable under certain circumstances. The Bankruptcy Code¹ excepts from discharge various debts. The amendments to the code in 2005 expanded these categories and recent case law has clarified their application to family law attorneys.

Bankruptcy Discharge and Exceptions to Discharge. Ultimately, a bankruptcy debtor is seeking to get a discharge of debt. The debtor is insolvent and needs relief. Perhaps the causal factor is income reduction, job loss, uninsured medical expenses or perhaps

the inability to budget income and expenses. Often the triggering event is the dissolution of marriage.

Consumer debtors have two choices. They can file Chapter 7 and get a fresh start or they can file Chapter 13 and enter into a repayment plan. Chapter 7 cases are about four months long and the debtor does not make payments to creditors. Chapter 13 cases may last from 36 to 60 months and require monthly payments according to a plan of repayment. Most consumer debts (e.g. credit cards, medical bills, utility bills, repossession debt, attorney fees, foreclosure deficiency) are dischargeable in either a Chapter 7 or Chapter 13 bankruptcy.

Not all debts are dischargeable in bankruptcy. Some debts are excepted from discharge for various public pol-

¹ All references to the Bankruptcy Code refer to Title 11 U.S.C. §101 *et al.*

icy reasons.² The good news for family law practitioners (and bad news for debtors) is that the law is trending toward expanding the non-dischargeability of divorce related debts, including attorney fees.

Effect of the Bankruptcy Discharge. Section 524 of the Bankruptcy code provides in relevant part that: “(a) A discharge in a case under this title (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived; (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; . . . ”³

The effect of a bankruptcy discharge is an injunction against collection of a discharged debt. Section 524 defines prohibited conduct against a discharged debtor and explains what is being discharged. On its face, section 524 appears to be a broad discharge, including attorney fees owed by a bankruptcy debtor, whether they are in the form of a claim for fees (e.g. pursuant to a written retainer agreement) or whether they have been reduced to a judgment.

Debts Excepted from Discharge. The Bankruptcy Code also excepts various debts from discharge; mainly for public policy reasons. Debts owed for fraud, taxes, student loans, child support, alimony, embezzlement, criminal fines, restitution are all non dischargeable. So too are various debts relating to family law, separation and dissolution of marriage. The relevant sections of the Bankruptcy Code are §523(a)(5) and (a)(15).

Family Law Exceptions to Discharge: Domestic Support Obligations. A debt owed for Domestic Support Obligations is not discharged in bankruptcy pursuant to 11 U.S.C. §523(a)(5). That section provides in

pertinent part that: (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-- (5) for a domestic support obligation”

The Bankruptcy Code defines Domestic Support Obligation in section 101(14A). That section provides: “The term “domestic support obligation” means a debt that accrues before, on, or after the date of the order for relief

in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—(A) owed to or recoverable by—(i) a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative; or (ii) a governmental unit; (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child’s parent, without regard to whether such debt is expressly so designated; (C) established or subject to establishment before, on, or



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after the date of the order for relief in a case under this title, by reason of applicable provisions of—(i) a separation agreement, divorce decree, or property settlement agreement; (ii) an order of a court of record; or (iii) a determination made in accordance with applicable non-bankruptcy law by a governmental unit; and (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child’s parent, legal guardian, or responsible relative for the purpose of collecting the debt.”⁴

Thus, a bankruptcy debtor attempting to obtain a discharge of debt will be prohibited from discharging alimony, maintenance and child support payments, provided they fall within the definition of Domestic Support Obligations. Furthermore, Section 523(a)(5) applies to discharges under both Chapter 7 cases and Chapter 13 cases.⁵

² See generally 11 U.S.C. §523(a).

³ 11 U.S.C. §523(a).

⁴ 11 U.S.C. 101(14A).

⁵ See 11 U.S.C. §727(b) and §1328(a)(2).

Lastly, debts for Domestic Support Obligations are non-dischargeable without being subject to the time limitations of Federal Rule of Bankruptcy Procedure 4007. That rule requires certain objections to discharge to be filed within the 60 days following the meeting of creditors held pursuant to 11 U.S.C. 341. No adversary complaint is required to be filed by any deadline.⁶

Family Law Exceptions to Discharge: Debts Incurred in a Divorce Proceeding. Debts relating to a family law matter, but not in the nature of a Domestic

Support Obligation may also be non-dischargeable in bankruptcy. Section 523(a)(15) states in pertinent part that: “(a) A discharge under section 727, 1141, 1228(a),

1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt- . . . (15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit”⁷ Therefore, if the debt is not a Domestic Support Obligation covered by section 523(a)(5), but was incurred by the debtor in a divorce or separation and owed to either a spouse, former spouse or child of the debtor and it, it is non-dischargeable under §523(a)(15).

However, Section 523(a)(15) applies to discharges under only Chapter 7 cases and not under Chapter 13 cases. A debtor in a Chapter 13 bankruptcy case *can* discharge debts that fall under §523(a)(15).⁸ As with a Chapter 7 case, a creditor is not bound by a time limitation to file an adversary action under §523(a)(15).⁹

To summarize the breadth of non-dischargeability of family law debts under the Bankruptcy Code, one influ-

ential commentator stated, “Essentially, the combination of amended §§ 523(a)(5) and (15) would be to exclude from discharge all marital and domestic relations obligations, whether support in nature, property division, or hold-harmless, provided that they were incurred in the course of a divorce or separation or established in connection with a separation agreement, divorce decree, or other order of a court of record or a determination made in accordance with state or territorial law by a governmental unit.”¹⁰

It is clear that certain family law debts are non-dischargeable in bankruptcy. But how does that affect the attorney fees claims of a family law practitioner? The best

Debts relating to a family law matter, but not in the nature of a Domestic Support Obligation may also be non- dischargeable in bankruptcy

way to answer this question is to look at some case law interpreting the statutes.

Debt Owed for Attorney Fees to Attorney from Own Client. A debt owed to the family law attorney by a client or former client that has now filed bankruptcy is dischargeable in all circumstances. The Seventh Circuit decided this issue in the case of *In re Rios*.¹¹ The court in *Rios* held that attorneys’ fees owed by the debtor-client were not excepted from discharge under § 523(a)(5).

The court considered the claim of an attorney who provided services to her client in an effort to obtain child support. The court collected cases and determined that §523(a)(5) did not apply to the contractual obligation between the debtor and her former attorney, despite the nature of the action being one to collect child support on behalf of the client.¹²

In the case of *In re Alexander Miceli*¹³, former United States Bankruptcy Judge John H. Squire cited *Rios* favorably, putting a fine point on the issue, stating “Clearly, under *Rios*, a debtor’s own attorneys’ fees incurred in a pre-petition state court domestic relations dispute, which remain unpaid as of the time the debtor files a

6 11 U.S.C. § 523 (c)(1).

7 *Id.* at § 523(a).

8 11 U.S.C. § 1328(a)(2) does not include section 523(a)(15) as an exception to the chapter 13 discharge.

9 11 U.S.C. § 523 (c)(1).

10 Hon. William Houston Brown & Lawrence Ahern III, 2005 BANKRUPTCY REFORM LEGISLATION WITH ANALYSIS, 32 (2d ed. 2005).

11 901 F.2d 71 (7th Cir. 1990).

12 *Id.* at 72.

13 2000 WL 1285347 (Bankr.N.D.Ill. 2000).

bankruptcy petition, are not excepted from discharge under § 523(a)(5).¹⁴

While fees owed to by client in bankruptcy are treated as a contractual obligation and thus dischargeable, there may exist a rationale for a determination of non-dischargeability based other provisions of §523. For instance, if it can be shown that the client/debtor never intended to pay the fees, the debt may fall under one of the various fraud provisions, such as section 523(a)(2) (a). In that section, the Bankruptcy Code excepts from discharge debts incurred for false pretenses, false representations or actual fraud.

This was the result in the case of *In Re Bucciarelli*.¹⁵ In *Bucciarelli* the creditor/attorney was able to show that the debtor fraudulently induced the attorney to work on the divorce case, all the while intending to discharge the debt in a bankruptcy case. The court held the debt was non-dischargeable.

Debt for Attorney Fees Owed by Debtor to Spouse or Former Spouse. If a bankruptcy debtor owes attorney fees that were ordered to be paid to the spouse/former spouse, those fees may be non-dischargeable in bankruptcy. If the shifted fees are characterized as a Domestic Support Obligation under §523(a)(5), then there should be little room for the Debtor to attempt to have them discharged. However, the debt can also be of the type contemplated by §523(a)(15); as a debt incurred during a family law proceeding. As such the debt would still be non-dischargeable in a Chapter 7 case. But, as analyzed above, a debt under 523(a)(15) can be discharged in a Chapter 13 case. The characterization of the debt becomes an important question. In making that determination, courts look at many factors.

First, federal bankruptcy law, not state law, is the standard for determination of whether a debt is in the nature of alimony, maintenance or support.¹⁶ Courts making this determination will look beyond labels imposed by the parties or state law and look to the substance of the obligation.¹⁷ State law is not irrelevant and the court may consider it for guidance.¹⁸ The deter-

mination rests on whether the obligation was intended as an equalization of property rights or as support and maintenance.¹⁹

In the case of *In Re Leroy*²⁰, the court stated the following factors considered by courts in the determination include the following: “(1) whether the obligation terminates upon the death or remarriage of either spouse (termination of the obligation indicates the obligation was for support); (2) whether the obligation is payable in a lump sum or in installments over a period of time (obligation spread over time indicates the obligation was for support); (3) whether the payments attempt to balance the parties’ income (payments to balance income indicate the payments were for support); (4) the characterization of the obligation in the decree (obligations described as support indicate the obligation was for support); (5) the placement of the obligation in the decree (obligations under the heading support indicate the obligation was for support); (6) whether there is any mention of support payments (separate mention of support payments indicates the obligation is not for support); (7) whether there are children who need support (if children are of the age when support is required, this indicates the payments may be for support); (8) whether there is a large differential in net income (a large differential in income would indicate the payments were for support); (9) whether the obligation was thought to be taxable to the recipient (payments thought to be taxable indicate the payments were for support); and (10) waivers of maintenance.”²¹

The court will use these factors to decide whether the parties intent was to provide support or to divide marital property or debts.²² Depending on the characterization, the debt for attorney fees owed to your client will either be non-dischargeable in both a Chapter 7 and Chapter 13 case (for debts falling under §523(a)(5) of dischargeable in Chapter 13, but not in a Chapter 7 (for debts falling under §523(a)15).

Debt for Attorney Fees Owed to Your Firm by

14 See *id.*

15 429 B.R. 372 (Bankr. N.D. Ga. 2010).

16 Haas v. Haas (In re Haas), 129 B.R. 531, 536 (Bankr.N.D.Ill.1989); Seidel v. Seidel (In re Seidel), 48 B.R. 371, 373 (Bankr. C.D.Ill.1984).

17 See Maitlen v. Maitlen (In re Maitlen), 658 F.2d 466, 468 (7th Cir.1981); Doss, Puchalski, Keenan & Bargiel, Ltd. v. Cockhill (In re Cockhill), 72 B.R. 339, 341 (Bankr.N.D.Ill.1987).

18 Calisoff v. Calisoff (In re Calisoff), 92 B.R. 346, 352 (Bankr.N.D.Ill.1988).

19 In re Woods, 561 F.2d 27, 30 (7th Cir.1977).

20 In re LeRoy, 251 B.R. 490 (Bankr. N.D. Ill. 2000).

21 *Id.* at 503 (citing In re Woods, 561 F.2d at 29-30); In re Maitlen, 658 F.2d 466, 468-69 (7th Cir.1981); In re Coil, 680 F.2d 1170, 1172(7th Cir. 1982); Sterna v. Paneras (In re Paneras), 195 B.R. 395, 401-02 (Bankr.N.D.Ill.1996); Wright v. Wright (In re Wright), 184 B.R. 318, 321 (Bankr.N.D.Ill.1995); Daulton v. Daulton (In re Daulton), 139 B.R. 708, 710 (Bankr.C.D.Ill.1992).

22 Elkhatib v. Elkhatib (In re Elkhatib), 108 B.R. 650, 652 (Bankr.N.D.Ill.1989).

Spouse or Former Spouse. Often times the attorney fees owed by one party to the divorce will be shifted to the other spouse. When that is the case, it is not uncommon to have the debt payable directly to the law firm representing the other spouse. In a case from the Northern District of Illinois, *Aldrich v. Papi*,²³ Judge Black pondered the question of attorney fees owed by the debtor to the law firm of the former spouse.

The court was asked to decide whether the former spouse's attorney had standing to pursue a claim of non-dischargeability under §523(a)(5). The main issue was that the plain language of §523(a)(5) only applied to

debt that is either owed to or recoverable by the *debtor's spouse, former spouse, or child*. Since the plaintiff was the former spouse's attorney, the debtor/defendant claimed the debt should be dischargeable.

Judge Black collected cases and engaged in a thorough analysis of the issues. He found that the overwhelming majority of courts deciding the issue specifically rejected a strict plain language interpretation of §523(a)(5) and extended standing to the former spouse's attorney. Furthermore, Judge Black concluded that the nature of the debt was that of support and thus the debt fell under the definition of a Domestic Support Obligation under section 523(a)(5).²⁴ The *Papi* case illustrates that attorney fees that are in the nature of support and owed to you or your firm by the former spouse of your client are not dischargeable in bankruptcy pursuant to §523(a)(5).

While the court is likely to conclude that such fees are in the nature of support, practitioners should establish a record from the state court to support that conclusion. When the characterization is not clear, other courts have determined that attorney fees can be held non-dischargeable under §523(a)(15) as debts incurred during a divorce matter.²⁵ Again, the distinction makes a difference because debts that fall under section 523(a)(15) can be discharged in Chapter 13, but not in Chapter 7.

Conclusion. Attorneys cringe when they receive notice that their client is filing bankruptcy. In most cases, any debt owed for attorney fees will be discharged in either a Chapter 7 or Chapter 13 bankruptcy case. Some debts are not dischargeable for public policy reasons, including certain debts related to alimony, support or other debts incurred in the course of a family law proceeding. Fees owed to an attorney by their own client and incurred in a family law matter are dischargeable in bankruptcy, unless fraud of some other exception to discharge applies. If a bankruptcy debtor is seeking to discharge attorney fees owed to a former spouse or the attorney of the former spouse, then they are likely to be non-dischargeable under 11 U.S.C. §523(a)(5) or (a)(15). □

23 427 B.R. 457 (Bankr. N.D. Ill. 2010)

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24 *Papi* at 463.

25 See *In re Prensky*, 416 B.R. 406 (Bankr. D. N.J. 2009), *Einhorn, Harris, Ascher, Barbarito & Frost, P.C. v. Hernandez* (Bankr.N.J., 2010), and *In re Kennedy*, 442 B.R. 399 (Bankr. W.D. Pa., 2010).

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Photo by Jeffrey Ross

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DCBA Law Day Speaker and Guantanamo Detainee Attorney H. Candace Gorman

Interview by Deborah Klein

H Candace Gorman is the keynote speaker for this year's DCBA Law Day luncheon. Well known for her pro bono representation of Guantanamo detainees, the 2012 Law Day theme: "No Courts, No Justice, No Freedom" has special meaning for this civil rights attorney. Ms. Gorman recently agreed to an interview for the DCBA BRIEF. An excerpt follows:

Q: At the time you graduated from the University of Wisconsin as a philosophy major, your father [Robert J. Gorman] was a prominent Chicago attorney practicing civil rights law. Was it your desire to follow in his footsteps?

A: My father actually had a general

practice that also included civil rights. His practice included the occasional criminal case to personal injury cases, from contract cases to probate cases and everything in between including civil rights. One of his major clients was Roosevelt University—he represented the school from the time it opened. Of course, it was opened by a group of professors who wanted to be part of a racially integrated university—he was especially proud of that. When I graduated from university, I had no intention of being a lawyer. I wanted to be a philosopher but there weren't many jobs for philosophers so I headed to Europe and traveled for a year and taught English as a second language in Germany to keep myself going. Eventually I came back to Chicago and worked with a small outreach organization started by a friend of mine that was trying to help get members of street gangs on the north side of the City (Latin Kings, Latin Eagles and a few others) into something a little more positive than drugs and gang fights. It was during this time that I finally gave in to the pull of law. I took the LSAT and entered John Marshall in January of 1980.

Q: Although your father served in WWII (and who, incidentally, was in the Jeep with Eisenhower riding into Paris) he successfully defended conscientious objectors to the Vietnam War on a pro bono basis. Some must have had a negative view of that. Did that impact you in any way?

A: I was very proud of the work my father did with conscientious objectors. He joined Veterans for Peace very early on during the war and he was a vocal critic of the war, which he believed was a terrible mistake. I really do not remember my father being publicly criticized but if he had been, he would have ignored it or lectured whoever was complaining about the importance of providing legal representation for all. In our family the law and politics were talked about at dinner and I was politically involved from the age of 13 when I began working on Eugene McCarthy's presidential campaign up through the 1968 convention. When McCarthy lost the vote on the war during the convention I left my workstation in the Conrad Hilton Hotel and joined the demonstrators. My dad was at the police station representing people arrested as part of an effort by the [National] Lawyers Guild and I know he breathed a sigh of relief when I was not in that crowd.

Q: Following your graduation



from John Marshall Law School, did you join your father's practice?

A: My father "retired" while I was in law school and left his practice to my brother, Greg. I worked as a law clerk for my dad off and on over the years and while I was in law school. When I finished school, Greg couldn't really afford to hire me but he gave me space in his office to set up my own practice and to mentor me. He threw me cases that he didn't want and I, like my father, started out with a very general practice.

Q: In your practice, has your primary focus been on civil rights?

A: Yes. I went to law school with the goal of being a civil rights attorney. It took some years to get established in that area of law. In the early years I handled lots of other cases but after about seven or eight years I was primarily handling employment discrimination claims and other civil rights claims. I think by my tenth year out my practice was 90 percent civil rights.

Q: Of your many achievements, in 2004 you won a unanimous decision before the U.S. Supreme Court [*Jones v. R.R. Donnelley*] regarding the statute of limitations in §1981 cases. In a term that saw many split decisions, how did it feel to convince the entire Court to agree with your position?

A: I had been working on the case for 11 years by the time of the Supreme Court decision. It was an amazing victory. I was surprised to win unanimously. During the argument, Justice Scalia was particularly harsh and kept asking me the same question over and over. I thought to myself, "Okay, so you don't like my answer—can't we just move on"? Of course I couldn't say that so I just kept giving him the same answer and hoped he would give up. I counted him as a "no" vote. I later learned that Justice Stevens—who wrote the opinion changing the statute of limitations in §1981 cases to four years across the

country instead of the personal injury statute in each state—thought it was very important for procedural issue decisions to be unanimous so they negotiated around Scalia's concerns.

Q: You are well known for your pro bono representation of two Guantanamo detainees. How did it come about that you joined the group of lawyers representing these detainees in habeas corpus proceedings?

A: By the spring of 2005 I had settled the last of the Donnelley class action cases that led me to the Supreme Court. I was finally being paid for my, then, twelve years on those cases. I started to contemplate what I would do next. It was around that time, late summer of 2005, when I received an email from the Chicago Council of Lawyers. The email announced a luncheon discussing Guantanamo, the U.S. naval base in Cuba where so-called "enemy combatants" in the war on terrorism are held in detention centers. When I read the announcement, I thought the topic sounded interesting. I also knew that I did not know as much about what was going on at Guantanamo as I should, so I RSVP'd that I would be there. When the time came for the luncheon, I was home sick with bronchitis. I was sitting on my couch checking my email when the reminder popped up on my computer screen reminding me the luncheon would take place in two hours. I thought to myself, "Well, I guess I will learn about Guantanamo another time." About a week had gone by when I received a follow up email from the Chicago Council of Lawyers. Like most luncheons, no one took attendance and the email was thanking me for my attendance—oops—and reminded me that there were still more than 200 men at Guantanamo without attorneys. Although I knew that there was a lot about Guantanamo that I did not know, it never occurred to me that four years after being captured—and more than one

year after the Supreme Court affirmed their right to hearing and counsel—individuals were still being held without legal representation. I stared at that email for a long time. I didn't realize at the time I was about to set on a new course in my legal career, but that email ended up sealing the deal for me.

Q: Representing clients detained on a military base outside the country must pose daunting complications. Security and language differences come to mind. Were you prepared for that?

A: The Center for Constitutional Rights (CCR) in New York City has been, and still is, acting as the umbrella organization for the Guantanamo pro bono effort. When I responded to the email sent by the Chicago Council I was told that I would first have to participate in an approximately two hour conference call and then if I was still interested, I would have to go to New York City for two days of training. By the time those were both completed, I had a pretty fair idea as to what was involved as far as having to apply for a security clearance and the language issues and some of the other issues that might come up. I was assigned a client right away after the training but it was almost five months before I obtained my security clearance and another six weeks before I was first allowed to go to the base. In many ways the CCR prepared us very well for what to expect but in some ways you cannot really be prepared. I had faith in our legal system when I started the pro bono representation. I was not prepared for the breakdown of our system of law that I witnessed and continue to witness. I was also not prepared for this to last now more than six years—for me—and more than ten years for my remaining client.

Q: Ultimately you shut down your civil rights practice. How did your focus change?

A: I shut down my practice really for two reasons: first, I could no longer assure my other clients confidentiality in our communications. The government declared that anyone who was suspected of “working with” “terrorists” was free game for having their phones tapped, emails read and who knows what else. The government concluded that the attorneys representing the detainees were working with terrorists and therefore we lost our right to privacy; and with that, so did my other clients. But the other reason I shut down my practice was because I became completely obsessed with the injustice that I was witnessing and the breakdown of our system of law. I couldn’t focus on anything else.

Q: Considering the ten-year anniversary of Guantanamo Bay has come and gone, do you get discouraged or depressed?

A: Discouraged, depressed, frustrated, angry—those are just a few of the adjectives that come to mind. Although I was not a great fan of [President] Obama, I did think he would close the place and the disappointment at his actions has been particularly disheartening. Things have actually gotten worse under Obama’s administration as far as the justice system is concerned. The secrecy is ten times worse than under the Bush administration; an administration that I considered to be the lowest of the low. That being said, one of my two clients was finally released under the Obama administration. He was granted a sort of temporary asylum in the country of Georgia. But he was also one of the last to get out of Guantanamo and that was more than two years ago . . . There are [currently] newspaper accounts suggesting that five Afghani’s will be released soon in an effort to help end the war in Afghanistan. Many of us are hoping that will open the logjam.

Q: During most of 2008 and 2009 you lived in The Hague (Netherlands) as a visiting professional at the International Criminal Court. The ICC just came into being in 2002. What was that period like for you?

A: It was good for me to get out of the United States for that period.

Deborah A. Klein is a Professor at College of DuPage where she teaches law classes in the Criminal Justice Program. Ms. Klein previously served as a prosecutor for 13 years. She received her undergraduate degree at ISU in 1985 and her law degree at NIU College of Law in 1989.



For one thing, the Guantanamo cases were all stayed. They were stayed at the time I volunteered and they remained stayed until the election of 2008. So although I continued to visit my clients regularly, even from the Hague, and I filed every imaginable pleading I could come up with—including an original habeas petition in the Supreme Court—nothing was happening on the legal front. I applied for the visiting professional position because of my frustration with our judicial system. I wanted to see if the international court was a viable alternative—even though the United States has not signed on to the Rome Treaty recognizing the court. I worked in the section of the court dealing with the victims of war crimes and I believe the court holds a lot of promise.

Q: Do you intend to continue your work with the ICC?

A: I am continuing with my work at the ICC with my writings but right now I don’t have the time or the re-

sources to work on the projects for the ICC that I feel would strengthen the court. Like a lot of bureaucracies, the court needs some innovative ideas to help make it viable for the challenges of policing war crimes on an international basis.

Q: You have stated it is your “duty” to do all you can to bring Bush and Obama administration war criminals to justice. Is this a self-imposed duty?

A: Actually I consider it my duty as an attorney and as a citizen. We have a Constitution, laws and treaties that our country has decided to simply ignore because we can—because we are a super power—the super power. I signed on as an attorney to protect the Constitution, not to turn the other way when it is convenient.

Q: What does the 2012 Law Day theme “No Courts, No Justice, No Freedom” mean to you?

A: The theme could actually be the motto for Guantanamo! That aside, it is actually a very timely theme given the passage of the National Defense Authorization Act (NDAA) earlier this year. That law codifies the decimation of habeas corpus and allows U.S. citizens that the president “thinks” may be associated with terrorists to be indefinitely detained without charge or trial. Of course, my government already thinks I am associated with terrorists because I represent a man being held as a terrorist—without charge or trial—so I guess I can very easily be put on the president’s list. I, too, could look forward to “no courts, no justice, no freedom” just like my clients at Guantanamo. □

Ms. Gorman also maintains “The Guantanamo Blog” at <http://gtmoblog.blogspot.com> where she writes about her experiences representing Guantanamo detainees.

Encore, encore!

By Brenda Carroll



For thirty-seven years, the DCBA has put on a show called Judges' Nite which spoofs the judges of the 18th Judicial Circuit in skits and song. For quite some time, the proceeds from the show have been collected for the benefit of our own DuPage Bar Legal Aid Service program which provides so many attorneys pro bono to those who need free legal services.

You may not realize that there are approximately 2,600 members of the DCBA and a little over 300 people attended this year's hilarious show, *Going Viral*. And of those 300 present, we can assume there were some non DCBA members such as spouses and friends of DCBA members. So most of you probably have no idea who was involved in putting on this year's extravaganza. I can assure you that the crew, cast and band worked especially hard because this year's venue was the McAninch Arts Center (The MAC) at the College of DuPage. Thank you to the President of the DCBA, **Colleen McLaughlin**, for taking the leap and envisioning the show in this location. Our special admiration goes to **Kevin Millon**, the director, writer and singer and **Angel Traub**, the producer and cast member, for making the vision a reality.

This year's Deep Gavel Award was given to **Judge Timothy McJoynt** as the Judge who suffered the most jabs at last year's show. Congratulations to **Judge McJoynt** on this singular honor.

There is so much talent in all the

Judges' Nite shows and this month's column will list everyone individually because they each deserve the applause of not only those in attendance at the show, but all of us who believe in the mission of the legal aid program.

The 37th Annual Judges' Nite Cast: **Garrett Ard, Terry Benshoof, Maryanna Callas, Brent Christensen, Lili Cinta, Mike Drabant, Pat Edgerton, Alycia Fitz, Mary Gaertner, Connie Gessner, Scott Hollmeyer, Carmel Huseman, Jeff Jacobson, Crystal Kelly, Carole Mallen, Christina Morrison, Clarissa Myers, Nic Nelson, Tim Newitt, Art Pape, Chantelle Porter, Jay Reese, Jim Reichardt, Art Rummmler, Todd Scalzo, Mark Schmidt, David Sigale, Marty Tasch, Angel Traub and Christa Winthers.**

The Judges' Nite Band: **Judge Ronald Sutter, Steve Armamentos & Dave Winthers** (Music Direction), **Linda Winthers, Matt Winthers, Frank Markov, Jack Provenziale, Frank Wesolowski, Don Provenziale Jr., Greg Martucci and Tim Newitt.**

The *Chair of Judges' Nite Committee*: **Angel Traub** (Producer); *Writers*: **Kevin Millon** (Director), **Patrick "Skippy" Hurley, Brent Christensen**; *Playbill*: **Jacki Hamler, Ashley Iovinelli**; *Costumes*: **Jennifer Marshalek** (Costume Director), **Robin Roe**; *Set Design*: **Troy Traub**, (Stage Director) **Joe Del Giudice, Jeff Dalton, Cee Cee Najera-Kramer, Phil Kramer, Jen Hollmeyer, Ariston Moss**; *Props*: **Robin Roe** (Stage Manager), **Jennifer Marshalek,**

Troy Traub, Joe DelGuidice, Jenn Hollmeyer; *Backstage Crew*: **Robin Roe, Troy Traub, Joe DelGuidice, Jeff Dalton, Jennifer Marshalek, Cee Cee Najera-Kramer, Phil Kramer, Jenn Hollmeyer, Ariston Moss, Nadia Abdelkoui, Valerie Pacis**; *Makeup*: **Donna Benshoof**; *Logistics*: **Sue Makovec**; *Videotape*: **Greg Wildman and Online Video Concepts**; *Viral Video*: **Brent Christensen**; *Photography*: **Jeffrey Ross Photography**; and *Clean Up First Assistant*: **Lucas Traub.**

And in a more serious vein, **Judge McJoynt** also recently was the recipient of the Downers Grove Area Chamber of Commerce Lifetime Achievement Award because of his many volunteer activities over the span of thirty years in numerous civil and legal associations as counsel to and officer on various boards. He was recognized as helping to "positively shape the direction of the community in which he serves." His former legal partner, **Lynne Kristufek**, was an associate attorney with our legal aid program many years ago. □

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.



ISBA Update

Legislative Involvement

By James F. McCluskey

I want to thank all of the members of the DuPage County Bar Association who are also members of the Illinois State Bar Association for your confidence over the last three years. I have been re-elected for another three-year term, and I believe it is very important for the members of the DCBA to have a strong relationship

with the ISBA. The ISBA welcomes DCBA members to become involved. An ISBA committee is available for you to join for every area of the law. During my three-year tenure as your representative on the Board of Governors, I have had the opportunity to serve on many substantive law committees and section councils. These section councils initiate legislation that is proposed by the ISBA in Springfield, Illinois.

While some of the section council and committee members might be frustrated by the time it takes to effectuate legislation, it is still important to be part of the process, especially if it affects the area of the law in which you practice. While we are all busy making a living, it is important to every Illinois lawyer's welfare to keep informed as to proposed legislation and the changes in the law. The ISBA is the state-wide vehicle that allows a lawyer to be informed and to participate in the process of law-making.

As a lawyer, each of you is uniquely qualified to speak about your area of practice. Many of the lawmakers in Springfield do not have detailed knowledge of certain areas of the law, such as tort law, family law, and estate and trust

law. With the assistance of lawyers through the ISBA and our legislative liaison, James Covington, we are well represented in Springfield. James Covington has over 30 years experience in proposing and effectuating legislation to the Illinois Legislature. He is our direct voice to the lawmakers. His knowledge and experience make him a very valued asset to the ISBA.

I encourage any DCBA member who is not currently a member of the ISBA to join. An additional benefit of membership in the ISBA, offered by ISBA Mutual Insurance Company, is full access to the Fast Case Premium Plan Library, which includes all bankruptcy cases and Illinois cases dating back to 1819.

Please note in your calendar the Annual Meeting in Lake Geneva, Wisconsin is set for June 14-16, 2012. □

James F. McCluskey, a principal of Momkus McCluskey LLC, handles a wide range of litigation. His areas of expertise incorporate 30 years of experience in contract, shareholder disputes, real estate, partnership dissolution, and professional liability litigation. He is the 18th Circuit's Governor of the Illinois State Bar Association and Past President of the DCBA.

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DCBA Brings Back 2 Programs

By Leslie Monahan



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As a novice gardener, spring is my favorite time of year. I love raking away the leaves and deadness to reveal the new growth sprouting from the soil. Each year I am amazed that the things I planted years ago just keep coming back. It is also exciting to anticipate how the plants will do in the coming months - will it get as big, will they bloom more or less than last year, will the rabbits eat it before it has a chance to bloom, etc.

In a similar way, spring is the perfect time to bring back some perennial favorite DCBA programs. The Keith E. Roberts, Sr. Civil Law Trial Advocacy Program is about to begin again for the first time since 2008. Forty attorneys of varying skill levels will participate over four Saturday mornings to improve their trial skills. Their instructors will be seated judges and experienced attorneys. We are expecting another excellent program and intend to offer the Trial Advocacy program to the membership every other year. Many thanks to the Trial Advocacy Oversight Committee Chair **Brad Pollock** and Civil Law Committee Chair **Kim Davis** for their work. Their commitment and attention to detail with the rest of the Trial Ad Committee: **Mark Bishop, Hon. John Demling, Hon. William**

Ferguson, Hon. Paul Fullerton, Patrick Hurley, Jay Laraia, Michelle Moore, Sharon Mulyk and Hon. John Darrah, ensures an excellent program.

In my ever growing list of new experience thanks to this job, I recently sat in behind the scenes during the filming of a new episode of Legal Action. Legal Action is a partnership of DCBA and NCTV in Naperville. **Susan O'Neill Alvarado** hosts the panel format show with each episode focusing on a different area of law. The first of five episodes scheduled for this year was focused on renter and homeowner rights. **Charles Jacques, Erik Miles and John Pcolinski** were the panelists that answered questions related to apartment contracts and homeowner associations. The episode should be airing on NCTV soon and is also viewable on DCBA's YouTube page. The next episode will feature laws pertaining to business owners. Thanks go to Media Committee Chair **Sean McCumber** and especially Co-Chair **Bradford Bennett** for coordinating the topics and panelists. The episodes will be shared with other local access channels and promoted through DCBA's social media venues. Members are encouraged to contact Sean or Brad if you have a suggestion

for a topic for a future episode.

A new plant in the DCBA garden (I know that is terribly cheesy, but I love a theme!) is the regular features on DCBA's social media. **Ashley Iovinelli**, our new Marketing and Communication Coordinator, has really hit the ground running and is posting regular event and legal updates on the DCBA Facebook and Twitter sites. If you are not friends or following DCBA yet, I encourage you to do so. Get tips on programs that can make life easier on Tech Tuesday, know the scoop on upcoming events and get snippets of information from our MCLE programs. If you already have a Facebook account, just search for DuPage County Bar Association and "like" us. On Twitter find us @DuPageCountyBar.

Lesson Learned: You don't have to reinvent the wheel all the time, look back to see what great things you have done in the past that can be done again. □

Leslie Monahan is the Executive Director of the DuPage County Bar Association and the DuPage County Bar Foundation. A graduate of North Central College, she previously worked with the Promotional Products Association of Chicago, American Fence Association and Coin Laundry Association.

Candidates Announced

For DCBA Board & Third Vice President

The deadline for nominating petitions closed just as this issue was going to press. One candidate is running for the position of Third Vice President. Nine candidates are running for three open positions on the DCBA Board of Directors. Two candidates are running for the new lawyer seat on the Board of Directors.

Below are the photographs and biographies the candidates submitted

with their nominating positions. In addition, we included the candidates response (issue statements) to the following question that the DCBA BRIEF asked each of them: "Identify and explain one or two key issues that you would seek to take action on if elected and why that(those) issue(es) should be addressed in a total of 95 words or less."

The ballots are out and must be re-

ceived back by the DCBA by May 7, 2012 at 5:00pm. Results will then be announced by May 14, 2011.

The Third Vice President is elected for a five year term, moving from Third to Second to First Vice President prior to serving as President of the Bar Association in his or her fourth year and as Past President and President of the DCBF the following year. Board members are elected to three year terms. □



Jay Laraia

Candidate for Third Vice-President (Unopposed)

Partner with Laraia, Harrison & Laraia, P.C. concentrating his practice in family law, civil litigation, and chancery matters. Former assistant state's attorney. Active member of the DCBA, currently serving as a Director and having previously served two terms as Assistant Treasurer and member of Executive Committee. James has also served as the Chair of the Entertainment Committee and member of the Judiciary, Budget, and Planning Committees. Past President and current Comptroller of the DuPage Chapter Justinian Society of Lawyers. Current Vice President and Member of the Robert E. Jones American Inn of Court, previously serving as the Programming Chair, and a team captain for three years.

Issue Statement: I believe it is vital to continue to address and complete the goals set forth in the DCBA Strategic Plan. The Planning committee, headed up by Sharon Mulyk last year and Pat Hurley this year, have created a thorough strategic plan to strengthen the DCBA's membership, to increase member benefits, to continue its service to the community, and to ensure the DCBA's financial short term and long term health and prosperity. I was fortunate to be a part of these committees and I believe seeing these goals completed should be one of our top priorities.



Gerald A. Cassioppi

Candidate for Board Member

As General Counsel, Associate Counsel and Business Law Committee Chair, I have actively served the DCBA - receiving the 2007 DCBA Directors Award. I will bring a unique business perspective to the Board so that the DCBA continues to flourish as a leading professional organization and premier Bar Association for its members. Focusing on corporate matters and as a CPA, I founded Nyberg & Cassioppi in Naperville. Following graduation from the University of Illinois, I was an associate with McDermott, Will & Emery and then served in the Quaker Oats Law Department, and as General Counsel for a successful start-up.

Issue Statement: We've heard the lawyer jokes - the best are heard at Judges' Nite. It obviously pays to have a sense of humor and not take ourselves too seriously. Yet any

bar association's mission, properly includes improving its members' professionalism and effectiveness. Accordingly, the DCBA and its Board must constantly work to earn public confidence. We should be proud to be a member of the legal profession. DCBA members should flourish through affiliation with an organization working to do the next right thing. Through professional conduct, the practice of law will be more effective for all.



Marta Spagnuolo

Candidate for Board Member

Marta Spagnuolo is an attorney with Tameling & Associates P.C. in Oak Brook, Illinois. She concentrates her practice in family law-divorces, paternity cases and child custody disputes. Marta was named as an Illinois Rising Star in 2008, 2009, 2010 and 2012. She received her bachelor's degree from the University of Illinois-Urbana Champaign (B.S. in Psychology, 1998) and her J.D. degree from Chicago-Kent in 2001. Marta grew up in Westmont and currently resides in Woodridge.

Issue Statement: I think a key issue for the DCBA members is obtaining the required CLE credits in a cost and time efficient manner. It is sometimes difficult to attend the free lunch time seminars offered at the ARC. I would suggest that these seminars be recorded and available on the DCBA website for members. The DCBA can charge

a "convenience" fee, in addition to the annual membership dues, to those members interested in participating and obtaining access to the unlimited seminars to view the seminar and obtain CLE credit.



J. Matthew Pfeiffer

Candidate for Board Member

Matt Pfeiffer, Glen Ellyn, IL; Partner, Fuchs & Roselli, Ltd., Wheaton, IL. Education: Purdue University, B.S., 1997; NIU College of Law, J.D., 2000. Practice: commercial litigation, business organizations, mechanics liens, civil appeals. DCBA: Chair, Business Law Cmte. (2010-2011); Chair, Professional Responsibility Cmte. (2009-2010); Chair, LPM Cmte. (2008-2009; 2012-2013); Co-Chair, Web Oversight Cmte. (2009-2010); Member, Planning Cmte. (2009-2011); DCBA Board of Directors Award (2009). Sustaining Member (2007-pres.); General Member (2000-07); frequent speaker for DCBA CLE programs. Misc.: President, NIU College of Law Alumni Council (2010-2012); NIU College of Law Board of Visitors (2010-2012); Director, Loaves & Fishes Community Pantry, Naperville (2011-2014).

Issue Statement: I would push for an increase in the visibility and activities of the DCBA's substantive law committees. I would propose that the Board work more closely with the substantive law committee chairs and vice chairs to assist them in developing a greater variety of subjects and frequency of CLE programs and committee meetings. I would also help the Board try to develop ways to reward or encourage DCBA membership and participation for existing and long-time members as well as ways to enhance both recruitment of non-members through outreach initiatives and participation of younger members.

DCBA Candidates for Office Continued



Ralieggh Kalbfleisch

Candidate for Board Member

Raleigh is a solo practitioner with a concentration in family law. In 1993 she earned a B.S. from Purdue University. In 2001, Raleigh graduated from Quinnipiac University School of Law and she spent her last year of law school as a visiting student at Chicago-Kent College of Law. She is an active member of the ISBA, DuPage County Bar Association and the Family Law Committee. She is also a member of the DuPage County Brief Editorial Board, the Family Violence Coordinating Counsel and helped create a mentoring program for at-risk teen aged girls through the DuPage County Juvenile Diversion Program.

Issue Statement: I would like to see the number of attorneys who volunteer their time grow and find ways to reward such volunteerism. The night court program along with the different help desks and other programs are always in need of attorneys who can give an hour or two of their time once a month. I want to explore the possibility of earning CLE credit or credit for pro bono legal services for an attorney who volunteers his or her time for these programs.



Patrick L. Edgerton

Candidate for Board Member

Patrick L. Edgerton is a Partner with Edgerton & Edgerton. He received his B.S. in Business Management and K.D., magna cum laude, from NIU and served as Managing Editor of Law Review and published in its law review journal. In addition to his extensive trial experience, he serves as an Arbitrator for DuPage, Kane and McHenry County. Patrick is a member of the ISBA, KCBA, and DCBA. With the DCBA, he previously served on its Board of Directors, Chaired the Membership Committee (then combined with New Lawyer's Committee), co-authored an article for its journal, lectured extensively, and participated regularly in Judges' Nite.

Issue Statement: The primary goal of the DCBA is to serve its members. Likewise, no Bar Association can be effective without active member participation. Therefore, my primary issue is to increase participation among the DCBA Members. First, we evaluate what has worked in the past (i.e. DCBA Committee Meetings with CLE, new lawyer functions, Judge's Nite, ARC, etc.) and build on that to bring new and senior attorneys and judges together. Second, evaluate and attempt new ways with the help of fellow board members to reach out to more members and bring them into our fellowship.



Arthur Rummler

Candidate for Board Member

I am a sole practitioner in Glen Ellyn, concentrating in bankruptcy. My DCBA experiences include Assistant Treasurer, Chairman of the Entertainment and Law Day Committees, member of the Planning Committee and member of the DCBA Brief Editorial Board. Through this service, I have gained knowledge of how the association works and the issues it faces in the future. The DCBA is strong and vibrant because of its members. As Director, I will support and promote continuous improvement in the services provided to our members. Also, I will work to contain costs through greater efficiency, planning and use of our resources.

Issue Statement: The DCBA is fortunate to have excellent staff, bar leaders and members. The result is high quality educational programs, social events and networking opportunities. Our main challenge ahead will be to continue this high level of services in difficult economic conditions. One way to address this is to continue to grow the membership. I would support programs that reach out to both new lawyers and established ones who are not currently members. I would also promote finding new streams of revenue to keep membership dues affordable, such as seeking sponsorships for standing bar events.

DCBA Candidates for Office Continued



Timothy P. Martin

Candidate for Board Member

Timothy P. Martin is a Partner at Martin & Kent, LLC and began his legal career in 1993 as an Assistant State's Attorney for DuPage County until 1996 trying over 300 cases as a Misdemeanor and Felony prosecutor. In private practice fifteen (15) years concentrating in criminal defense and various civil matters. Martin has been active in the DuPage and State Bar Associations and a contributing author for the DCBA Brief. Past president of the DuPage County Criminal Defense Bar association and Gubernatorial appointed Commissioner on the Illinois Racing Board. Seeking re-election to the Board of Directors for a second three (3) year term.

Issue Statement: My first objective in serving another term on the Board of Directors would be to enhance our Continuing Legal Education Program. Currently, we do a good job offering various courses to our DCBA members. Now, I would strive to expand the program to include more "specialty" courses and more outside "specialist" to speak in each major area of legal practice. My next main objective would be to expand our committees in unrepresented Law Concentration Areas. Currently, we have only a few major areas of the law covered by specialized group members. (Family Law, Criminal Law, etc.)



Kimberly A. Davis

Candidate for Board Member

Kim is a partner in the Insurance Practice Group at Momkus McCluskey LLC. She received her J.D. with Honors from IIT Chicago-Kent College of Law in 1997. Kim currently serves a Chair of the DCBA's Civil Practice Committee and Vice Chair of ADR. She is a Mentor in the DCBA's Lawyer to Lawyer Mentor Program and a DCBA Academy of Bar Leaders Fellow. Kim is a past Chair of the DCBA's Membership and Diversity Committees and a member of the DCBA Committee on Professionalism. Kim is also a proud recipient of a DCBA Board of Directors Award.

Issue Statement: As a DCBA Director, I would continue to move forward with strategic planning that focuses on both recruitment of new DCBA members and reinforcement of our mentor program. In particular, I would concentrate our marketing campaign at the law school and college levels and encourage a diverse pool of students to live and practice in DuPage County. As for mentoring, I believe that our most valuable resource for professionalism and practical advice lies with our more senior members and we would all benefit by tapping into their expertise via additional mentoring opportunities, seminars, etc.



Frank May

Candidate for Board Member

Frank May is in private practice representing individual and corporate clients in real estate, business/corporate and litigation matters. Frank is presently outside General Counsel for MRED, former in-house regional General Counsel for Coldwell Banker, NRT, and General Counsel for The Prudential Preferred Properties. Frank was also Secretary and Senior Counsel for Budget Rent a Car, Inc. Frank is a DuPage Bar Patron and served on its Real Estate Law, Corporate Law and Planning Committees. Frank is a chair qualified Arbitrator. Frank is a graduate of New York University and the John Marshall Law School. Frank resides in Wheaton with his wife, Mary.

Issue Statement: There has been a growing need to not only protect the public from those who practice law without a license, but a growing need to protect the reputation of the legal profession, the livelihoods of lawyers and practice of law itself. What is needed is for the DuPage County Bar Association to implement a program and media campaign of public service announcements which identify the unauthorized practice of law issue to its members and the public and encourage the filing of appropriate complaints by its members and the public with the ARDC.

DCBA Candidates for Office Continued



Clarissa Myers

Candidate for New Lawyer Board Member

Clarissa Myers is a DuPage County Assistant Public Defender. She holds a Bachelor's Degree with Highest Honors from the University of Florida. She has interned with the Cook County State's Attorney, the City of Chicago, and the United State's Air Force. She graduated from DePaul College of Law in 2006. She worked for the (Hon.) Richard Russo, followed by filling in at Fortunato, Knobbe, Davenport & Arnold. She has been the Chair of Law Day and Vice-Chair of Entertainment. She co-founded the Law Day Outreach Program, and she is a DCBA Brief author. She also enjoys sky-diving, motorcycle riding, and scuba-diving.

Issue Statement: If I were elected to the DCBA Board of Directors – New Lawyer Position, I would bring a fresh and new perspective to the DCBA Board. First, I would focus on how the DCBA could better meet its younger members' needs by developing and supporting mentoring programs to help young lawyers in the areas of CLE, professionalism, business, and the practice of law. I would also concentrate on resolving all issues brought before the DCBA Board with collaboration, consensus, and cooperation, which would increase the DCBA Board's effectiveness in representing its members' interests.



Chantelle Porter

Candidate for New Lawyer Board Member

Chantelle Porter is a graduate of The Ohio State University and DePaul University College of Law. Chantelle is an associate at A. Traub and Associates in Lombard. Chantelle is a former supervisor of the DuPage County Public Defender's Office Juvenile Division. Chantelle currently serves on the Board of Directors; she has served as Chair of the New Lawyer's Committee, Law Day Committee and a current participant in Judge's Night. Chantelle is the 2nd Vice President of the DuPage Association of Women Lawyers and on the Board of the DuPage County Bar Foundation. Chantelle is a member of the ISBA and the American Inns of Court-DuPage Chapter.

Issue Statement: As the New Lawyers Director, I have always been focused on the needs of attorneys who have been in practice less than 7 years. This year the DCBA has done a great job with the restructured mentoring program and new programs from the New Lawyers Committee. It is a very different environment for new lawyers, most are graduating with a large amount of student loan debt and jobs aren't as plentiful. We need to ensure that the new lawyers are supported and encouraged by creating opportunities for them to network and develop their legal skills.

DCBA Welcomes New Members

The DCBA welcomes the following members that have recently joined the DCBA: Shawn Krebs of The Greenberg Law Firm; Traci (Racine) Lambert-Cwerenz of Martocchio & Martocchio; Cynthia K. Sproul of Mevorah Law Offices; Alfred J. Chiappano of Diligent Security & Investigations; Barry L. Cullum of Legal Aid; Jennifer N. Miller Airato of Gardiner Koch Weisberg & Wrona; James J. Boness of Law Office of Jim Boness; John E. Bucheit of Roeser Bucheit & Graham LLC; Katie A. Cotter of Jahnke, Sullivan & Toolis, LLC; James M. Freeman of Law Offices of James M. Freeman PC; Stephen C. Hsu of Law Offices of Stephen C. Hsu; Robert J. Irsuto of Law Office of Robert J. Irsuto; Molly H. McKinley of Jansson Shupe & Munger Ltd. Anna Morrison-Ricordati of AMR Law Group, LLC; Toni Sexton Pritchard of Holland & Knight LLP; John A. Ranieri of John A. Ranieri, LLC; Kristopher S. Ritter of Kirkland & Ellis, LLP; Konrad Sherinian of Law Offices of Konrad Sherinian; Robert M. Shupenus of Brooks Tarulis & Tibble LLC; Adam S. Tracy of The Tracy Firm, Ltd; Rebecca M. Wapner of Law Office Trent & Butcher; Leslie Robbins of Cook County Public Guardian; Honorable Donald R. Cassling of US Bankruptcy Court; Joseph A. Gartner of Gartner & Bondavalli, LLP; Gregory W. Jones of Rathje & Woodard; Rosario M. Spaccaferro of Spaccaferro Law Offices, Ltd.; Sheila Trunnel of Clingen Callow & McLean, LLC; William S. Thayer of Office of the State's Attorney; Melissa Bocker Ellis; Heewon O'Connor; Amanda N. Pintaro; Andrew K. Scott; Joy Wolf; Frank D. Feska, Sr.; Kelley M. Brittain; Christine Koontz; Roslyn Lampkin-Smiley; Jason M. Manola; Evan A. Vasiliades; and Peggy Ann Gill-Curtin.

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Where To Be In May:

Installation of Officers set for Morton Arboretum

By John J. Pcolinski, Jr.

The Ginkgo Room of the Morton Arboretum is the venue for this year's installation of officers and directors

on May, 31, 2012. "The Ginkgo Room will be a beautiful setting to reflect on the accomplishments of the past year and get a glimpse of what exciting things we have planned for the year ahead. The Arboretum will be in full spring bloom and attendees will have the opportunity to enjoy the scenery on the veranda before and after dinner" said Incoming DCBA President, **Sharon Mulyk**, who promises to keep her remarks brief.

The evening will start with cocktails at 5:30 with dinner and



Incoming DCBA President,
Sharon Mulyk



the swearing in to follow. Tickets are \$75.00 each and program book sponsors are being sought. Take this opportunity to congratulate Sharon and wish all those who volunteer their valuable time well. Tickets for the installation are available online at the dcba.org. Contact Sue Mackovec for Program Book Sponsorships or additional details about the event. □

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