

# DCBA BRIEF

The Journal of the DuPage County Bar Association



**2016-17 LEADERSHIP CONFERENCE:  
WHAT'S NEXT FOR THE DCBA**

Volume 29 Issue 1  
September 2016









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# DCBA BRIEF

The Journal of the DuPage County Bar Association  
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Volume 29, Issue 1  
September 2016

## Table of Contents

22 past presidents gathered at the 2016 Presidents' Ball and Installation of Officers: Front row, L to R: Lynn Cavallo, Joe Mirabella, Jay Laraia, Hon. William Bauer, Fred Spitzzeri, Glenn Gaffney, Jack Donahue, Steve Ruffalo, Pat Leston, Paul Brinkman, Chris Ory, Joe Laraia. Back row, L to R: Kent Gaertner, Pat Hurley, Kevin Millon, Steve Culliton, Hon. Neal Cerne, Rick Felice, Jim McCluskey, Hon. Tom Else, Colleen McLaughlin, Tom Sullivan

### 3 Editor's Message

### 5 President's Message

## Articles

**8** Being Locked Up Does Not Mean Being Locked Out From Medical Care  
- By Glenn R. Gaffney and Jolianne S. Walters

**14** The Process For Perfecting & Litigating The Uninsured Or Underinsured Motorist Claim  
- By Dexter J. Evans

**22** Illinois Good Samaritan Act, Not a Protection For Employers and Their Employees Who Provide Assistance as Part of Their Employment  
- By Edward R. Sherman

**24** Illinois Law Update  
- Editor James L. Ryan

## News Events

### **28** InBrief

- By Terrence Benshoof

**29** DuPage Convalescent Center Renamed  
- Jane Nagle

**30** DCBA Update  
- By Robert Rupp

**31** Legal Aid Update  
- By Cecilia Najera and Kathleen Panagopoulos

**33** Mentoring Program Orientation

**34** Keith E. Roberts, Sr., Civil Trial Advocacy Workshop Coming in October/November.

**34** What's the Plan for this year's President's Trip?

**35** ISBA Update  
- By Kent A. Gaertner

**36** DuPage Bar Foundation Donation  
- Jane Nagle

**38** Chief Judge Creswell Hosts the Supreme Court's Commission on Professionalism Seminar  
- By James L. Ryan

**39** DCBA Leadership Comes Together for New Year Conference  
- By Ted Donner

**40** 2016 Presidents' Ball and Installation  
- By Tony Abear

**43** Classifieds

**44** Where to Be in September  
- By Annette Corrigan

**James L. Ryan**  
*Editor-in-Chief*

**Azam Nizamuddin**  
*Associate Editor*

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## From the Editor

### Volume 29

By James L. Ryan



Jim Ryan is an associate at the law firm of Roberts & Caruso in Wheaton. He focuses his practice primarily on contested probate, business litigation, and construction law. Jim serves as a member of the DuPage County Bar Association's Civil Law & Practice Committee, Business Law Committee and Estate Planning Committee. He is also a member of the federal trial bar.

I am honored to have the privilege to serve as the Editor of this year's *DCBA Brief*. Last year, the Editorial Board made some significant changes to the magazine, both to its format and to its publication schedule. **Christine McTigue** spearheaded those efforts and did a wonderful job working out the kinks in a new system and guiding the magazine through those changes. It is my goal to maintain the high standards that Christine and the other past editors have set for the *Brief*.

Thanks to the excellent work of my predecessors, the DCBA received over 20 applications to fill three open Editorial Board positions. Among those 20 applicants, **Dexter Evans**, **Annette Corrigan**, and **Peter Evans** have been selected to serve on our board and all have hit the ground running. **Azam Nizamuddin** will serve as Associate Editor for this volume and then Editor for Volume 30. **Terry Benshoof** will continue his monthly "InBrief" column to report on the latest happenings around the DCBA. **Kent Gaertner** will continue to provide a monthly update from the ISBA, and **Cecilia Najera** will continue to provide regular updates on the excellent work that DuPage Bar Legal Aid has been doing. Working alongside the Editorial Board is **Jacki Hamler**, our DCBA staff liaison, **Catherine Ross**, our design

professional, and **Kelmscott Communications**, our printer.

**Robert Potter** shot this issue's cover at the DCBA Leadership Conference in July, and it features the many faces of DCBA. On the back of the front cover is a key to identifying these faces and their roles.

**Dexter Evans** served as our lead articles editor for this month's issue and shares with us his expertise in litigating uninsured or underinsured motorist claims. **Glenn Gaffney** and **Jolianne Walters** wrote a fascinating piece about rights of prisoners to receive medical care and the procedures to be used to enforce those rights. **Edward Sherman** also brought us a summary of the Illinois Good Samaritan Act. I highly encourage DCBA members to submit articles to the *DCBA Brief* for publication. There are many benefits to doing so including CLE credit. If you are interested in submitting an article, the guidelines are found on our website: [www.dcbabrief.org](http://www.dcbabrief.org).

I am looking forward to this publication year and hope you, the reader, are as well. I encourage readers to submit feedback, comments, and suggestions to my attention at [email@dcbabrief.org](mailto:email@dcbabrief.org). □

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## President's Message

# What's Next for the DuPage County Bar Association

By Ted A. Donner



Ted A. Donner is the President of the DuPage County Bar Association. The owner of Donner & Company Law Offices LLC in Wheaton, Illinois, his practice is concentrated in commercial litigation and transactional work for small business. Recognized as DCBA's Lawyer of the Year in 2011, he has been AV-Rated and recognized by Super Lawyers in each of the last ten years. He is an Adjunct Professor with Loyola University Chicago School of Law and the author of two treatises for Thomson Reuters (West), including *Jury Selection: Strategy & Science* and *Attorneys Practice Guide to Negotiations*.

On June 10, 2016, I was honored to be installed as president of the DuPage County Bar Association. Judge **William Bauer**, who served as our president from 1963-64, swore me in, along with our other officers and directors, at a ceremony attended by over 230 people, including 22 past presidents and three vice presidents. It was an exhilarating and humbling evening, one I'd prepared for and thought about for months and one which ended in what seemed like a heartbeat.

They tell me this whole year will be like that, my friends the past presidents. They tell me it will be over before I know it and they tell me I shouldn't get too comfortable.<sup>1</sup> They tell me I should try to focus on one idea, with maybe a theme for the year, because they tell me...well, you know. I really shouldn't get too settled in.

It is certainly true that a year goes by quickly and there is indeed only so much you can do in that much time, but that has not given much pause to my enthusiasm for what lies ahead. To the contrary, what I keep reminding myself is that, as exciting an opportunity as it is to serve as DCBA president, my involvement in this association didn't start in June of this year and it won't be over in June of next year. When my term as president comes to an end, I'll also be celebrating 20 years as a member of this association. There were roles for me to play before I was president and I've no doubt there will be room for me when this ends. I know I'll be getting some great memories out of this year, but I also know that I have every year, and I plan on getting still more out of the next 20 years.

We elect a new president every spring and a new editor-in-chief for the *DCBA Brief*

begins every summer. The membership on our boards, our commissions and foundations, keeps changing, while new players join the Judges' Nite cast and new attorneys take on cases with DuPage Bar Legal Aid. It is part of what makes this organization such a great one to be involved in – as we grow as an association so too do the opportunities for those with an interest in leadership. The merry-go-round moves quickly enough to give everyone on board an interesting ride, but it also moves slowly enough that others can jump on and join the fun. If it starts to get crowded, we simply build a bigger merry-go-round – or at least that's what we've been trying to do these last couple years.

Beginning in 2014, our Board of Directors focused heavily on developing ways to expand leadership opportunities within DCBA. **Lynn Cavallo** and **Jay Laraia** worked some long hours during their tenures as DCBA president, along with the board and planning committee, and the results were down right spectacular. We established a New Lawyer Division in 2015 and a Senior Lawyer Division this last spring. Our sections were expanded to involve leadership councils, and the Public Interest and Education Commission was founded to bring new leadership to our work in *pro bono* and public education programming. Both the Bar Foundation and Legal Assistance Foundation became more autonomous, with leadership coming up through the ranks of those programs rather than from DCBA's executive committee.

I'm grateful for the work that **Kent Gaertner** is now doing with the Senior Lawyer Division and for what **Patrick Boland** is putting

1. Well. Maybe "they" didn't say that last one so much as Gerry Cassioppi maybe said that. Gerry's our President-Elect, by the way, he gets to write this column next year.



The DCBA BRIEF is a publication of the  
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**DCBA Brief welcomes members' feedback.**  
 Please send any Letters to the Editor to the attention  
 of James Ryan, at email@dcbabrief.org

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## President's Message *(Continued from page 5)*

together for New Lawyers. I couldn't be happier than to know that **Jim Ryan** is serving as our Editor-in-Chief and I'm certainly thrilled to know that the Public Interest and Education Commission chose **Melissa Piwowar** to serve as their chair this year. We also have **Eric Waltmire** developing new programs for our magazine online, however, and **Robert Rupp** joining us as our new Executive Director. We have **Kevin Millon** creating a new video series, **Kendall Hartsfield** taking a fresh look at our mentoring program, and **Erica Bertini** focused on breathing new life into our wellness program. There is a lot going on and there are a great many people involved in all of it and that, I should finally point out, is what prompted the cover image for this issue of the *DCBA Brief*.

Our leadership conference in July brought together some 70 directors, commissioners and chairs from among DCBA's membership. We heard from some great speakers, we exchanged ideas, and then we all got together for a truly extraordinary group photograph. It graces the cover of this issue in lieu of the usual president's portrait because **Chris Tews** is a remarkably gracious printer to work with and because Jim Ryan and I both see it as an important marker for this milestone in bar history.

When Judge Bauer was our president in 1963-64, we had just over 100 members in total. Today, we have twice that many serving in leadership positions and a total membership edging closer to 3000. I am proud to be serving as the President of the DuPage County Bar Association this year. I mean to do my best to honor the legacy of those who have held this position before me, but I also know that the job will be that much easier than it was in the past because of the people on the cover and those who just couldn't make it that day. We have a great many extraordinary people involved in DCBA, both among the membership and in our leadership, and I am grateful beyond measure to be here with them – with you, at this time, in this association. □

## Letter to the Editor

Dear Editors:

I want to extend my thanks to the DuPage County Bar Association volunteers who wrote, performed and directed the video which illustrates the Illinois Supreme Court Policy on Assistance to Court Patrons. It's funny, instructive and well done. We will use the video for training of courthouse employees and volunteers for years to come. Many thanks.

Sincerely,  
**Kathryn Creswell, Chief Judge**

# Articles

## Articles Editor



**Dexter Evans**

Dexter Evans is an equity partner at the law firm of Woodruff Johnson & Palermo and concentrates his practice in the litigation of personal injury and worker's compensation cases. He graduated magna cum laude from Elmhurst College where he majored in political science, and graduated magna cum laude from the Northern Illinois University College of Law. While at NIU, Dexter was on the law review and was a lead articles editor for the publication. He has written many publications/blogs on various aspects of personal injury and worker's compensation law.



- 8** Being Locked Up Does Not Mean Being Locked Out From Medical Care  
- By Glenn R. Gaffney and Jolianne S. Walters
- 14** The Process For Perfecting & Litigating The Uninsured Or Underinsured Motorist Claim  
- By Dexter J. Evans
- 22** Illinois Good Samaritan Act, Not a Protection For Employers and Their Employees Who Provide Assistance as Part of Their Employment  
- By Edward R. Sherman
- 24** Illinois Law Update  
- Editor James L. Ryan



# Being Locked Up Does Not Mean Being Locked Out From Medical Care

By Glenn R. Gaffney and Jolianne S. Walters

Even prisoners have freedoms that cannot be locked away in a jail cell. One such freedom is the Eighth Amendment right to be free from cruel and unusual punishment. While cruel and unusual punishment can take many forms, the deliberate indifference to an inmate's serious medical condition presents one of the more egregious and often encountered violations of an inmate's Eighth Amendment rights. When an inmate's constitutional rights are violated in this way, he or she can bring a claim under 42 U.S.C. § 1983 against the governmental entity, prison officials, or others acting under color of state law.

## **Pleading a § 1983 claim and surviving a motion to dismiss**

Governmental entities, such as states, counties, and municipalities, "have an affirmative duty to provide medical care to their inmates."<sup>1</sup> When a prisoner's Eighth Amendment rights have been violated due to inadequate medical care, a plaintiff can bring a complaint alleging such violation. In order to survive a motion to dismiss, which is typically the first attack on a complaint, the allegations must be sufficient to raise at least a possibility of relief above the "speculative level."<sup>2</sup> So while specific facts are not necessary, the complaint and its allegations should give the defendant fair notice of what the claim is and the grounds upon which it rests.<sup>3</sup>

## **The necessary elements of a claim**

To plead a claim under 42 U.S.C. § 1983 alleging a violation of an inmate's Eighth Amendment rights, the law requires that a plaintiff plead sufficient facts to support each of the following elements: (1) that the inmate has an objectively serious medical condition; and (2) that an official was deliberately indifferent to that condition resulting in harm.<sup>4</sup> Deliberate indifference

1. See *Duckworth v. Ahmad*, 532 F.3d 675, 678-79 (7th Cir. 2008); *Estelle v. Gamble*, 429 U.S. 97, 103-104 (1976).

2. *EEOC v. Concentra Health Services, Inc.*, 496 F.3d 773, 776 (7th Cir. 2007).

3. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007).

4. *Estelle*, 429 U.S. at 106; See also *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 821 (7th Cir. 2009) (the Supreme Court has stated that to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face); *Arnett v. Webster*, 658 F.3d 742, 752 (7th Cir. 2011) (a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged).

occurs when the prison officials, or others acting under state or federal law, realize that a substantial risk of serious harm to a prisoner exists, but then disregard that risk.<sup>5</sup> In this regard, the mental state of the state actor has to be somewhere beyond the line of negligence, but need not be as far as the line of actual purpose, and may properly be equated with the standard of “reckless disregard.”<sup>6</sup>

### Successfully pleading an “objectively serious medical condition”

With regard to the first element of “objectively serious medical condition,” the Seventh Circuit has demonstrated that a broad range of medical conditions can qualify as “objectively serious.”<sup>7</sup> Some examples of “objectively serious medical conditions” include a dislocated finger, a hernia, arthritis, heartburn with vomiting, a broken wrist, minor burns, tooth decay, and even transsexualism.<sup>8</sup> Additionally, courts have repeatedly held that treatment of psychiatric or psychological conditions may also present a “serious medical need.”<sup>9</sup> What’s more is that “a medical condition need not be life-threatening to be serious; rather, it could be a condition that would result in further significant injury or unnecessary and wanton infliction of pain if not treated.”<sup>10</sup> Thus, in short, a serious medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention.<sup>11</sup>

### Successfully pleading an “official’s deliberate indifference to a serious medical condition”

The second element follows from the principle that only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.<sup>12</sup> In this regard, not every claim by a pris-

oner alleging inadequate medical care states a constitutional violation. The Supreme Court has limited recovery under the Eighth Amendment to only those cases in which a prisoner can establish “deliberate indifference to serious medical needs.”<sup>13</sup> Therefore, in order to successfully plead that an official was deliberately indifferent to a serious medical need, sufficient facts must be pled to establish that the prison official had a “sufficiently culpable state of mind.”<sup>14</sup> In other words, the deliberate indifference standard is satisfied if the plaintiff shows that the prison official acted or failed to act despite the official’s knowledge of a substantial risk of serious harm to the plaintiff’s safety.<sup>15</sup> A failure of prison officials to act in such circumstances suggests that the officials actually wanted the prisoner to suffer the harm.<sup>16</sup>

To successfully plead deliberate indifference, sufficient facts must be pled to overcome two hurdles. The first hurdle is pleading a substantial risk of serious harm. The second hurdle is establishing that the official had the requisite knowledge of the harm and disregarded that knowledge. To show a substantial risk of harm, facts must be pled to show an objectively serious risk, which is one that society considers so grave that to expose any unwilling individual to it would offend contemporary standards of decency.<sup>17</sup> For example, in *Erickson v. Pardus*, 551 U.S. 89 (2007), the plaintiff inmate, an individual suffering

## About the Authors



Glenn Gaffney has been Chair of the DCBA Labor and Employment Section and has been a member and Chair of the ISBA Labor and Employment Section Council. Mr. Gaffney was President of the DCBA for the term 2006-2007 and is currently Vice Chair of its Professional Responsibility Section.



Jolianne S. Walters is currently an associate with Gaffney & Gaffney, P.C. Ms. Walters has represented clients in a wide variety of labor and employment-related matters. She practiced at various corporate firms, where she performed risk management audits, human resources development, and litigation services and has experience in workers’ compensation litigation, personal injury actions, foreclosures, and construction claims.

5. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (a plaintiff must show that officials are aware of facts from which indifference could be drawn that a substantial risk of harm exists and they must also draw the inference).

6. *Id.*

7. *Roe v. Elyea*, 631 F.3d 843, 861-862 (7th Cir. 2011) (collecting cases), citing *Edwards v. Snyder*, 478 F.3d 827 (7th Cir. 2007) (dislocated finger); *O’Malley v. Litscher*, 465 F.3d 799, 805 (7th Cir. 2006) (minor burns resulting from lying in vomit); *Norfleet v. Webster*, 439 F.3d 392, 394-95 (7th Cir. 2006) (arthritis); *Johnson v. Doughty*, 433 F.3d 1001, 1003-04, 1010 (7th Cir. 2006) (hernia); *Greeno v. Daley*, 414 F.3d 645, 649-51 (7th Cir. 2005) (heartburn and vomiting); *Duncan v. Duckworth*, 644 F.2d 653, 654 (7th Cir. 1981) (fractured wrist); *Berry v. Peterman*, 604 F.3d 435, 440 (7th Cir. 2010) (tooth decay); *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987) (transsexualism considered to be serious medical condition).

8. *Id.*

9. See e.g. *Partridge v. Two Unknown Police Officers of Houston*, 791 F.2d 1182, 1187 (5th Cir. 1986); *Wellman v. Faulkner*, 715 F.2d 269, 273 (7th Cir. 1983).

10. *Gayton v. McCoy*, 593 F.3d 610, 620 (7th Cir. 2010).

11. *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997).

12. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

13. *Estelle*, 429 U.S. at 104.

14. *Id.*

15. *Daniels v. Mezo*, 2014 U.S. Dist. LEXIS 149822, at \*6-7 (S.D. Ill. Oct. 21, 2014); *Nunn v. Busse*, 2010 U.S. Dist. LEXIS 40491, 2010 WL 1710449, at \*6 (N.D. Ind. 2010).

16. *Id.*

17. *Id.*





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from Hepatitis C and a liver condition, brought action against the State. The plaintiff alleged that the decision to remove him from his Hepatitis C treatment program was endangering his life, that he was still in need of treatment, and that the officials were refusing to provide treatment.<sup>18</sup> The Court held that the plaintiff stated a claim because sufficient facts were pled to show an objective risk of harm.<sup>19</sup> In other words, the Eighth Amendment not only prohibits deliberate indifference to the inmate's *current* serious health problems, but also deliberate indifference to conditions which pose an unreasonable risk of serious damage to *future* health.<sup>20</sup>

In addition to showing an objective risk of harm, a plaintiff must also plead sufficient facts to show that the prison official subjectively knew of and disregarded the excessive risk to the inmate's health and safety.<sup>21</sup> Courts have held that a sufficiently culpable state of mind is shown when the prison official exhibits a substantial departure from accepted professional judgment, practice, or standards.<sup>22</sup> In this regard, the plaintiff's burden is high.<sup>23</sup> However, a successful plaintiff does not have to show that he was "literally ignored" in his demands for medical treatment in order to be able to state a claim. If a plaintiff can show that the treatment provided was "blatantly inappropriate," a plaintiff can establish that the prison official was deliberately indifferent to his medical needs.<sup>24</sup>

### Surviving a motion for summary judgment

A complaint that survives a motion to dismiss will allow a plaintiff to engage in the broad federal discovery process. In discovery, the plaintiff will need to find and then present evidence that the defendant was deliberately indifferent to the prisoner's serious medical condition. Without such evidence, a defendant would prevail on a motion for summary judgment, which is usually the last attack on a complaint before trial.

At the summary judgment stage, the defendant will undoubtedly present facts showing its own version of the events that either there was not an objectively serious medical condition at stake and/or that the prison officials were not deliberately indifferent to a known serious medical condition. Despite defendant's arguments and evidence, however, the court must

adopt the plaintiff's version of facts, but, only those facts which are real and established in the record. Therefore, in order to survive a motion for summary judgment, the plaintiff needs to establish that the record, taken as a whole, could lead a rational jury to find that the prisoner's claim has merit.

### Examples of cases surviving a motion for summary judgment

While each case is different, with its own unique set of facts, the body of law that exists provides helpful guidance and illustrative instructions on how to go about defeating a defendant's motion for summary judgment on a § 1983 claim. As an example, in *Farmer v. Brennan*, 511 U.S. 825 (1994), the plaintiff inmate, a transsexual male, brought suit when he was placed in the general male prison population and subjected to numerous beatings and rapes by a fellow inmate in the prisoner's cell. The inmate alleged that the official's conduct in placing him in the general male prison population constituted deliberate indifference to his safety because they knew he projected feminine characteristics and would be particularly vulnerable to sexual attack. The question before the Court was whether the evidence showed that the prison officials were deliberately indifferent to plaintiff's safety in light of his medical condition. The Court explained that if an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official had been exposed to information concerning the risk and thus, must have known about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.<sup>25</sup> As such, the plaintiff was allowed to proceed to trial.

In another example, *Board v. Farnham*, 394 F.3d 469 (7th Cir. 2005), two plaintiff detainees brought suit against the State for violation of their Eighth Amendment rights when they were denied toothpaste and an asthma inhaler. The evidence revealed that one of the detainees requested toothpaste from a jailer approximately 15 times and was refused each time, which caused him to suffer tooth decay, resulting in the removal of several teeth.<sup>26</sup>

18. *Erickson*, 551 U.S. at 89.

19. *Id.* at 94.

20. *Roe v. Elyea*, 631 F.3d 843, 858 (7th Cir. 2011), citing *Board v. Farnham*, 394 F.3d 469, 479 (7th Cir. 2005).

21. *Golden v. Berge*, 2003 U.S. Dist. LEXIS 28458, at \*14 (W.D. Wis. 2003).

22. *Sain v. Wood*, 512 F.3d 886, 894-95 (7th Cir. 2008).

23. *Duckworth*, *supra* n. 1 at 679.

24. *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005).

25. *Farmer*, 511 U.S. at 842-843.

26. *Board*, 394 F.3d at 473.



## ARTICLES

The evidence also showed that although the prison officials knew of the deplorable condition of the ventilation system and that it was causing the detainees to suffer nose bleeds and suffer breathing problems, they failed to remedy the situation.<sup>27</sup> On this evidence, the Court found that the prison official's failure to provide the toothpaste sufficiently showed deliberate

hospitalization, and he missed several appointments with the medical staff regarding his asthma. Based on this, the Court ruled that the plaintiff did not satisfy the first element because he did not demonstrate that he had an objectively serious medical condition. As a result, the Court ruled that plaintiff had not shown that he had a medical need sufficiently serious to implicate the Constitution.<sup>30</sup>

**“ The Supreme Court has limited recovery under the Eighth Amendment to only those cases in which a prisoner can establish deliberate indifference to serious medical needs.**

indifference to that detainee's serious medical condition.<sup>28</sup> In the same way, the Court found that the failure to provide the other detainee with an inhaler and the failure to remedy the known poor ventilation of the jail constituted deliberate indifference.<sup>29</sup> As such, the detainees' cases were allowed to proceed to trial.

### **Examples of cases being dismissed on a motion for summary judgment**

Although successful cases are instructive in their own right, arguably, more can be learned from the failures of others. For example, in *Oliver v. Deen*, 77 F.3d 156 (7th Cir. 1996), the plaintiff inmate, an asthmatic, brought suit against the State when his asthma was aggravated after being placed with another inmate who smoked. The evidence revealed that the plaintiff was only “mildly asthmatic” and that he only exhibited occasional signs of distress when his fellow inmates smoked. The evidence also revealed that plaintiff received considerable medical attention for his asthma, he never required outside

In another example, in *Freeman v. Berge*, 441 F.3d 543 (7th Cir. 2006), the plaintiff inmate brought suit against the State when he was denied meals. The evidence revealed that the prison had a feeding protocol and that if the prisoner did not comply, the meal was not served. The evidence showed that the plaintiff voluntarily failed to comply with this rule.<sup>31</sup> Because he missed so many meals, plaintiff lost 45 pounds. The Court granted summary judgment in the State's favor because it found that to an overwhelming degree, the plaintiff's food deprivation was self-inflicted. The Court further found that the record contained no evidence that the inmate experienced any real suffering, extreme discomfort, or any lasting detrimental health consequences.

In another example, in *Johnson v. Doughty*, 433 F.3d 1001 (7th Cir. 2006), the plaintiff inmate, who suffered from a hernia, brought suit against prison officials alleging that the prison officials and doctors were deliberately indifferent to his need to undergo surgical treatment for his hernia. The Court found that the evidence failed to support any findings of deliberate indifference because they took plaintiff's medical complaints seriously and they reasonably relied upon the prison doctors' recommendations in handling the inmate's conditions.<sup>32</sup> The Court further held that the prison doctors' treatment of the inmate was grounded in professional judgment, and that the inmate was afforded adequate, reasonable medical treatment.<sup>33</sup> Thus, an inmate's “mere dissatisfaction or disagreement with a doctor's course of treatment is generally insufficient” to establish deliberate indifference.<sup>34</sup>

### **Trial of an Eighth Amendment failure to provide medical attention.**

A plaintiff surviving a motion for summary judgment is entitled to a jury trial. The elements of a plaintiff's claim are set forth within Seventh Circuit Pattern Jury Instructions § 7.12 which provides, as follows:

30. *Oliver*, 77 F.3d at 161.

31. *Freeman*, 441 F.3d at 543.

32. *Johnson*, 433 F.3d at 1001.

33. *Id.*

34. *Id.* at 1013.

27. *Id.* at 474.

28. *Id.* at 480.

29. *Id.* at 485-486.

To succeed on his claim for failure to provide medical attention, a plaintiff must prove each of the following things by a preponderance of the evidence: (1) plaintiff had a serious medical need; (2) defendant was deliberately indifferent to plaintiff's serious medical needs; (3) defendant's conduct caused harm to plaintiff; (4) defendant acted under color of law (this element is typically not in dispute).

The Seventh Circuit Pattern Jury Instructions § 7.13 defines "serious medical need," as a condition that a doctor says requires treatment, or something so obvious that even someone who is not a doctor would recognize it as requiring treatment. The Seventh Circuit Pattern Jury Instructions § 7.14 also defines the term "deliberately indifferent," as follows: "When I use the term 'deliberately indifferent,' I mean that defendant actually knew of a substantial risk of [serious harm] or [describe specific harm to plaintiff's health or safety], and that defendant consciously disregarded this risk by failing to take reasonable measures to deal with it."

If a plaintiff can prove with sufficient evidence to a judge or jury each element under the Seventh Circuit's rules, the plaintiff will prevail and be entitled to an award of damages.

#### Damages available for a successful plaintiff

The Seventh Circuit sets forth the types of damages that a plaintiff can receive.<sup>35</sup> A plaintiff can obtain the following types of compensatory damages:

1. The reasonable value of medical care and supplies that Plaintiff reasonably needed and actually received, as well as the present value of the care and supplies that he is reasonably certain to need and receive in the future.
2. The wages, salary, profits earning capacity that Plaintiff has lost and the present value of the wages, salary, profits, earning capacity that Plaintiff is reasonably certain to lose in the future because of his inability or diminished ability to work.

3. The physical and mental/emotional pain and suffering and disability/loss of a normal life the Plaintiff has experienced and is reasonably certain to experience in the future. No evidence of the dollar value of physical or mental/emotional pain and suffering or disability/loss of a normal life has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount that will fairly compensate the Plaintiff for the injury he has sustained.

In addition to compensatory damages, a plaintiff can also attempt to receive punitive damages.<sup>36</sup> The jury, however, can only assess punitive damages if it finds that the defendant's conduct was malicious or in reckless disregard of plaintiff's rights.<sup>37</sup>

#### Conclusion

It is readily apparent that prisoners have the constitutional right to be free from cruel and unusual punishment, which in this context means that prison officials must not be deliberately indifferent to serious medical conditions. A successful plaintiff must establish that the defendant actually knew of a substantial risk of serious harm to plaintiff's health or safety and that the defendant consciously disregarded that risk and failed to take reasonable measures which caused plaintiff harm. If successful, the plaintiff can then receive compensatory damages/potentially punitive damages and attorney's fees and cost of suit. □



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30

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36. Seventh Circuit Pattern Jury Instructions § 7.24.

37. *Smith v. Wade*, 461 U.S. 30, 56 (1983).

35. Seventh Circuit Pattern Jury Instructions § 7.23.

# The Process For Perfecting & Litigating The Uninsured Or Underinsured Motorist Claim

By Dexter J. Evans

## Synopsis

If you practice personal injury law, you run into uninsured (UM) and underinsured (UIM) motorist cases on a regular basis. For those of you who routinely handle these claims, you know that there is a certain process by which these claims should and must be handled. Failure to adhere to the proper procedures for handling UM and UIM claims can result in a bad monetary outcome for your client or, worst of all, a complete bar of your client's claim. This article will attempt to streamline this process and include everything a practitioner needs to know about handling these claims from opening the file through settlement or arbitration.

## Pre-Arbitration Process

### *Initial Letter - Your Most Important Letter*

#### **Demand Arbitration**

As personal injury attorneys opening up a new case file, we are accustomed to sending an attorney lien letter to the tortfeasor and insurance company, not only to inform all relevant parties of our professional interest in the case, but to alert them to the fact that we are now in charge of the claim. For an uninsured or underinsured case, one of the first things this author makes sure to include in his initial attorney lien/notification of representation letter is a demand for arbitration and naming his arbitrator. Arbitration is the process by which an uninsured/

underinsured motorist claim is litigated. Why is it so important to demand arbitration before you have even had a chance to exhaust settlement negotiations? Because failure to do so in a timely manner could result in your claim being barred by a quasi-statute of limitations built into the insurance policy. There is no statutory or common law time bar applicable to UM and UIM claims. However, insurance companies began inserting time limits within UM and UIM policies to restrict the ability of an insured to present a claim. Some practitioners mistake the time limit as the time by which a UM or UIM claim must be made. This is a fatal practice error in that such time provisions very specifically require the insured to demand arbitration and/or name their arbitrator by the required time. This is an important distinction because failure to actually demand arbitration by the prescribed time limit has been held as a complete bar to bringing an uninsured/underinsured motorist claim much the same way blowing a statute of limitations deadlines extinguishes the action against the tortfeasor.

In *Buchalo v. Country Mutual Ins. Co.*,<sup>1</sup> the First District evaluated a provision requiring a demand for arbitration and selection of an arbitrator within 2 years from the occurrence of the loss.<sup>2</sup> Within 4 months after the accident, the insured's attorney sent a letter which stated, "I believe the best thing to do with respect to this case is to arbitrate. I will, in the future, forward the name of our arbitrator."<sup>3</sup> No formal demand of arbitration was ever made within the 2-year period specified in the policy and Country subsequently denied coverage.<sup>4</sup> Ruling in favor of Country, the First District held that the attorney lien letter did "not constitute an unequivocal demand for arbitration."<sup>5</sup> Additionally, the court noted that the letter was defective in that it also failed to even name an arbitrator as required by the policy.<sup>6</sup>

Conversely, in *Hale v. Country Mutual Ins. Co.*,<sup>7</sup> the Fifth District reached the opposite result more than two decades after *Buchalo* in finding that a notice of attorney lien did constitute

1. 83 Ill.App.3d 1040 (1st Dist. 1980).

2. *Id.* at 1042.

3. *Id.* at 1043.

4. *Id.* at 1044.

5. *Id.* at 1045.

6. *Id.* at 1046.

7. 334 Ill.App.3d 751 (5th Dist. 2002).



a sufficient demand for arbitration. In *Hale*, the claimant's attorney sent a letter of representation which stated that "[i]t appears that we have an underinsured claim."<sup>8</sup> Taking an opposite approach than that of the First District in *Buchalo*, the Fifth District liberally construed the policy at issue and determined that the letter providing only notice of the claim without a formal demand for arbitration properly perfected the insured's UIM claim.<sup>9</sup> The court's reasoning was two-fold. First, since the underlying action against the tortfeasor was still pending on the 2-year anniversary of the accident, the court noted that the insured's attorney could not possibly have known for certain whether he truly had a valid UIM claim.<sup>10</sup> Additionally, the court held that strict adherence to the demand for arbitration would inundate insurance companies with premature demands for arbitration, even in the most minor of claims, lest an attorney subject him or herself to professional malpractice.<sup>11</sup>

More recently, in *Rein v. State Farm Mutual Ins. Co.*<sup>12</sup>, the First District strictly adhered to its previous ruling in *Buchalo* while also offering a scathing criticism of the Fifth District's decision in *Hale*. Rein was injured in an accident caused by an uninsured motorist on April 5, 2007.<sup>13</sup> One week before the 2-year anniversary, Rein's attorney sent a letter of representation to State Farm.<sup>14</sup> The letter made no reference to arbitration. State Farm denied the claim and the trial court, in Rein's declaratory action, agreed, citing the First District's decision in *Buchalo*.<sup>15</sup> While the trial court noted the conflict with the Fifth District's decision in *Hale*, sitting in the First District, it was bound to follow First District precedent.<sup>16</sup>

On appeal, the First District determined that the letter of representation was not a demand or request for arbitration as required by the policy.<sup>17</sup> The court took exception with the *Hale* court's ruling that "notice" of an underinsured claim was equivalent to a "demand" for arbitration.<sup>18</sup> Finding the policy provision at issue to be unambiguous, the First District held

that Rein failed to comply with the terms of the policy.<sup>19</sup> The court also disregarded the Fifth District's concern over the inundation of premature arbitration demands noting that it was up to the insurance industry to determine if it wanted to deal with such a burden.<sup>20</sup> The court also found a further defect with respect to the letter of representation sent by Rein's attorney noting he also failed to name an arbitrator as required by the policy.<sup>21</sup>

With the Supreme Court's decision not to accept *certiorari* of the First District's decision in *Rein*, the conflict amongst the districts remains. However, practically speaking, a proactive approach is the best way to avoid any pitfalls on your way to litigating a UM or UIM claim. Demand arbitration and name your arbitrator immediately if there is *any* possibility that such a claim exists.

Another case of note specific to uninsured motorist claims is that of *Cowens v. Illinois Ins. Guar. Fund.*<sup>22</sup> In *Cowens*, the First District determined that *date of loss* was not synonymous with *date of accident* and that the 2-year period did not begin to run until after it was determined that the tortfeasor was insured since that was when the insured actually could be said to have suffered a "loss".<sup>23</sup> While *Buchalo* contained the same "date of loss" language as the policy in *Cowens*, the First District noted that argument regarding definition of the phrase was not raised in *Buchalo*.<sup>24</sup> Additionally, the First District further distinguished *Buchalo* as a case which dealt with a pure uninsured driver which would be known rather quickly whereas Cowens was injured by a hit-and-run driver whose uninsured status was much more difficult, if not impossible, to determine.<sup>25</sup> While a favorable case to the plaintiffs' bar, most insurance companies seem to have caught on and usually define the 2-year period from the date of *accident* rather than *loss*.

## About the Author



Dexter Evans is an equity partner at the law firm of Woodruff Johnson & Palermo and concentrates his practice in the litigation of personal injury and worker's compensation cases. He graduated magna cum laude from Elmhurst College where he majored in political science, and graduated magna cum laude from the Northern Illinois University College of Law. While at NIU, Dexter was on the law review and was a lead articles editor for the publication. He has written many publications/blogs on various aspects of personal injury and worker's compensation law.

8. *Id.* at 753.

9. *Id.* at 755.

10. *Id.* at 754.

11. *Id.* at 755.

12. 407 Ill.App.3d 969 (1st Dist. 2011).

13. *Id.* at 971.

14. *Id.*

15. *Id.*

16. *Id.* at 972.

17. *Id.* at 974.

18. *Id.* at 976.

19. *Id.* at 977.

20. *Id.*

21. *Id.* at 978.

22. 249 Ill.App.3d 214 (1st Dist. 1993).

23. *Id.* at 219-20.

24. *Id.* at 221.

25. *Id.*

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### **Name Your Arbitrator**

As briefly discussed above, another essential item to include in your opening UM/UIM letter is the name and contact information of your arbitrator. The process of arbitrating an uninsured or underinsured motorist claim generally involves the insured and insurer each selecting their own arbitrator and the two sides selecting a “neutral” third party arbitrator who presides over the arbitration process. Why name your arbitrator so soon? The reason is two-fold. First, this author has seen policies which not only require the insured to demand arbitration within a prescribed time limit, but also name their arbitrator. Indeed, in the *Buchalo* and *Rein* cases cited above, the attorney’s letter was held insufficient because it also failed to name an arbitrator as required by the policy. The second reason to name your arbitrator so soon is it puts the insurer on notice that you have handled these types of claims on a regular basis and that you are uniquely familiar with the process. By naming your arbitrator, it also puts the onus on the insurer to name its arbitrator within 45 days or have the entire claim be sent to the American Arbitration Association (AAA) for hearing. Some view the AAA as favorable to the plaintiff’s bar so it will get your case immediate attention from the claim representative.

Keep in mind that demanding arbitration and naming your arbitrator does not mean that you are foregoing any attempts to negotiate a settlement. Typically, the insurer will ask to have arbitration held in abeyance pending settlement negotiations. Although unnecessary, you can also include a paragraph in your opening letter in which you indicate a desire to hold the proceedings in abeyance pending exhaustion of settlement negotiations.

### **Obtain a Copy of the Policy**

Within the same initial letter, you should demand a copy of the insurance policy and declarations page. Make sure this demand is specific. You want all policies for uninsured, underinsured, or umbrella (also known as “PLUP”) coverage, etc. You need the declarations page to determine what the applicable policy limits are when it comes time to craft your demand. Getting the policy also provides you with any “poison pill” provisions that the insurance company might use to try and defeat your claim. You can analyze the policy for any conditions precedent that must be met in order to perfect the claim. In addition, the policy will contain the time limitations for when you must

demand arbitration and/or name your arbitrator. This might seem of little importance except when faced with a policy which fixes the time by which arbitration must be demanded by less than 2 years. Finally, as will be more fully discussed below, it will contain the rules with respect to arbitration and how the presentation of evidence is handled, though this is also covered by statute and the American Arbitration Association rules.

For motor vehicle accident cases, an insured has a legal right to obtain a copy of the policy and declarations page from the insurer. Pursuant to Section 143.24b of the Illinois Insurance Code, an insurer must provide this information within 30 days upon written request.<sup>26</sup> However, certain conditions must be met in order to place this affirmative obligation on the insurer. First, the Code requires that the claimant (or his/her attorney) provide:

- a) A brief description of the nature and extent of injuries;
- b) Amount of medical bills to-date; and
- c) Copies of all medical records to-date.

While some insurance adjusters are relaxed with this requirement, most insist you at least provide them with the insured’s medical records before they will send you the policy and declarations page. Additionally, when sending the request, it must be sent via certified mail.<sup>27</sup>

### ***Certification Of Uninsured Status***

In order to prove-up your uninsured motorist case, obtaining certification of the tortfeasor’s uninsured status is essential. Some adjusters will not even negotiate without such certification. Moreover, you will need to provide this certification as evidence of the tortfeasor’s uninsured status at the time of arbitration.

The process of certification is relatively simple. You must send a written request enclosing the required fee and a copy of the traffic crash report to the Illinois Department of Transportation’s Division of Traffic Safety asking for certification that the tortfeasor is uninsured. Make sure the letter is detailed and gives the IDOT crash auto accident report number, agency crash report number, date of accident, location of accident, and name of the uninsured motorist.

<sup>26</sup> 215 ILCS 5/143.24b.

<sup>27</sup> *Id.*



## ARTICLES

### ***Sending The Demand Letter***

Prior to articulating your demand letter, you should have accomplished several things with respect to your client's uninsured or underinsured claim. First, you will have made sure to adhere to all of the conditions precedent required by the insurance policy and Illinois law. Furthermore, your client will have completed treatment and you should have obtained all of his or her medical records and bills. Finally, you should have already obtained a copy of the declarations page of the policy and have specific knowledge regarding the UM/UIM limits and if there are any excess policies. Knowing the UM or UIM policy limits is extremely important if you are seeking to perfect a potential first party bad faith claim if the insurer fails to settle for the limits. At the very least, asserting the potential liability of an insurer for bad faith gives you leverage in negotiations and also will get your claim on the adjuster's radar. Assuming your case has damages with a reasonable expectation of being in excess of the coverage limits, you should include a paragraph in your demand about the insurer's exposure with respect to a potential bad faith claim if it does not agree to tender the full limits. This author will typically give the adjuster or opposing attorney 30 days in which to tender the policy limits.

If you have not done so already, make sure to name your arbitrator and demand arbitration within this letter. Waiting until now to demand arbitration and name your arbitrator should only be done in rare cases where there was some reason why you could not achieve it at the outset of the claim. In other words, it should only be used as your escape hatch and not your general practice. Also within the demand, you may even want to reference the fact that you previously demanded arbitration and named your arbitrator in a prior correspondence to the adjuster.

### ***Protecting Subrogation***

Protecting an insurer's subrogation interest means two very different things depending on whether you are pursuing an uninsured or underinsured motorist claim. The one commonality is that failure to protect the insurer's subrogation interest in either will result in your claim being barred.

“ In order to prove-up your uninsured motorist case, obtaining certification of the tortfeasor's uninsured status is essential.

### **Uninsured – File Suit**

For an uninsured motorist claim, protecting subrogation simply means filing a lawsuit against the uninsured tortfeasor. This applies only in situations where the identity of the uninsured driver is able to be determined versus a hit-and-run. As in all civil cases, failure to file suit within the requisite time limitations will result in a complete bar to the claim against the uninsured driver. If you file suit to protect the UM carrier's subrogation, you are entitled to recover the costs of doing so from the insurer.<sup>28</sup> At times, you may be able to get a written declaration from the adjuster or opposing counsel indicating that the UM carrier is not requiring that suit be filed against the tortfeasor. Error on the side of caution, however, especially when dealing with substandard carriers.

### **Underinsured – Get Permission to Settle**

While you do not need to file suit in order to protect subrogation in an underinsured motorist claim, you do need permission to accept a settlement for the tortfeasor's policy limits. Once an offer of settlement has been made by the underlying carrier for the policy limits, you cannot accept said offer until and unless you get permission from the underinsured motorist carrier. If you settle the claim against the tortfeasor without obtaining permission, your UIM claim will be barred as you will have effectively extinguished the underinsured carrier's subrogation right against the at-fault driver. While it is more likely than not you will be granted permission to accept the settlement, strict adherence to this procedure is of utmost importance because it acts as a means by which an insurer can escape providing UIM coverage.

28. 215 ILCS 5/143a(7).

As soon as the tender of the policy limits has been made by the underlying carrier, you should immediately send a letter to the insurance company requesting permission to accept the offer or, in the alternative, for it to pay the amount that is being offered to your client in return for its subrogation rights. The underinsured carrier has 30 days in which to grant permission or tender an amount equal to the offer or its subrogation rights are extinguished.<sup>29</sup>

### **Settling The Case**

#### **Set-offs**

The most typical set-off that personal injury attorneys deal with in the UM/UIM realm is that given to the underinsured carrier for the limits obtained from the tortfeasor in a UIM claim. This is a statutorily mandated set-off.<sup>30</sup> For example, if the tortfeasor has limits of \$20,000 and your client has a UIM policy with limits of \$100,000, the UIM carrier gets a credit for the \$20,000 already obtained. Thus, under that scenario, the most you can obtain from the UIM carrier is \$80,000. While there are other set-offs, they must be explicitly contained within the policy language in order to be enforceable.

Perhaps the most confusing set-off based on the misunderstanding as to when and when it does not apply is the set-off for medical payments. Insurance policies routinely claim a set-off for any medical payments made by the insurer as a result of the accident. While such a set-off is valid, it has been held unenforceable where the insured's total damages are greater than the combination of uninsured or underinsured motorist coverage and medical payments coverage.<sup>31</sup> For example, if the UIM and medical payments policy limits total \$105,000 and the damages suffered by the insured are in excess of that amount, the set-off for medical payments cannot be taken.

Another set-off many uninsured or underinsured policies contain is for any workers' compensation benefits obtained by the insured as a result of the accident. A set-off for workers' compensation benefits has been held valid.<sup>32</sup> However, keep in mind that, while employers have a right of subrogation out of any monies collected from third parties as a result of a work injury, they have no such right with respect to collecting out of an injured worker's uninsured or underinsured motorist claim.

Additionally, a set-off for workers' compensation benefits will not be enforced where the workers' compensation lien has been fully satisfied out of the underlying third party case.<sup>33</sup> Finally, a set-off for Social Security benefits paid has been held unenforceable as a matter of public policy.<sup>34</sup>

#### **Permission to Accept Less than Limits?**

One of the most frequent questions this author has encountered with respect to underinsured motorist claims is whether the insured can obtain less than the full policy limits of the tortfeasor and still maintain a claim under his or her underinsured motorist coverage. The answer is yes, assuming you have obtained the permission of the UIM carrier to accept the sub-limit offer.

This of course begs the question as to why you would ever accept less than the tortfeasor's policy limits in a case you believe is worth substantially more than the limits. Indeed, you may be signaling that you do not significantly value the case. However, there are reasons you may take that approach. For example, it could be that while damages may not be at issue, liability is and resolving the case for slightly less money makes sense in avoiding the costs of a jury trial and the possibility of a not-guilty verdict. Taking such an approach is risky and is not ideal since it diminishes the leverage you have when negotiating the value of the UIM claim.

#### **Stacking**

Stacking refers to an insured's attempts to combine several UM or UIM policies in order to increase the available limits of insurance coverage. While there is no statutory prohibition against stacking, most insurance policies contain provisions prohibiting the practice. As long as the provisions against stacking are clear and unambiguous, they have been held to be enforceable.<sup>35</sup>

### **Going To Arbitration**

If settlement negotiations fail and it appears there will be no meeting of the minds in resolving the claim amicably, the next step is arbitration. There are two different types of arbitration hearings available depending on whether the time limit for naming of arbitrators has been met. When the insured demands arbitration, each party is entitled to select its own

29. 215 ILCS 5/143a-2(6).

30. 215 ILCS 5/143a-2(4).

31. *Roberts v. Country Mutual Ins. Co.*, 231 Ill.App.3d 713, 716 (3d Dist. 1992) citing *Greenawalt v. State Farm Insurance Co.*, 210 Ill.App.3d 543 (1st Dist. 1991) ("if there is a 'windfall'...it should be to the insured who paid the several premiums, rather than to the insurer who collected them").

32. *Sulser v. Country Mut. Ins. Co.*, 147 Ill.2d 548, 552 (1992).

33. *Roberts v. Northland Ins.*, 185 Ill.2d 262, 271 (1998).

34. *Id.* at 273-74. (finding that Social Security benefits were already reduced by workers' compensation benefits received).

35. *Armstrong v. State Farm Mut. Ins. Co.*, 229 Ill.App.3d 971, 975-76 (2d Dist. 1992).

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Court certified a class of all customers of a national hotel chain's large hotel. Following successful interlocutory appeal, judgment in favor of the class for millions of dollars in damages, prejudgment interest and all attorneys' fees. Affirmed on appeal. 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 numerous other national hotel chains.

### **Vocational School Failing to Follow Illinois law Requiring Accurate Disclosure of Employment Statistics for Obtaining Jobs Following Graduation**

Court certified class seeking millions of dollars in refunds and other damages for all students who took a medical sonography course but did not obtain jobs in the field. The class claimed that Defendant violated the Consumer Fraud Act's provision for vocational schools by failing to disclose that very few graduates obtained jobs. Appellate and Supreme Case refused to hear an appeal of class certification order.

### **Breach of Contract and Gift Card Cases**

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Representing putative class members in a number of cases against employers seeking repayment of alleged unpaid overtime or for other wage and hour violations such as failure to pay minimum wages. We have obtained favorable class wide settlements in wage and hour and overtime cases.

### **Auto Repossessions**

Class certification order affirmed by the Appellate Court. 365 Ill.App.3d 664. Represented 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 the damages payment, debt totaling \$6.5 million was forgiven as to all class members as part of the settlement.

### **Hidden Voice-Mail Charges in Telephone Bills**

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

### **Class Action Defense**

Defended national marketing company in four Fair Credit Reporting Act class claims seeking over \$100,000,000 brought in federal courts 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, a municipality in claims involving alleged illegal fines, and a medical services finance company regarding alleged illegal loans for plastic surgery procedures. Also act as advisors and co-counsel with attorneys who have asked us to assist them in defending their clients in class claims.

**We enter into referral and co-counsel agreements with attorneys who assist us in prosecuting class action or whistle blower claims.**

**We are also investigating the following Potential Claims:**

Violations of Federal and state Wage claim laws by failing to pay overtime to salaried employees, forcing employees to work off the clock or failing to pay minimum wages.

Whistle Blower claims involving fraud on the government or securities purchasers.

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

Junk text messages received from national or well established companies.

## **Areas of Interest:**

Wage & Hour Overtime and Minimum Wage Violations

Whistle Blower (Qui Tam) Claims

Unfair Check Overdraft Fees

Healthcare Product Fraud

Defective Car & 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

Infomercials & Deceptive Advertising





arbitrator and those arbitrators must select a neutral third arbitrator.<sup>36</sup> If all of this does not occur within 45 days, either side may elect to have the American Arbitration Association (AAA) arbitrate the claim.<sup>37</sup> This is done via a formal demand with the AAA. This author has seen some policies, typically substandard ones, in which arbitration via the AAA is mandated at the outset. The AAA arbitration can be presided over by as few as one and as many as three arbitrators.

The AAA has its own rules specific to uninsured/underinsured arbitrations which can be found at [www.adr.org](http://www.adr.org) and by reviewing the Illinois Insurance Code. These rules will govern the entire process of the arbitration hearing from the production of documents to the admissibility of evidence. Interestingly, while the rules regarding admissibility of evidence and the mandate for arbitration are discussed in the uninsured motorist portion of the Code in Section 5/143a(l), no such requirement of arbitration or rules regarding evidence are found in the underinsured statute. Likewise, there is no trial *de novo* provision found in the UIM statute. While UIM claims are typically handled in accordance with the UM statutory rules as the statutes have been held to be "inextricably linked"<sup>38</sup> by the Supreme Court, the policy likely controls any such disputes and thus, it is imperative that the policy is obtained immediately to determine if it differs from the Code.

The admissibility of medical opinions is handled very differently depending on the extent of damages being claimed. If the amount of damages is not in excess of the minimum liability limits (\$25,000 per person/\$50,000 per occurrence) required pursuant to Section 7-203 of the Illinois Vehicle Code<sup>39</sup>, then the AAA rules regarding admission of medical opinions applies.<sup>40</sup> If the damages being claimed exceed the minimum limits, then the normal Illinois Rules of Evidence apply.<sup>41</sup> This is an important distinction because AAA rules are relaxed as to the admissibility of medical records and opinions contained therein. If you are claiming damages in excess of the minimum limits and you are unable to come to agreement with opposing counsel to allow such records or narrative reports into evidence without foundation, you must obtain a doctor's evidence deposition (customary) or have him/her testify live at the arbitration hearing in order to establish medical causation/damages.

If the insured is not seeking damages in excess of the minimum liability limits, each side may submit any and all documents, without foundation, it wants the non-AAA arbitration panel to consider no later than 60 days prior to the arbitration hearing.<sup>42</sup> If the AAA is presiding over the hearing, AAA rules fix the time period for providing documents at no later than 20 days prior to the hearing.<sup>43</sup> Preparation of your client for the arbitration hearing should mimic your preparation for jury trial. These arbitration hearings are taken more seriously and often involve damages much greater than what practitioners have seen in the fast-paced and rules-relaxed atmosphere of the mandatory arbitration proceedings called for by Illinois Supreme Court Rule 222.

If hearing is via a 3-person panel, the award or non-award must be agreed to by 2 of the 3 arbitrators. The award is only binding up to \$75,000.00 for one person and up to \$150,000.00 for 2 or more person or the corresponding policy limits, whichever is less.<sup>44</sup> If the award is in excess of these amounts, either side can reject the award and demand a jury trial, also known as the trial *de novo* provision.

## Conclusion

UM or UIM coverage can be the saving grace for a client who has been seriously injured by a motorist who either had no coverage or barely any. Therefore, perfecting these claims is essential not only to practice law effectively and responsibly, but to ensure our injured clients are compensated as much as they possibly can be. □

36. 215 ILCS 5/143a(1).

37. *Id.*

38. *Phoenix Ins. Co. v. Rosen*, 242 Ill.2d 48, 65 (2011) citing *Schultz v. Illinois Farmers Ins. Co.*, 237 Ill.2d 39, 1, 404 (2010).

39. 625 ILCS 5/7-203.

40. 215 ILCS 5/143a(1).

41. 215 ILCS 5/143a(1).

42. 215 ILCS 5/143a(1)(A).

43. Illinois Uninsured: Underinsured Arbitration and Mediation Rules, R-6 (2016).

44. 215 ILCS 5/143a(1). The thresholds contained in this section should control regardless of whether the insurance policy contains a lesser amount.

# Illinois Good Samaritan Act, Not a Protection For Employers and Their Employees Who Provide Assistance as Part of Their Employment

By Edward R. Sherman

The Illinois' Good Samaritan Act (745 ILCS 49/1 et seq.) provides "protections for the generous and compassionate acts of its citizens who volunteer their time and talents to help others."<sup>1</sup> The Act provides immunities for a broad array of emergency assistance, including:

- CPR<sup>2</sup>
- Automated External Defibrillators (AED)<sup>3</sup>
- First Aid<sup>4</sup>
- Emergency Care in Building Evacuations<sup>5</sup>
- Co-Employees<sup>6</sup>
- Choking Victim Assistance<sup>7</sup>

The purpose of the Good Samaritan Act as set forth above is to provide "protections for the generous and compassionate acts of its citizens who *volunteer* their time and talents to help others" and the provisions are to be "liberally construed to encourage persons to volunteer their time and talents."<sup>8</sup> However, protection under the Act is limited to persons who *volunteer* and do not receive compensation for their services, whether in the form of a fee or because they are on the clock and assistance is part of their job duties.

In *Tobin v. AMR Corporation*, an airline passenger had a heart attack aboard an American Airlines flight.<sup>9</sup> A crew member attempted to use an automated external defibrillator, but he eventually died.<sup>10</sup> Tobin's Estate sued AMR Corporation and AMR Corporation asserted the Illinois Good Samaritan Act and a separate provision concerning Automated External Defibrillators.<sup>11</sup> With respect to the Good Samaritan Act, the court quoted the following language as to CPR under the Act:

Any person trained in basic cardiopulmonary resuscitation who has successfully completed training in accordance with the standards of the American Red Cross or the American Heart Association and who in good faith, ***not for compensation***, provides emergency cardiopulmonary resuscitation in accordance with his or her training to a person who is an apparent victim of acute cardiopulmonary insufficiency shall not, as the result of his or her acts or omissions in providing resuscitation, be liable for civil damages, unless the acts or omissions constitute willful and wanton misconduct.<sup>12</sup>

The court concluded that because the flight attendants were required to receive training in emergency services and were performing services within their job duties they were not "volunteering their time and talents" as envisioned in the legislative purpose set forth in Section 1 of the Good Samaritan Act and were not protected by the act.<sup>13</sup>

*Tobin's* emphasis on "volunteering" has been recently affirmed. In *Home Star Bank and Financial Services v. Emergency Care and Health Organization, Ltd.* the court was confronted with the issue of whether a doctor who was compensated for his work at the time of the incident, but did not ever bill the patient was "without fee" such that immunity was afforded under the Act.<sup>14</sup> The Illinois Supreme Court reaffirmed the concept in *Tobin* that "the legislature's intent was to encourage and promote volunteerism, and a doctor who is paid for his services is not acting as a volunteer."<sup>15</sup>

1. 745 ILCS 49/2.

2. 745 ILCS 49/10.

3. 745 ILCS 49/12.

4. 745 ILCS 59/67.

5. 745 ILCS 49/71.

6. 745 ILCS 49/75.

7. 745 ILCS 49/65.

8. 745 ILCS 49/2.

9. *Tobin v. AMR Corporation*, 637 F.Supp.2d 406, 410 (N.D. Tex. 2009) (applying Illinois law).

10. *Id.* at 410.

11. *Id.* at 415-18.

12. *Id.* at 418 (emphasis added).

13. *Id.* at 419.

14. *Home Star Bank and Financial Services v. Emergency Care and Health Organization, Ltd.*, 2014 IL 115526, 6 N.E.3d 128 (Ill. 2014).

15. *Id.* at ¶ 50.

With the exception of the provision regarding choking victim assistance at restaurant establishments, all of the immunity provisions of the Act require that assistance be provided without fee or compensation.<sup>16</sup> Therefore, employers who choose to have their employees trained to provide emergency assistance should be advised that their employees and the employers will most likely not be covered under the Act.

This does not mean that no protections are available for employees of employers. The purpose of the Act is to provide protections for people who are volunteering and not being compensated or paid for their service.<sup>17</sup> Employees who perform assistance on their own accord outside of the scope of their duties should be able to argue that they are volunteers under the scope of the Act regardless of whether they are technically "on the clock". These employees are not performing these types of services for compensation and should be afforded protection under the Act. □

16. See *Supra*, ii – vii.

17. 745 ILCS 49/2

## About the Author



Edward R. Sherman is an attorney in the Oak Brook firm of Lillig & Thorsness, Ltd. Mr. Sherman's practice includes civil litigation in multiple areas, as well as appeals. He is a member of the Appellate Lawyers Association, Illinois Association of Defense Trial Counsel, as well as the Defense Research Institute's Appellate Advocacy Committee where he is the Appellate Rules Vice-Chair. Mr. Sherman can be reached by email at [esherman@lilliglaw.com](mailto:esherman@lilliglaw.com) or (630) 571-1900.



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# Illinois Law Update

Editor James L. Ryan

## Attorney Out \$860,000.00; No Signed Fee Sharing Agreement

*Naughton v. Pfaff, 2016 IL App (2d) 150360*

By Sean Lazzari

The Illinois Second District Appellate Court affirmed a grant of summary judgment in favor of defendants, Bruce T. Pfaff and Pfaff & Gill, Ltd., holding, defendants did not breach their fiduciary duty to plaintiff, Richard P. Naughton, when their client, who was referred to them by Naughton, did not sign a contract authorizing a fee sharing arrangement complying with Illinois Rules of Professional Conduct Rule 1.5(f). (eff. Aug. 1, 1990).

Naughton and Pfaff, both attorneys, had an oral agreement where Naughton would refer clients to Pfaff in exchange for a referral fee. In 2006, Naughton referred Elizabeth Frankfield to Pfaff. Elizabeth met with Pfaff informing him that she had been referred by Naughton, and Pfaff accepted the case. Pfaff's retainer agreement did not refer to Naughton or their fee-sharing arrangement. Naughton was not aware Elizabeth retained Pfaff or ever contacted Pfaff about the case. In December 2008, Naughton was informed that the case has settled for \$7.9 million. Naughton never received a percentage of Pfaff's fee.

On January 19, 2010, Naughton filed a complaint alleging breach of contract against defendants for failing to pay him attorney's fees and breach of fiduciary duty for failing to include Naughton in the retainer agreement. On July 20, 2010 Naughton voluntarily dismissed the breach of contract count, but proceeded on the breach of fiduciary duty count. The trial court granted summary judgment in favor of Pfaff.

In affirming a grant of summary judgment, the appellate court looked to the language of Rule 1.5 and held that both attorneys are obligated to ensure the client agrees in writing to the fee-sharing agreement. The Court cited *Donald W. Fohrman & Associates, Ltd. v. Marc D. Alberts, P.C.*, 2014 IL App (1st) 123351 as holding that a fee-sharing agreement cannot be enforced without the client's signed consent. Therefore, the court ruled that the fee-sharing agreement was unenforce-

able due to Naughton's failure to ensure Elizabeth signed the fee-sharing agreement and that the entry of summary judgment in favor of Pfaff was proper.

Author would like to acknowledge the assistance of Bailey B. Lazzari, a Second Year Law Student in the drafting of this case update.

## "Per Stirpes" is A Method Used to Decide Who Receives a Distribution Under an Instrument, Not When The Distribution is Taken.

*In re Estate of Agin, 2016 IL App (1st Dist) 152362*

By James Ryan and Natalie Skizas

Stephen Agin was a transfer on death beneficiary of his predeceased uncle's land trust ("the Trust"). The language of the Trust provided that upon the death of the uncle, the beneficiaries' interest in the Trust "shall immediately pass and vest [to Stephen], *per stirpes*". Stephen did not take any steps during his lifetime to transfer his interest out of the Trust after his uncle's death.

When Stephen passed away without a will, there was a dispute between Stephen's surviving spouse and his children from a prior marriage as to whether or not Stephen's interest in the Trust was an asset of Stephen's probate estate that would pass in part to the surviving spouse. The children claimed that the "*per stirpes*" language in the Trust was written with the intention that upon the death of a beneficiary, the deceased beneficiary's interest in the Trust would pass directly to the beneficiary's children *per stirpes* and not pass through the beneficiary's probate estate. Stephen's surviving spouse claimed that the "*per stirpes*" language in the Trust did not apply because Stephen was still alive at the time of his uncle's death, and thus, Stephen had a fully and vested interest in the Trust at the time of his uncle's death. The spouse argued that Stephen's fully vested interest became part of Stephen's probate estate upon Stephen's death.

In resolving this dispute, the Court looked to the language of the Trust and found it to be clear and unambiguous. While the trust used “*per stirpes*” language, the Court found the “*per stirpes*” language only applied if Stephen had pre-deceased Stephen’s uncle. The Court noted that “*Per stirpes*” is a term used to specify the method of distribution of property and that “*per stirpes*” simply denotes a taking by right of representation of that which an ancestor would take if living. Because Stephen was living at the time of his uncle’s death, the Court found that *per stirpes* language was inapplicable to Stephen’s interest in the Trust. Thus, the Court found that Stephen’s interest in his uncle’s Trust passed outright to Stephen upon the uncle’s death and became part of Stephen’s probate estate upon Stephen’s death.

## Court Invalidates Disclaimer that Purports to Direct Distributions

*Estate of Sterba - 2016 IL App (3rd) 150483*

By James Ryan

Jason Sterba’s mother passed away with a will leaving an equal distribution of her probate estate to her four children. Jason signed a “Partial Disclaimer” in which Jason purported to disclaim his interest in his mother’s estate. Jason stated that the purpose of his disclaimer was to allow his sister to receive the portion of the estate that Jason would have received but for his disclaimer.

Approximately three months after signing the “Partial Disclaimer”, Jason filed for Chapter 7 bankruptcy. The trustee of Jason’s Chapter 7 estate sought a declaration that Jason’s “Partial Disclaimer” was invalid and that Jason’s interest in his mother’s probate estate was an asset of Jason’s bankruptcy estate. The trustee argued that Jason’s “Partial Disclaimer” was not a disclaimer at all, but rather an assignment of Jason’s interest to his sister.

The Appellate Court agreed with the bankruptcy trustee. The Court cited Section 2-7 of the Probate Act as barring a devisee from disclaiming an interest in an estate whenever he engages in a transaction or deals with the property in a manner inconsistent with a complete renunciation of any interest in or power

over the property. In this case, the Court found that Jason acted in a matter inconsistent with a complete renunciation of his interest by attempting to direct the distribution of his interest in his mother’s probate estate to his sister in his “Partial Disclaimer”. The Appellate Court determined that the “Partial Disclaimer” was an assignment of Jason’s interest, and not a true disclaimer.

This case serves as a great reminder of why a drafter should be cautious about stating purposes or intentions in legal instruments. If Jason had simply signed a disclaimer without adding unnecessary commentary about his intentions for doing so, then he may not have encountered such resistance to his disclaimer. □

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# News & Events



*Joe Mirabella entertains the audience with his acceptance of the Ralph Gabric Award*

**28** InBrief

- By Terrence Benshoof

**29** DuPage Convalescent Center Renamed

- Jane Nagle

**30** DCBA Update

- By Robert Rupp

**31** Legal Aid Update

- By Cecilia Najera and Kathleen Panagopoulos

**33** Mentoring Program Orientation

**34** Keith E. Roberts, Sr., Civil Trial

Advocacy Workshop Coming in October/November.

**34** What's the Plan for this year's President's Trip?

**35** ISBA Update

- By Kent A. Gaertner

**36** DuPage Bar Foundation Donation

- Jane Nagle

**38** Chief Judge Creswell Hosts the Supreme Court's Commission on Professionalism Seminar

- By James L. Ryan

**39** DCBA Leadership Comes Together for New Year Conference

- By Ted Donner

**40** 2016 Presidents' Ball and Installation

- By Tony Abear

**43** Classifieds

**44** Where to Be in September

- By Annette Corrigan

# InBrief

By Terrence Benshoof

Yawn! It's time once again for *InBrief* to hop off the hammock, put down that now-empty frosty mug, pick up the news headlines off the computer and...Wow!! It was apparently quite a busy DCBA summer while *InBrief* relaxed! I better catch up a bit.

**Jim Ryan** (no; not that **Jim Ryan**, or the other **Jim Ryan**...) is the new Editor in Chief. And our former Editor in Chief (while back), **Ted Donner**, is now the DCBA President, sworn in at the gala Presidents' Ball at Medinah on June 10.

## In the Courts

Summer saw a whole lot of activity in the courts. First there was the Supreme Court holding oral arguments, in real cases, before a packed house at Illinois Benedictine University. The Justices joined DCBA for lunch afterwards, giving our membership the opportunity to meet the court in a more casual setting.

The summer months also saw a number of retirements from the 18th Circuit bench, with Judges **Terry Sheen**, **Jane Mitton**, and **Blanche Fawell** riding off into the sunset. The ensuing courtroom shuffle had judges moving from court to court and floor to floor. Judge Sheen will not be replaced at

this time and many of the usual suspects are vying to replace Judge Mitton. The Supreme Court has appointed **Bryan Chapman** to fill Judge Fawell's spot.

The electronic order system initiated by Judge **Bonnie Wheaton** has now moved into Judge **Paul Fullerton's** court as well. The Probate call may take a bit more time, since many of the clerk's forms are not in place as yet.

## People, Places

Where to start? Well, the big news hitting the press to start off July was the mega-merger of Momkus McCluskey with Nyberg & Cassioppi and Roberts, PC. **Ron Nyberg**, **Gerry Cassioppi**, **Kevin Coyne** and **Ann Matthews** join from the Naperville firm, while **Chuck Roberts**, **Will Thayer**, and **Bill Costello** come down from Wheaton. The firm has been renamed Momkus McCluskey Roberts LLC.

We knew him when...DCBA official photographer **Jeffrey Ross** was honored by the College of DuPage Photography Department last May with its Distinguished Alumnus Award. Kudos!

**Larry Stein** was appointed to the ISBA Standing Committee on Legal Education

Admission and Competence, and to the Federal Civil Practice Section Council.

**David Sigale** was appointed as Counsel for the Illinois State Rifle Association.

Mulyk, Mack & Laho has added associates **Teresa Pisula** and **Adam Kaplan** to its growing practice in Glen Ellyn.

**Jeff Jacobson** received an award as one of the Top 30 Best Bankruptcy attorneys in the area, and moved his offices to a new location on Roosevelt Road in Wheaton.

Haskin, Corrigan, Tabis & Parravano has added associate attorney **Jeffrey S. Burns** to its Wheaton office.

Huck Bouma welcomed **Colleen Henes** to the Estate Planning Practice Group and **John Benson, Jr.** to the Banking & Finance, Business Services & Real Estate Group.

And, on the move, **Mia McPherson** has relocated from Elmhurst to offices on Harger Road in Oak Brook, while **Raleigh Kalbfleisch** has moved from downtown Wheaton to new digs just south of the courthouse on County Farm Road. □

# DuPage Convalescent Center Renamed

By Jane Nagle

On June 14, 2016, the DuPage County Convalescent Center was named in honor of former DuPage County Board member, the Honorable **Kenneth Moy** (Ret.). Judge Moy, a prominent member of the DuPage County community, has given a \$2 million dollar gift to the Convalescent Center to support its care of the elderly and disabled adults. Moy hopes that his gift and his legacy will inspire others to pursue community service as he continues to support causes that are important to him.

Judge Moy said "I am grateful to the County Board and to the community for honoring me in this way. My hope is to influence others and make life in DuPage County better for all residents, especially those like my wife, who need our support as they battle difficult medical conditions." Moy's wife is presently battling Alzheimer's disease.

In 1984, Judge Moy was the first Asian-American to be elected to county government in the State of Illinois when he was elected to a seat on the DuPage

County Board. Later, Moy served as the DuPage Forest Preserve Commissioner as well as serving as a member of the 18th Circuit Court from 1996 until his retirement in 2007.

Board Chairman **Dan Cronin** commented "Ken Moy's life is an example of the impact one person can have in their community. He is determined to serve the public long after he is gone. We salute his life, his work, and his community devotion."

The DuPage Convalescent Center has been in operation since 1888 and it provides care to elderly and disabled adults, the majority of whom receive Medicaid funding. The DuPage Convalescent Center Foundation was established in 1993 to provide support and supplemental funding to improve the quality of life for the residents. Through Moy's financial support, the DuPage Convalescent Center will be able to continue to provide the high-level of care as it has in the past, long into the future. □

## LRS Stats 6/1/2016 - 6/30/2016

The Lawyer Referral & Mediation Service received a total of 495 referrals, including 20 in Spanish (360 by telephone, 2 walk-in, and 133 online referrals) for the month of June.

If you have questions regarding the service, attorneys please call Cynthia Garcia at (630) 653-7779 or email [cgarcia@dcba.org](mailto:cgarcia@dcba.org). Please refer clients to call (630) 653-9109 or request a referral through the website at [www.dcba.org](http://www.dcba.org).

Administrative . . . . .	1
Appeals . . . . .	1
Bankruptcy . . . . .	13
Business Law . . . . .	18
Civil Rights . . . . .	0
Collection . . . . .	19
Consumer Protection . . . . .	1
Contract Law . . . . .	3
Criminal . . . . .	116
Elder Law . . . . .	6
Employment Law . . . . .	27
Estate Law . . . . .	26
Family Law . . . . .	102
Federal Court . . . . .	2
Government Benefits . . . . .	0
Health Care Law . . . . .	0
Immigration . . . . .	2
Insurance . . . . .	14
Intellectual Property . . . . .	0
Mediation . . . . .	0
Mental Health . . . . .	0
Military Law . . . . .	0
Personal Injury . . . . .	37
Real Estate . . . . .	84
School Law . . . . .	0
Social Security . . . . .	7
Tax Law . . . . .	6
Workers' Compensation . . . . .	10



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DCBA Update



## Heeere's Robert!

By Robert Rupp

My name is Robert Rupp, and I am honored to be joining DCBA as your new Executive Director. It is tremendously exciting for me to write those words, culminating a three month courtship during which I have learned so much about your rich history and traditions, the strong vision of your leadership and the enormous potential that lies before us.

While it was great to meet many of you at the Installation Dinner and Presidents' Ball last month, an introduction is in order for the thousands of you I have not met. I come to DCBA having worked with legal and medical associations for 22 years. For the past eleven years I have been at the American Bar Association, serving the last three years as Associate Executive for Business Services. My time at the ABA was focused on the provision of CLE, member development and volunteer engagement. If these areas sound familiar to you as key goals for DCBA...GOOD, because they are absolutely critical to the growth and health of any bar association. I look forward to putting my experience to work with and for all of the lawyers in DuPage County.

A bit about me personally. You may hear a vicious rumor that I will be commuting

daily from my home on Chicago's beautiful North Side. This rumor is true, at least until I become completely enamored with life in DuPage. It is worth mentioning I am an avid golf hack (which you will see on display at the DCBA Golf Outing, August 31 at Cantigny) so that may accelerate the move. My other passion is hockey and our beloved Chicago Blackhawks. Reading the comments of some of the veteran free agent signings of late, I feel a kindred spirit in the sentiment that they express when they say they are at points in their careers where situation and winning take priority over other factors. This is precisely why I am so happy to be joining a winning DCBA team.

I will close by sharing a final thought that I had in a moment of recreation over the holiday weekend when I finally broke out the hover board that had found its way under my Christmas tree last year. Aside from smiling and laughing while thinking about the mountain of insurance litigation these devices have created, I found myself thinking of DCBA. If you have never ridden one of these, it is impossible to make it go if you do not lean forward. This is not an instinctive physical move for me. Once balanced though, if you lean forward,

the glide is hugely enjoyable. Leaning forward is not always a comfortable move in organizational leadership either, but its necessity to success and the joy of that success are indisputable. I look forward to leaning forward with all of you as we grow the DCBA. We will lean forward to make membership in DCBA a valuable and rewarding experience. We will lean forward to elevate the role and reputation of the legal profession in DuPage County. We will lean forward in educating the community and serving the public. If we are willing to trust the balance and stability that have been given to us by the past leadership of DCBA, we can lean forward confidently and the ride will be one we won't forget.

It's great to be here. Thank you all! □

## About the Author

Robert Rupp is the Executive Director of the DuPage County Bar Association. He has worked in professional association management since 1994, serving a variety of national and international medical and legal associations, including the American Bar Association.



## Legal Aid Update



## Lawyers Trust Fund Grant

By Cecilia Najera and Kathleen Panagopoulos



*Brenda Carroll receives Esther Rothstein Award, surrounded by Legal Aid staff and DuPage Legal Assistance Foundation board members.*

This year Legal Aid received a grant from Lawyer's Trust Fund ("LTF") in the amount of \$62,500. This award was an increase from the previous year's award of \$57,500. We are very grateful for the increased funding and to **Mark Marquardt**, LTF's Executive Director and **David Holtermann**, Assistant Director, as well as the wonderful staff at LTF.

LTF of Illinois is the largest state-based funder of civil legal aid to the underprivileged of Illinois. It provides funding to more than 30 non-profit organizations, serving the poor in Illinois by collecting and disbursing funds from Interest On Lawyers Trust Accounts ("IOLTA"). The interest earned on the deposit of client or third party funds that are nominal in amount or expected to be held for only a short time are collected and paid into the IOLTA program. Under Rule of Professional Conduct 1.15 (f), lawyers are required to deposit these short-term funds into an IOLTA account.

In July of 2015, the Supreme Court of Illinois amended Rule of Professional Conduct 1.15 (i) to increase the amount of money being directed to civil legal aid organizations across the state (many of which are experiencing a decline in funding from other sources). Under the new rule, unidentified funds sitting in IOLTA accounts for more than 12 months are to be remitted to LTF. A good-faith effort must be made to find the correct person or party to whom to return the funds. If after 12 months, these efforts are not successful, then LTF receives the money and is able to direct it to non-profit organizations that help disadvantaged Illinoisans. Since the new rule took effect, more than \$600,000 has been collected from unidentified funds. We are so thankful for those that are dedicated to providing funding to legal aid organizations across the state.

Not only did Legal Aid receive increased funding from LTF, but also on June 23, 2016, LTF awarded our former Director, **Brenda Carroll**, with one of the two Esther Rothstein awards given this year for dedication to legal aid service and ensuring low income individuals have equal access to the judicial system. The awards were presented during a Cocktail Hour at the ISBA Mutual Insurance Office, and was attended by long time legal services advocate, Supreme Court Justice **Thomas L. Kilbride**, along with

many directors from legal aid organizations around the state. A good time was had by all attendees. Although Chief Justice **Rita B. Garmin** could not make the event, she wrote a very nice letter congratulating Brenda and thanking her for not only representing clients, but also mentoring lawyers, and inspiring lawyers to support the efforts of legal aid service.

To give a little background on the award's namesake, **Esther Rothstein** was elected partner in the firm of McCarthy and Levin in 1955, thereby becoming one of the first women in the country to become partner at a major law firm. *(Continued on page 32).*

## About the Authors

A Wheaton native, Cecilia "Cee-Cee" Najera is a graduate of the University of Iowa and received her J.D. from Southern Illinois University. She served as the DCBA New Lawyer Director from 2004 to 2009 and is currently the Director of DuPage Bar Legal Aid Service.




Kathleen Panagopoulos is a second year law student at The John Marshall Law School, expecting to graduate in 2019. She decided to go to law school after working for several years in corporate public relations and raising two small boys.

*(Continued from page 31).*

She served as Director of the Illinois Pro Bono Center, LTF, and the Illinois Humane Society to name just a few of the many organizations she served. Ms. Rothstein was a well-respected lawyer and had a strong passion for service.

The Esther Rothstein awards were presented by LTF President, **Elizabeth L. Jensen**. When presenting Brenda's award, Ms. Jensen quoted **Jim Reichardt** who has said of Brenda, "Her sainthood is assured." It is not only Brenda's mind and character that are held in such high regard, but her heart that is so gracious, humble and fiercely protective of her clients, family and friends. Brenda was asked to keep her acceptance brief. So, she did what probably comes second nature to her and expressed her gratitude to our entire staff who have helped her serve our community.

The second recipient of the Esther Rothstein award was **Lois Wood**, the Executive Director of Land of Lincoln Legal Assistance Foundation. Land of Lincoln serves 65 counties from Gibson City to Anna, Illinois. When presented with her award, Lois thanked her first client. I could not help but think about all of the individuals Brenda has helped through the years...single parents, the children to whom she was Guardian Ad Litem, and the biological parents and all of the alleged disabled individuals in probate court. The event reminded me that we belong to a very noble profession. One that, through each client we serve and the facts we present, upholds a process that seeks what is just. □



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# Mentoring Program Orientation

The DuPage County Bar Association (DCBA) is once again offering the Illinois Supreme Court Commission on Professionalism Lawyer to Lawyer Mentoring Program once again. Mentors and Mentees can earn up to 6 Hours PRMCLE credit upon completion of the program. A mandatory orientation to the program will be held at the Attorney Resource Center, 3rd floor of the DuPage Judicial Center on **Friday September 23rd, 2016**.

11:30 am: Lunch  
12 pm-1 pm: Program

Applications must be received by **Friday September 9th** to participate. For more information and the application, visit the ILSCCP Mentoring Website at: <http://lawyermentor.ilsccp.org/dcba/>

## Qualifications:

**New Lawyers** - Must begin this program no later than two years after being admitted to the Illinois Bar; be registered on the Illinois ARDC Master Roll of Attorneys as active; practice or intend to practice law in Illinois and be a DCBA Member.

**Mentors** - Must be registered on the Illinois ARDC Master Roll of Attorneys as active and in good standing; be admitted to practice law in Illinois at least six years; never have been suspended or disbarred from the practice of law and have no formal disciplinary complaint pending; and be a DCBA Member.

*\*Please note: You will be notified by email if you have been paired with a mentor/mentee to attend the orientation. □*



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## Keith E. Roberts, Sr., Civil Trial Advocacy Workshop Coming in October/November.

DCBA will hold a 16 hour trial advocacy workshop on four successive Saturday mornings, beginning October 29. This program has received rave reviews in the past and promises to be another great program, well worth the time and financial investment. Registrations will open soon and will be limited to 48 so watch for more details in the October Brief and email notices. Fee will be \$425 for DCBA members and \$475 for non-members. □

## What's the Plan for this year's President's Trip?

Join us Thursday, October 20 for a unique, three-hour program with the Seventh Circuit Court of Appeals followed by a reception and private show at The Second City.

Friday, we join the CBA at their facilities downtown for a "Bar Summit", featuring a choice of PRMCLE sessions and a meet and greet with new lawyers and law students.

Friday evening, the party continues with blues and BBQ at Kingston Mines.

DCBA has retained a block of rooms at the newly remodeled Hotel Lincoln in Old Town at reduced rates. Call the Bar Center at 630.653.7779 for more information and watch for a detailed itinerary in the October *Brief* and the *Docket*. □

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ISBA Update



## DCBA Member Vincent Cornelius Sworn in as ISBA President

By Kent A. Gaertner

On June 16th through 18th the ISBA Annual Meeting was held at the Westin Hotel in Rosemont. Fellow DCBA member **Vince Cornelius** was installed at the 140th President of the Association. Vince is also the first African-American President of the Association. Supreme Court Justice **Thomas Kilbride** noted that while we should celebrate Vince being the first African American President of the Association, we should also look forward to the day when such things are no longer noteworthy or unusual. Other officers of the ISBA for the upcoming year are Judge **Russell Hartigan** - President Elect, **Jim McCluskey** - 2nd Vice President and **David Sosin** - 3rd Vice President. **Umberto Davi** moves into the position of Past President. All officers are DCBA members.

One of Vince's goals this year will be to get younger attorneys more involved in ISBA. To that end he has appointed a number of younger ISBA members to the various section councils so that they can learn and ISBA can take advantage of their enthusiasm and energy.

The ISBA will continue to monitor proposed programs that allow non attorneys more and more inroads into the legal profession such as LLLTs, Avvo programs where client funds are held by Avvo and non lawyer ownership of law firms. Where appropriate, ISBA will actively oppose these proposals.

ISBA is also continuing its discussions with the Deans and Administrators of Illinois Law Schools regarding law school curriculum and student loan debt. The goal is to find ways to better train law school grads so that they are practice ready when they graduate from law school and not encumbered with a hundred thousand dollars or more of student loan debt.

The Assembly voted unanimously for a resolution condemning attacks on the Judiciary that question their integrity or fairness by political parties or their candidates.

Past DCBA President **Bill Scott**, with Momkus, McCluskey Roberts, LLC in Lisle, received an award from the ISBA Board of Governors for his work on the

recent changes to the Illinois Dissolution of Marriage Act.

Lastly, Vince has pledged to continue work on making the ISBA and the Courts more diverse and provide for more inclusion. Vince says that we have to recognize the "implicit bias" in all of us and be ready to move past that. Implicit bias being the type of attitudes we were all raised with and that tend to be hard-wired into our brains rather than more overt attitudes of bias.

As always, if you have a suggestion for the ISBA or an issue with the ISBA, please let me know and I will make sure it gets to the proper person to be acted upon. □

### About the Author

Kent is the Eighteenth Judicial Circuit's representative on the ISBA Board of Governors. He is the principal of Kent A. Gaertner P.C. and "Of Counsel" to Springer Brown, LLC. where he concentrates his practice in bankruptcy and workouts. He was president of the DCBA in 2009/2010.

## DuPage Bar Foundation Donation

By Jane Nagle

The Honorable S. **Louis Rathje** (Ret.) made a generous donation to the DuPage Bar Foundation, William J. Bauer Scholarship Fund. Thanks to Mr. Rathje's donation, the Fund will continue to provide its annual scholarship award to benefit one or more law students with connections to DuPage County.

Judge Rathje was elected as a judge of the 18th Judicial Circuit Court in 1992 where he served until 1994. He was then elected as a Justice of the Appellate Court, Second District, in 1994. In January of 1999, Rathje was appointed to the Illinois Supreme Court where he served until December 4, 2000. Rathje has been involved with the leasing, acquisition and disposition of real estate with his work at Liberty Drive Realty Corp, where he has worked since January, 2000.

The DuPage Bar Foundation is able to continue to carry out its mission of providing grants to local charitable organizations, assisting members in need, and providing scholarships to law school students thanks to donations like that of Lou Rathje. Established in 1997, the DuPage Bar Foundation is the charitable arm of the DuPage County Bar Association that is governed by a Board of Directors made up of DCBA members. The organization's purpose is to foster and maintain the honor and integrity of the profession of law; improve and facilitate administration of justice; promote the study of law; acquire, preserve, and exhibit rare books and documents; and assist deserving members of the DCBA and their dependents who are ill, incapacitated, or elderly. If you are interested in making a donation to the Bar Foundation, please contact **Cindy Allston** at [callston@dcba.org](mailto:callston@dcba.org). □

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# Welcome

**Welcome to our new DCBA Members.**

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**Diana M. Law**  
7 Law ElderLaw LLP  
Aurora

# Chief Judge Creswell Hosts the Supreme Court's Commission on Professionalism Seminar

By James L. Ryan



*Participants in Professionalism Skit*

On June 9, 2016, Chief Judge **Kathryn Creswell** hosted the Illinois Supreme Court's Commission on Professionalism, and approximately 70 DuPage County attorneys, judges, and courthouse staff to participate in a new interactive training program entitled "Professionalism: Perspectives and Perceptions."

Participants first watched a skit featuring a *pro se* litigant attempting to navigate his first court appearance and were asked to observe the skit from the perspective of a *pro se* litigant. Following the skit, the participants split up into smaller discussion groups to discuss ways to make a day in court more understandable for *pro se* litigants and to discuss effective

techniques for dealing with civility issues in the courtroom.

Participants also listened to presentations from **Jayne Reardon**, the Executive Director of the Commission on Professionalism, on information transfer and listening techniques, as well as a presentation from the Commission's Chair, Cook County Judge **Debra Walker**, regarding communication techniques involving multiple generations. In her presentation, Judge Walker mentioned that, for the first time, four different generations are practicing law in Illinois, and discussed how communication techniques may differ across these multiple generations of practicing attorneys. □

## DCBA Benefit Highlight

### *Lawyer to Lawyer Mentoring Program*



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# DCBA Leadership Comes Together for New Year Conference

By Ted Donner



*DCBA Leadership Conference attendees*

With the expansion of its CLE programming, the creation of the New Lawyers Division and Senior Lawyers Division, and a host of programs developing through the new Public Interest and Education Commission, the number of people involved in DCBA's leadership has expanded exponentially in the last few years. DCBA hosted a Leadership Conference on July 15, 2016 in celebration of that fact, and to kick off a new year in which over 100 people are involved in leadership. The cover of this edition of the DCBA Brief features most of the attendees from that conference, each and every one of whom is involved in bringing new ideas and initiatives to the bar association.

The Conference began with a presentation by **Jonathan Howe**, one of the architects of Illinois' Not-for-Profit Corporation Act and an attorney

the Chicago Tribune once called the United States' "Mr. Association Lawyer." Howe gave a pointed and masterful presentation on the organizational dynamics of bar associations. Providing attendees with his unique insight into how the applicable law is constructed, he emphasized the importance of active boards and membership involvement.

After lunch (and the photo shoot for this cover), DCBA's leadership re-grouped in the William Bauer Mock Courtroom at College of DuPage for a session on Creativity and Collaboration. **Diana Martinez**, the Director of the McAninch Arts Center at COD and former President of The Second City, led a spirited program during which people found themselves acting out improvisational scenes or standing in the aisles with their socks pulled up over their pants. The games were entertaining

but the message also an important one. Martinez emphasized the importance of bringing a collaborative focus to every group within the association, leaving attendees all the more enthusiastic for the coming year.

The Leadership Conference was put together by DCBA President **Ted Donner** who saw it as an important step in recognizing how the association has grown in recent years. "With this many people in leadership positions," Donner said in the introductory materials, "it's no longer possible for the DCBA President to list off everything that's going to happen in the coming year at his or her installation dinner. A great many other people are involved - you are involved - and your vision for the future of this association is as important as that of anyone else here. □

# 2016 Presidents' Ball and Installation

By Tony Abear



*DCBA welcomes new Executive Director, Robert Rupp. L to R: Jay Laraia, Lynn Cavallo, Hon. Bill Bauer, Robert Rupp, Ted Donner, Gerry Cassioppi*

DuPage County Bar Association hosted the 2016 Presidents' Ball and Installation of Officers and Directors this past June 10, 2016. We celebrated this black tie and evening gown event by returning to the opulent Medinah Country Club in Medinah, Illinois. As our bar association continues to grow, the attorney involvement in our bar likewise increases. The result this year was an installation event that was a *complete sell-out*.

The Presidents' Ball is an annual event held by the DCBA to recognize the transition of our bar association's elected and appointed attorney leadership. At the event we celebrate the change of guard and also recognize by awards and scholarships accomplishments for the year. While the dinner guests sit and eat at round tables each seating 10 people, the officiating and speeches proceed to keep the evening moving along. When the speeches and dinner are complete,

the tone of the event changes when a live band takes the stage and the dancing begins.

The evening began with a reception of hors d'oeuvres and cocktails, after which past DCBA president **Lynn Cavallo** announced the official start of the night with the call to order. In the grand ballroom, Lynn introduced the then current DCBA President **James (Jay) Laraia**, who addressed the bar association with

his words of gratitude (“and relief”). His remarks were followed by the DCBA’s traditional invocation, led by **Umberto Davi** who delivered the prayer in perfectly spoken Italian, delivered as if he were fluent in the language.

President Laraia announced this year’s *Lawyer of the Year*, the dashing and youthful **Bradley Pollock** for recognition and appreciation of his service and leadership to the DCBA. Lynn and Jay also presented the DCBA’s Board of Directors *Distinguished Service Awards* to: **Susan O’Neill Alvarado, Patrick Boland, Jennifer Burdette, Barbara Corrigan, Mary Kay Furiasse, Christine McTigue, Kevin Millon, Christina Morrison, Melissa Piwovar, Scott Pointner** and **Todd Scalzo**.

Retiring Directors awards went to **Lisa Giese**, who completed her term as New Lawyer Director and to **Kiley Whitty**, Assistant Treasurer.

This year’s *Ralph Gabric Award* was bestowed upon 2 individuals: **Joseph Mirabella** and **John Kincaid**. Both gentlemen are well-known to our membership and the award is appropriately bestowed based upon their years of dedicated service and character. Not a man to hide his opinions or to mince words, Joe Mirabella brought howls of laughter to the ballroom when he addressed the crowd and accepted the award.

The gala event enjoyed the benefit of special guests, United States 7th Circuit Court of Appeals Judge **William Bauer** and his wife, **Patricia**. (Continued on page 42).



Jay Laraia is welcomed to the Past Presidents’ “club” by Lynn Cavallo



Hon. Bill Bauer handing the President’s gavel to Ted Donner





Bar Foundation President, Clarissa Myers with Ambassador Scholarship winners: David Handley, Anna Schiefelbein and Zach Vojslavek

(Continued from page 41).

Judge Bauer not only was the guest of honor, but also presented the *Bauer Scholarship* to **Rikkilee Moser**, a law student at Northern Illinois University College of Law.

Judge Bauer next officiated at the swearing in of officers and directors. The ever effervescent **Ted Donner** accepted his position as our new DCBA president, and **Gerald Cassioppi**, **Matt Pfeiffer**, and **Stacey McCullough** likewise took their oaths of office as president-elect, 2nd vice president, and 3rd vice president, respectively. The swearing in of new DCBA directors also occurred, with **Terry Benshoof**, **Mark Bishop**, **Jim Harkness**, and **Amalia Romano** all accepting their new positions.

**Jeff York** spoke to the crowd in his capacity as President of the DuPage

Legal Assistance Foundation, after which **Clarissa Myers**, President of DuPage Bar Foundation took over the podium. Clarissa then announced this year's winners of the *DuPage Bar Foundation's Ambassador Scholarships*, which included **David Handley**, a law school student at the University of Illinois, **Anna Schiefelbein**, a law school student at John Marshall Law School, and **Zach Vojslavek**, also a student at John Marshall Law School.

Presenting this year's *Woodruff, Johnson & Palermo Scholarship* was **Dexter Evans**. He presented this year's award to **Matthew Duquette**, a law school student at John Marshall Law School and who has served with the U.S. Marines since 2005 including four overseas deployments.



Brad Pollock showing off his Lawyer of the Year Award

The night ended with raucous exuberance when the live band took the stage, tables were cleared from the center of the room, and the rug-cutting began. Without debate, no dancer could show up our own DCBA finance manager, **Jacki Hamler**, who showed off her best dance moves, however everyone on the dance floor as well as those watching from the sides enjoyed this closing event. We cannot wait for next year's gala. □



# Classifieds

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## Where to Be

In September

### Cousin County Counselors & Their Cohorts Compete For A Great Cause

By Annette Corrigan



On September 21, 2016, the DCBA and the KCBA will take to the field to compete in an inaugural, co-ed softball game. Proceeds from this “friendly” event will benefit the DuPage Legal Assistance Foundation and the Kane County Bar Foundation. The game will be held at the Benedictine University Stadium Complex, 5700 College Road, Lisle, DuPage County. (Hah.) Pre-game activities will commence promptly at 6p.m., with the first pitch to take place at 7p.m. Admission is free to all.

Chief Judge **Kathryn Creswell** has graciously agreed to be our Honorary Umpire from DuPage. Don’t let the robe confuse you, we’ve been told her honor really knows her baseball!

Coach **Mike Calabrese** is actively seeking male and female volunteers to make up Team DuPage. Prior baseball/softball experience is not necessary, but very welcome. In fact, some skill is probably important if we *PLAN TO BRING HOME THE W! COME ON DUPAGE – LET’S GET FIRED UP AND KICK SOME KANE...*(A-hem.) Please note: All players must be a member in good standing with either the DuPage or Kane County Bar Association and have been a member since September 2015. Please contact Mike at [calabreseassoc@aol.com](mailto:calabreseassoc@aol.com) for further details.

Both bar associations have pledged a minimum contribution of \$2500 in sponsorship money to the “Winner’s Pot”. Anyone

interested in becoming a sponsor for the event should contact **Robert Rupp**, [rrupp@dcba.org](mailto:rrupp@dcba.org). Levels of sponsorship begin at \$100 for recognition in the *DCBA Brief*. Mid-level sponsors at \$250 are also mentioned in the *DCBA Brief* and will have their name included on the game scorecard. Top level sponsors at \$500 receive all of the above and the added bonus of displaying their sponsorship banner during the game. All DCBA members are encouraged to dig deep to show sponsorship support for this worthy event. We want to thank OVC Online Marketing for Lawyers who are generously sponsoring the jerseys for both teams!

A variety of concession stand delicacies and beverages will be available for purchase during the game. In addition, an extra “buck for a beer” will be included on all alcohol purchases, with the extra dollars going into the Winner’s Pot. Any DCBA member who renews their membership by September 1st and registers to attend the game will receive a voucher for a free meal. In addition, a 50/50 raffle will be held. The DCBA/KCBA planning committee will host a game of “Chuck a Duck”. Ducks to chuck can be purchased for \$5 each. The owners of the two ducks closest to the pitcher’s mound will each receive a \$50 gift certificate. Please be advised: Chucking a duck at the opposition is severely frowned upon and litigation is highly likely.

To the victor will go the spoils. The winning team not only receives a year’s worth of gloating rights, but also earns 75% of the Winner’s Pot for their respective charity, so please be generous and go the DCBA website to donate today and you can track our team’s progress on the DCBA Softball Facebook page.

**DCBA members, Team DuPage and the DuPage Legal Assistance Foundation need you. They need your skill, your attendance in the stands, your “family friendly” cheers, or just your money. KCBA – we say BRING IT! □**

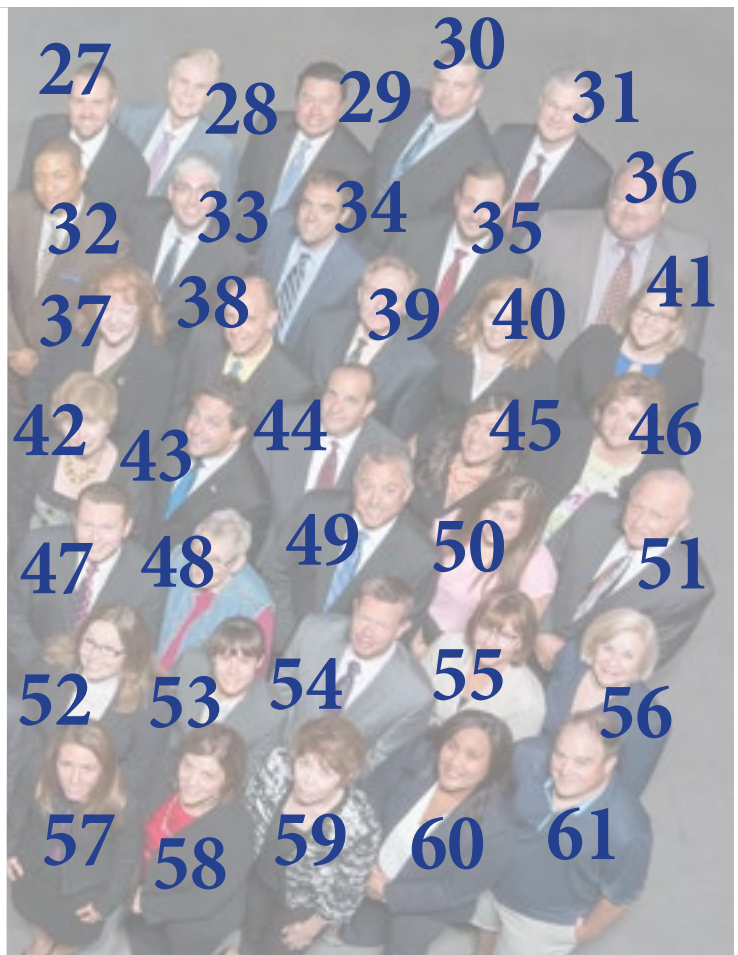


## DCBA'S 2016-17 LEADERSHIP

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- 60. Cecilia Najera, PIE Commission Member
- 61. Nick Nelson, Judges' Nite Director

Not Pictured: Sooha Ahamad, PIE Commission Member, New Lawyers Division Vice Chair; Susan Alvarado, PIE Commission Member; James Bernicky, Intellectual Property Section Chair; Erin Birt, Diversity Program Chair; Patrick Boland, New Lawyers Division Chair; Tricia Buhrfield, Assistant Treasurer; Ashley Bump, Board Member; Dave Clark, PIE Commission Member, Mega Meeting Chair; Patrick Edgerton, Board Member; Hon. Rod Equi (ret.), PIE Commission Member; Jennifer Friedland, 101 Program Chair; Kent Gaertner, Senior Lawyers Division Chair; Glenn Gaffney, Professional Responsibility Section Chair; Brad Giglio, Immigration Law Section Chair; Lawrence Gregory, Tax Law & Practice Section Chair; Katie Haskins Becker, Membership Committee Chair; William Hutul, Law and Literature Program Chair; Sean McCumber, Family Law and Practice Section Chair; Amanda Meindl, Criminal Law Section Chair; Wendy Musielak, Board Member; John Pankau, Legislation Committee Co-Chair; Mollie Peskind, Animal Law Section Chair; John Pleviak, Secretary/Treasurer; Brad Pollock, Trial Advocacy Program Chair; Elizabeth Pope, Real Estate Law & Practice; and Bryan Sims, Law Practice Management.



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