

DCBA BRIEF

The Journal of the DuPage County Bar Association



**Chief Judge Diane Wood of the
Seventh Circuit Court of Appeals**
Keynote Speaker at Law Day

Volume 29, Issue 9
May 2017

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Volume 29, Issue 9
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From the Editor

Law Day and Elections: A Celebration of Our Democracy

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.

In 1957, the President of the American Bar Association suggested setting aside a special day each year to celebrate our system of democracy. At that time, America was entrenched in the "Cold War" with the Soviet Union, and the world confronted an ideological battle between competing systems of government. In 1958, the President of the United States of America, **Dwight D. Eisenhower** formally established Law Day as a day of national dedication to the principles of government under law. Three years later, in 1961, Congress, by joint resolution, designated May 1 as the official date for celebrating Law Day.

Thankfully, the Cold War is over, the Soviet Union has fallen, and our country has shown the value of democracy throughout the world. Law Day continues to be celebrated among the legal community in part to remind ourselves of the unique role lawyers play in our democracy and to provide us with an opportunity to reach out to the public and demonstrate our commitment to democratic principles.

In this issue, we commemorate Law Day in a number of ways. On the cover, we feature Hon. **Diane Wood**, our Law Day speaker and Chief Judge of the Seventh Circuit Court Appeals. In the news section, **Timothy Klein** drafted an excellent judicial profile on the Chief Judge and previewed her Law Day speech. Recent developments have made Judge Wood's Law Day speech on equal protection particularly interesting. Judge Wood will speak to us one month to the day since she issued the landmark decision, *Hively v. Ivy Tech*, in which the Seventh Circuit became the first court to expressly hold that workplace discrimination on the basis of sexual orientation is actionable under Title VII of the Civil Rights Act.

We continue to run features on the many programs offered at our area's law schools with a piece on the *pro bono* opportunities available at John Marshall Law School. Next month, we expect to complete these features with a piece on the opportunities available at another one of our local law schools.

Another way we celebrate Law Day is through our scholarship on the law. **Art Rummler**, a former chair of our Law Day Committee, served as lead articles editor for this issue and brings us articles on a wide variety of topics. Northern Illinois Professor **Jeffrey Parness** and Northern Illinois law student **Alex Yorko** teamed up to provide an article on the agency principles in play when a plaintiff sues a principal alone for the acts of his agents. **Larry LaVanway** provides an excellent summary of the lawyers' role in a residential real estate closing and offers an excellent roadmap for handling a real estate closing. **Doug Blanchard** provides his observations of the modern jury pool and provides his thoughts on tailoring a jury trial to the different generations comprising our jury pools. Finally, **Art Rummler** offers his own practical view on the Chapter 13 Bankruptcy process. Thanks to Art and all of the authors for their contributions to this issue.

Voting is perhaps the most democratic principle of them all. I find it fitting that the DCBA's elections take place around the time when bar associations across America celebrate a lawyer's role in our system of democracy. In this issue, we have also provided you with profiles of the fine individuals running for DCBA Third President and for Director. Please consider voting in our upcoming election. □



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Jon Walker

Jon Walker has helped over a thousand clients recover workers' compensation benefits and social security disability awards. He has been recognized as both an "Emerging Lawyer" and "Rising Star" by leading Illinois publications. He is the author of the 2015 IICLE publication "Social Security Disability Offsets of Workers' Compensation Benefits."

At Woodruff Johnson & Evans, Jon represents Workers' Compensation and Social Security Disability claimants.



Steven Sandler

Steven Sandler joins us after having spent the last 10 years defending insurance companies in catastrophic airplane, trucking, and auto accidents. Previously, he spent 25 years as a Plaintiff's trial attorney, obtaining several multi-million dollar verdicts and settlements for his injured clients. He has been an "Illinois Super Lawyer" in civil litigation for the last 5 years and is an adjunct professor at DePaul Law School, teaching Products Liability.

At Woodruff Johnson & Evans, Steve represents the victims of transportation accidents, defective products, and medical malpractice.



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DCBA's Public Interest and Education Commission Works With PILI to Support *Pro Bono* Efforts

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*.

Since our Public Interest and Education Commission ("PIE") was formed, now almost two years ago, its members have helped spearhead or develop a number of *pro bono* and public education programs. Some highlights include the work they did helping the courthouse staff develop an instructional video for working with self-represented litigants, developing a website for DuPage Legal Aid, the creation of a Veterans Assistance Program with DuPage Legal Aid and John Marshall, and Lawyers Lending a Hand's recent participation in Lawyer Volunteer Week. As we celebrate Law Day, therefore, it seems a particularly good time to offer our thanks and a tip of the hat to the members of our PIE Commission. Their work has enabled us to collectively participate in a number of new public interest programs and has resulted in more comprehensive and constructive efforts in existing programs.

Among the various PIE initiatives this last year, most recently, the DCBA Board of Directors approved PIE's developing an affiliation with the Public Interest Law Initiative ("PILI"). PILI is a not-for-profit group which has been focused on volunteerism among Illinois lawyers, law students and other legal professionals for some 40 years. It works with law firms, corporations, bar associations and other public interest groups to ensure that groups like DuPage Legal Aid have access to information, resources, and support to more effectively carry out their missions. In addition, PILI operates a Law Student Internship Program and a Graduate Fellowship Program through which it places law students and recent law school graduates at public interest law organizations, with PILI providing supplemental educational, networking and mentoring opportunities. As PILI Executive Director

Michael Bergmann explains, "In this last year, PILI made \$260,000 in grants to support Law Student Interns across Illinois. PILI's Alumni Network, made up of over 4,000 former Interns and Fellows, builds and maintains the connection between past PILI Interns and Fellows and the public interest law community through educational, networking, leadership and service opportunities."

The PIE Commission's role within the PILI network is described as that of an "Eighteenth Judicial Circuit *Pro Bono* Committee." That means, in a nutshell, that the DCBA's PIE Commission will continue to serve as a nexus for those involved in public interest and education work in DuPage County while also participating in a state-wide network of similar groups from other judicial circuits. According to Bergmann, "the Judicial Circuit *Pro Bono* Committees strive to achieve their goal of increasing *pro bono* within a specific judicial circuit by raising awareness of the need for free or low-cost legal services; identifying and reducing barriers to providing free or low-cost legal services; promoting *pro bono* legal services and recruiting attorneys to participate in existing *pro bono* programs; and recognizing the *pro bono* contributions of attorneys." PILI started this effort a few years ago and is adding two circuits each year until a state-wide network has been established. Most of the Circuit Committees have taken awhile to develop because they require the participation of different courts, different bar associations and a range of public interest service providers. The committee for this judicial circuit has been inherently easier to develop because our PIE Commission is already similarly structured and focused on that same agenda. (Continued on page 6)

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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)*

Through the Commission's affiliation with PILI, in turn, as issues involving *pro se* litigants and *pro bono* assistance continue to be a source of concern and debate in Illinois, our association will be at the forefront of the dialogue, ensuring that solutions are crafted in DuPage County that specifically serve the unique concerns of this community.

The PIE Commission's participation in PILI's Judicial Circuit program involves their attending an annual meeting with PILI here in DuPage County and participating in summits hosted by PILI once every year or so in Springfield. After Bergmann came to Wheaton for two introductory meetings with the full PIE Commission, this year for example, PIE Commission Chair **Melissa Piwowar** and Vice Chair **Walt Jankowiec** traveled to Springfield on March 15-16, 2017 to attend PILI's 2017 Judicial Circuit *Pro Bono* Committee Summit. There, they participated in a dialogue with representatives of the existing Committees (from the Third, Fifth, Sixth, Tenth, Eleventh and Fourteenth Judicial Circuits) and with a number of other invited guests, including **Dave M. Anderson**, Executive Director, Illinois Bar Foundation, **Lisa Colpoys**, Executive Director, Illinois Legal Aid Online (ILAO), **Leslie Corbett**, Illinois Equal Justice Foundation, **Clarissa Gaff** and **Susan Zielke**, Land of Lincoln Legal Assistance Foundation, **Deborah Hagan**, Chief, Consumer Protection Division, Office of the Illinois Attorney General, **David T. Holtermann**, General Counsel, Lawyers Trust Fund of Illinois, Honorable **Lloyd A. Karmerier**, Chief Justice of the Illinois Supreme Court, **Brad Lane**, President, PILI Board of Directors, and **Samira Nazim**, Illinois Supreme Court Commission on Access to Justice. The purpose of the summit was to encourage involvement in public interest and education in Illinois and to discuss ways in which all concerned can learn from each other, helping everyone through whatever specific problems may be developing in their specific circuits or state-wide. The cost of the trip was covered by PILI, the benefits that came out of it were invaluable. *(Continued on page 42)*



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Articles Editor



Arthur Rummler

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Suing Principals Alone for the Acts of Agents

By Jeffrey A. Parness and Alex Yorko*

This past August the Illinois Appellate Court, in *Yarbrough v. Northwestern Memorial Hosp.*,¹ suggested there was never a need to join, or to continue to join, an agent when pursuing a vicarious liability lawsuit against its principal.² Herein, we review this statement in *Yarbrough*. We then counsel lawyers and judges regarding future suits against principals based on the acts of agents. When it reviews the apparent agent issue in *Yarbrough*, perhaps the Supreme Court will clarify when the joinder of principals and agents may be required.

In *Yarbrough*, the court ruled that a hospital could be vicariously liable for the acts of the employees of an unrelated, independent clinic under the doctrine of apparent authority. The clinic was never made a party to the litigation against the principal. The court relied on *Gilbert v. Sycamore Mun. Hosp.* in concluding that the plaintiffs were not required to name the apparent agent as a party.³ But the court noted that in *Gilbert*, the issue of whether the apparent agent must be named as a party when the principal was sued “was not at issue.”⁴ Additionally, the court relied on *Miyzed v. Palos Community Hosp.*, a First District case, where a medical negligence claim was allowed to move forward against a hospital as the principal for the acts of a physician who rendered treatment on behalf of an independent medical group “under the doctrine of actual and apparent agency.”⁵

The *Yarbrough* court also looked to the Illinois Pattern Jury Instructions to support the notion that a “principal may be sued even where the apparent agent is not.”⁶ The Note accompanying one instruction, 105.11, says the instruction “should be used where the issue of apparent agency is in dispute, *the principal alone is sued*, and the plaintiff alleges reliance upon a ‘holding out’ on the part of the principal.”⁷ Thus, in medical malpractice cases per *Yarbrough*, plaintiffs do not always have to name an independent clinic or its employees when attempting to hold the principal/hospital vicariously liable.⁸

* Jeffrey A. Parness is a Professor Emeritus and Alex Yorko is a student at Northern Illinois University College of Law. Thanks to Matt Timko, Academic Technologies and Outreach Services Librarian at NIU, for his helpful comments.

1. *Yarbrough v. Northwestern Memorial Hosp.*, 2016 App (1st) 141585, ¶ 43 [hereinafter *Yarbrough*].

2. Herein, principals and agents include employers and employees. Compare *Northrop v. Lopatka*, 242 Ill. App. 3d 1, 5 (4th Dist. 1993) (“cases recognize the rule of vicarious liability only where a principal and agent or employer and employee relationship is shown”).

3. *Yarbrough*, at ¶ 44 (citing *Gilbert*, 156 Ill.2d 511 (1993)) [hereinafter *Gilbert*].

4. *Id.*

5. *Id.* (citing *Miyzed v. Palos Community Hosp.*, 2016 IL App (1st) 142790, at ¶¶ 23-25 [hereinafter *Miyzed*]).

6. *Id.* at ¶ 45.

7. *Id.* (emphasis added by court).

8. *Id.* at ¶ 46.

9. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 517 (1993) [hereinafter *Gilbert*].

In *Gilbert*, the administrator of a decedent's estate sued both a treating physician and a hospital for the wrongful death of the decedent arising out of negligent emergency room care.⁹ The physician practiced through a professional medical association whose work in the hospital was considered by the hospital as the work of an independent contractor, as the association's doctors were paid no salary by the hospital.¹⁰ After the administrator settled with the doctor, the hospital moved for summary judgment, arguing there was no vicarious liability as the doctor was not an agent or employee of the hospital.¹¹ The court held that "under the doctrine of apparent authority, a hospital can be held vicariously liable for the negligent acts of a physician providing care at a hospital, regardless of whether the physician is an independent contractor, unless that patient knows, or should have known, that the physician is an independent contractor."¹² The court in *Yarbrough* correctly observed that the need for a continuing joinder of the agent was not an issue in *Gilbert*.

In *Mizyed*, the physician and the related medical association that treated the plaintiff were not included as parties in a medical malpractice lawsuit against a hospital alleged to be vicariously liable for the acts of the physician under the actual and apparent agency doctrines.¹³ The court granted summary judgment on behalf of the hospital, which urged successfully that the physician was not the hospital's agent, so there could be no vicarious liability.¹⁴

While unnoted in *Yarbrough* and *Mizyed*, the Supreme Court opinion in *DeLuna v. Treister* presents difficulties for these rulings on suing only principals. There, a plaintiff sued a doctor and a hospital as principal. The claim against the doctor was dismissed for pleading deficiencies. The hospital, in a refiled case, then urged that dismissal of the claim against it was required.¹⁵ The court allowed the claim against the hospital to

proceed, holding that the defenses articulated by the doctor in the first case were "personal" to the doctor and that *res judicata* did not bar the claim against the hospital/principal in the second case, citing Section 51 of the ALI Restatement (Second) of Judgments.¹⁶ The court suggested, however, that generally the dismissal of a claim against an agent with prejudice compels dismissal of any vicarious liability claim against the principal.¹⁷ This can be read to apply even when there is only one lawsuit wherein the agent and principal are sued and then the agent is dismissed. Yet, the court further noted in *DeLuna* that "[h]ad plaintiff chosen to do so," plaintiff could have sued St. Elizabeth's "alone" as the doctor "was not a necessary party" and that "it would be particularly unfair to permit" the hospital "to avoid liability merely because of its employee's fortuity in obtaining an involuntary dismissal from plaintiff's lawsuit, where that dismissal did not otherwise absolve the employee of fault."¹⁸ Thus, *DeLuna* hints that suing principals alone can sometimes prompt difficulties for claimants.

DeLuna was applied by the Second District in 2003 in *Sterling v. Rockford Mass Transit District*.¹⁹ There, plaintiffs sued a motorist, as well as a bus company and its driver, for personal injuries arising from the motorist's causing the bus to crash into a restaurant.²⁰ The claims against the bus company were

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10. *Gilbert*, 156 Ill.2d at 515.

11. *Id.* at 517.

12. *Id.* at 524.

13. *Mizyed*, at ¶¶ 23-25.

14. *Id.* at ¶ 64.

15. *DeLuna v. Treister*, 185 Ill.2d 565, 571 (1999) [hereinafter *DeLuna*].

16. *Id.* (citing Restatement (Second) of Judgments § 51 (1982)).

17. *Id.* at 581 (citing *Towns v. Yellow Cab Co.*, 73 Ill.2d 113, 124 (1978) [hereinafter *Towns*]), while positing that this is because the principal's liability is "derivative" and the principal and agent "are considered one and the same tortfeasor").

18. *Id.* at 582.

19. *Sterling v. Rockford Mass Transit Dist.*, 336 Ill. App. 3d. 840, 846 (2d Dist. 2003) [hereinafter *Sterling*].

20. *Sterling*, at 843.

21. *Id.*

based on the doctrine of respondeat superior.²¹ The plaintiffs later dismissed the bus driver voluntarily, whereupon the bus company sought dismissal. As the plaintiffs at the close of the evidence voluntarily dismissed the bus driver with prejudice, the company urged that it was entitled to a favorable judgment.²² The court referenced *Towns*, which said that “in suits based on respondeat superior, a judgment for either the employer or the employee, arising out of an action predicated on the alleged negligence of the employee, bars a subsequent suit against the other for the same claim of negligence where the agency relationship is not in question.”²³ In *Towns*, there was no second lawsuit as in *DeLuna*, only a “subsequent” claim presentation against an agent once an earlier claim against the principal was dismissed and operated as “an adjudication upon the merits.” This dismissal of the principal led the *Towns* court to dismiss the claim against the agent.²⁴

Viewing the issue under *res judicata*, the *Sterling* court said it had to decide “under what circumstances will a voluntary dismissal with prejudice be deemed an adjudication on the merits.”²⁵ While the court recognized that although generally a dismissal of an agent compels a dismissal of any vicarious liability claim against a principal, “the key inquiry is whether the defenses articulated by the parties are substantively different.”²⁶ As the plaintiffs voluntarily dismissed only the bus driver without a finding as to his negligence, the *Sterling* court ruled there were different defenses.²⁷ Citing *DeLuna* the court also said that “had the plaintiffs chosen to do so,” they could have sued the bus company alone.²⁸

In recognizing that not all judgments dismissing agents “with prejudice” will prompt claim preclusion defenses for principals, the *Sterling* court distinguished between dismissals bearing or not bearing any “relationship to the actual merits.”²⁹ It opined that no personal defenses available to agents could be employed by principals seeking dismissals. Yet the *Sterling* court also more broadly ruled that, under *DeLuna*, plaintiffs can sue principals alone, so that agents need not be joined.³⁰

“The safest road for plaintiffs is to join agents when suing principals, and to continue joinder until judgment...”

The provision in the Restatement (Second) of Judgments, utilized in *DeLuna*, states that an earlier judgment involving an injured person bars that person from later bringing a related lawsuit against any other person who may have been responsible unless the later lawsuit is based upon grounds that could not have been asserted in the earlier action or unless any judgment in the earlier action was based on a defense “personal to the defendant” in that action.³¹ Another provision in the same Restatement, unrecognized in *Sterling*, effectively states that a settlement with an agent in a case generally does not “discharge the liability of any other persons liable for the loss” who were sued in the case.³² It does not say, however, that an involuntary dismissal of an agent does not discharge the principal in the same case.

22. *Id.* at 845.

23. *Id.*

24. *Towns*, 73 Ill. 2d at 117 (per Rule 273, a dismissal with prejudice of a claim against a principal for a discovery violation was an adjudication upon the merits barring a claim against).

25. *Id.* at 847.

26. *Id.* at 848.

27. *Id.*

28. *Id.*

29. *Id.* at 849 (citing *DeLuna*, at 578-579).

30. *Id.* at 848.

31. Restatement (Second) of Judgments § 51 (1982).

32. Restatement (Second) of Judgments §50 (1) (1982) (though the settlement by its terms can discharge others).

33. *DeLuna*, at 582.

So, some Illinois precedents support the statement in *Yarbrough* that agents need not always be continued in suit if earlier joined when claims are presented against principals based on vicarious liability. Yet other precedents indicate that *res judicata* can bar claims against principals when agents are sued and then dismissed based on defenses that are not “personal” to them. Perhaps as well, there can be barriers to suits against principals when agents are never sued, but would have had defenses not personal to them if they were sued.

After *Yarbrough*, what should plaintiffs do? In particular, how should they differentiate between defenses that are and are not personal to agents? We suggest the safest road is to join agents [even those without money] when suing principals and to continue to sue to them until the vicarious liability claims against the principals are resolved, unless it is absolutely clear or a court rules the agents are not suable due to their “personal” defenses.

As to what constitutes a personal defense, we suggest caution. It clearly does not encompass a defense that absolves the agent of fault, per *DeLuna*.³⁴ It likely does not include a defense that could have absolved the agent of fault if the agent had ever been sued.³⁴ As well as, for now at least, it does not include a successful defense of an agent who is sued, where the involuntary dismissal of the agent never prompted for the principal “the inconvenience of having to prepare for trial,” per *Sterling*.³⁵ Pleading deficiencies prompting dismissals of agents with prejudice, as in *DeLuna*,³⁶ and statute of limitations defenses prompting dismissals of agents with prejudice, as in *Sterling*,³⁷ seemingly are “personal” when successfully raised by agents. Lawyers can find further clarifications on “personal” defenses of agents in judicial precedents outside of Illinois which utilize, as did *DeLuna*, the Restatement (Second) of Judgments (though such precedents are sparse).

Section 51 of the Restatement presents other traps for claimants who sue principals for vicarious liability without suing or

without continuing to sue their responsible agents. It states: “If the action is brought against the primary obligor and judgment is against the injured person, it extinguishes the claim against the person vicariously responsible if under applicable law the latter is an indemnitor where liability arises only when the primary obligor is found to be liable to the injured person.”³⁸ Here, claimants should distinguish between a principal’s vicarious liability for an agent and a person’s indemnification liability (e.g., for an insured). More pertinent to *Yarbrough*, Section 51 also states that a judgment in favor of an injured person usually “is conclusive ... as to the amount of ... damages,” meaning a later suit (or a continuing suit?) against the principal will often be precluded.³⁹

The safest road for plaintiffs is to join agents when suing principals, and to continue joinder until judgment, unless an agreement on the waiver of a *res judicata* or similar defense is obtained. Plaintiffs should not assume that all possibly nonsubstantive defenses leading to involuntary dismissals of agents will not impact the continuing claims against principals. Illinois Supreme Court Rule 273, utilized in *Towns*, allows some involuntary dismissals on procedural (i.e., nonsubstantive) grounds to be adjudications “upon the merits,” especially where, per *Sterling*, these dismissals came after the principals endured “the inconvenience of having to prepare for trial.”

Written norms are possible when the vicarious liability of a principal ends with the end of the liability of an agent, whether due to the nonjoinder of the agent and the running of the limitation periods, or through a settlement postsuit with the agent, or due to a dismissal with prejudice postsuit of a claim against the agent involving no settlement, or otherwise. One Illinois Supreme Court Rule⁴⁰ already expressly recognizes a suit against a principal can continue when an agent is dismissed from the suit due to a failure of reasonable diligence in service of process (clearly a “personal” defense). As well, an Illinois Civil Procedure Code provision expressly recognizes “a judgment in an action brought and conducted by a subrogee”

34. But see *DeLuna*, at 582 (claimant can sue principal “alone,” without noting explicitly a bar if there was a defense for the agent that was not personal).

35. *Sterling*, at 849 (citing *Leow v. A&B Freight Line, Inc.*, 175 Ill.2d 176, 186-187 (1997) [hereinafter *Leow*]).

36. *DeLuna*, at 581.

37. *Sterling*, at 849 (citing *Leow*, at 188).

38. *Id.*, at § 51 (3).

39. *Id.*, at § 51 (2).

40. Ill. Sup. Ct. R. 103(b).



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by virtue of a subrogation right “is not a bar or a determination on the merits ... in an action by the subrogor to recover” upon a claim “arising out of the same transaction or series of transactions.”⁴¹ Even if there is to be no new general written norm governing all cases, regardless of any personal or nonpersonal actual or potential defenses of agents, there should at least be a new written norm on the effects of settlements with agents alone, as here there appears significant discord in the Illinois courts.⁴²

41. 735 ILCS 5/2-403(d) (not saying that a judgment in an action by a subrogee will not bar a later action by a subrogee).

42. See, e.g., *McGrath v. Price*, 342 Ill. App. 3d 19, 36-37 (1st Dist. 2003) (“appears to be a conflict” on whether a settlement with an agent “extinguished any potential vicarious liability on the part of the principal”).

The court in *Yarbrough* said that generally a claimant need not join an agent when suing a principal. Yet lawyers in civil cases alleging vicarious liability of a principal must proceed with caution regarding nonjoinder of the agent since sometimes there will operate a *res judicata* defense. Lawyers should take particular care when settling with defending agents (or even principals per Towns) when they wish to pursue related vicarious liability claims against principals (or agents). □



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Accounting for Generational Differences in Perception by Jury Candidates

By Doug Blanchard

Now that there are four, and potentially five, generations in prospective jury pools, the process of *voir dire* is more critical than ever to win your case. Attorneys that define a strategy for each case, specifically what type of demonstratives will be used and how they will resonate with each juror, will have a significant advantage over an attorney who approaches jury selection for each trial in essentially the same way.

Understanding the differences in perception and what motivates each generation is as important as the facts of the case. How the different generations process, understand and react to the facts (data) will significantly influence their final decision. So, let's start by looking at what makes each generation different.

Traditionalists / Greatest Generation – born before 1946

Hard working, believe in self-sacrifice, respect authority and chain-of-command, values shaped by WWII, Great Depression, focused on the greater good. Relied on radio for information, connection to outside world.

Baby Boomers: born ~ 1946 – 1964

Optimistic, loyal, hopeful, idealistic. Strong work ethic, however can be leery of authority. Values education, status, financial rewards and societal change. Grew up on broadcast TV, aware and engaged in current events and charitable causes.

Generation X: born ~ 1965 – 1980

Skeptical of “big business” and government authority. Independent and entrepreneurial. High rate of divorced parents. Latchkey kids developed values of self-reliance and freedom, and resist bureaucracy and restrictions. Raised by cable

television available 24 hours per day. Job uncertainty caused lack of loyalty to large institutions due to roller coaster economy and recessions.

Generation Y / Millennials: born ~ 1981 – 1995

Socially and environmentally conscious. Seeking collaborative approach to meaningful work, while requiring work/life balance. Tech savvy and reliant on 24/7 information via Internet. Raised by “helicopter” parents providing safety and assurance. World view shaped by domestic and international terrorism events. Interpersonal communication skills declined due to email & text messaging. Research and learning skills shaped by Siri and Wikipedia.

Generation Z: born ~ 1996 - ?

Instant gratification and totally tech-dependent. If it's not on You-Tube, it didn't happen. Over sharing of information, little is kept private. Constantly seeking input and stimuli. Very smart and quick to process data, however very short attention span. Seeks to be entertained by media, not by interacting with others. Resurgence of entrepreneurial work environments, with constant feedback a necessity.

How will these differences impact your trial presentation? If you are using standard time-line boards to show a progression of activity or events, the Traditionalists and Boomers will thoughtfully follow along to the conclusion of your argument. Gen X jurists will reach the conclusion before you do and wonder what else there is to know. Millennials and Gen Z have stopped paying attention after a few moments and are wondering what is happening in their social network – which they cannot access because they don't have their mobile devices with them.

Savvy litigators have adopted a “chameleon” approach. Presenting the same information in multiple formats is required to grab, and keep, the jury's attention. Cases with any type of complexity must employ demonstratives using available technology, and whenever possible, video. Every night on the news, which Gen Y and Z access on their iPads, there is video of something happening. It is the expectation.

Plaintiff firms now understand this and are using all types of media: 3-D animation for accidents or medical malpractice, day-in-the-life videos, animated timelines and exploding

diagrams for product liability matters, clips from video depositions, and even 3-D printers to recreate objects too large to enter the courtroom.

Defense firms have to counter balance this with their own use of technology. This will be driven by their ROI calculation of what and how to use appropriate technology and agreeing where the settlement tipping point is.

For cases that do go to deliberation, closing arguments should be specifically crafted to each generation represented on the jury and their unique perceptions and processing characteristics. The facts are the facts, however how each generation processes this information will be different, and should be addressed before they leave the courtroom to make their decision.

Many firms now assemble trial teams with each of the generations represented and actively seek out everyone's opinions and insights on how to craft their message. While there can be a wide variance of how each generation perceives information it does not make one wrong or one right. They're just different. Creating trial strategy that understands and acknowledges these differences can be the winning formula.

While presenting this information at a recent legal association conference I noticed a veteran attorney slowing shaking his head and looking down at his notes. During the break I asked him if there were any issues with the information. He looked up and said it just became painfully clear why he lost a recent case. He volunteered that he spent too much time trying to convince the jury how well versed he was in the complex and nuanced issues of the case, and did not focus on the body language and attention (or lack thereof) of the jury.

Most firms conduct a de-brief after each trial. To what extent does your analysis focus on the represented generations in the jury? What strategies were implemented specific to each generation? In other words, knowing what you know now, what would you have done differently to influence a more advantageous decision? How you prepare to communicate with each generation is as important as the facts of the case. Understanding and respecting how each group generally thinks and processes data will facilitate a more fluid and targeted message – one that is seen, heard and experienced by each segment within their optimal learning mode. □

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Doug Blanchard is a Vice President at Jensen Litigation Solutions and has been in the legal industry for over fifteen years and has worked across the EDRM cycle. At Jensen, he works with leading law firms on trial preparation and presentation strategies, and provides court reporting, deposition and records retrieval services. He also has extensive experience managing eDiscovery and litigation support teams, as well as staffing and facilitating large scale managed review projects.

Back to Basics: Residential Real Estate Closings

By Lawrence K. LaVanway

It's a Monday morning in June. As you settle into your desk at work, you find an unexpected email waiting in your in-box: over the weekend a friend, family member, or client has signed a contract to sell or purchase a residential property, and they would like you to represent them. The only problem? You've never done a residential real estate transaction, or you haven't done one in decades. In most circumstances, you might simply refer them to an experienced real estate attorney in the area and wish them luck. But in this instance (perhaps out of a sense of obligation to the requester, or perhaps it's just been a slow month in the office) you'd like to take the file. Where to begin?

As the 2017 residential real estate market heats up, the above scenario is likely to unfold for more than a few reading this article. Heeding the following points will improve an attorney's effectiveness in bringing a residential real estate contract to a successful closing.

Be a Dolphin, Not a Shark

Although a residential real estate deal is relatively straightforward, non-specialists need to be mindful of the general characteristics of the transaction, lest they jeopardize the deal by approaching it with the wrong mindset.

First, unlike many other transactional deals, the lion's share of the potentially adversarial points are negotiated before the attorney even gets the contract. The parties – with assistance from their realtors – have likely already executed a Multi-Board Residential Real Estate Contract (the form contract created by the Mainstreet Organization of Realtors that governs the vast majority of transactions in the western suburbs).

Attorneys have the opportunity to modify the contract (except for the purchase price) during the attorney review phase and negotiate repair items as needed, but some have a hard time resisting the urge to “over-lawyer” what should otherwise be a

simple matter. Some of the quickest ways to inadvertently kill a contract is to send over a heavy-handed attorney review letter (effectively redrafting the Multi-Board) or to play hardball with the home inspection issues. Even if an attorney “wins” an early brutal round without killing the deal, it often drains the reservoir of goodwill he or she might need later when complications arise and a favor is needed from the other side.

Second, although residential real estate transactions are relatively small, they are still deadline and detail oriented. One of the first actions an attorney should take when opening a real estate file is to enter all key notice dates and deliverable deadlines into a reliable docketing and tickler file system. Although easy to overlook, missing a key deadline in some circumstances can lead to severe consequences such as a breach of contract claim against the client or the opening of an opportunity for the other party to lawfully terminate a contract that the client had no intention of terminating. The upshot is that residential real estate transactions tend to take a disproportionate amount of time and energy to complete, relative to the overall size of the matter (and therefore the fees an attorney can charge). This dynamic increases a risk that is nearly the opposite of the “over-lawyering” problem and increases the risk of the transaction failing due to lack of appropriate energy and attention from the attorney.

One good way to successfully avoid these two problems is to follow the mantra, “Be a Dolphin, Not a Shark.” A successful real estate transaction requires the attorney to approach the file with an attitude of energetic collaboration.

Manage Expectations & Work as a Team

Residential real estate transactions have a variety of players involved. When opening the file, the attorney should create a cover sheet that lists the individuals involved, their roles, and

their contact information. Initial phone calls to the individuals working on the same side of the deal – as well as the opposing counsel – can help establish a healthy rapport that can prove useful later on if complications arise.

The first call an attorney should make is to the client. During this call, the attorney should gather as much background on the contract as possible – the client's own logistics (current living situation and projected moving date), as well as the true level of interest they have in buying or selling the property (some are fickle whereas others may be highly motivated to close the deal).

During this conversation, the attorney should set realistic expectations and remind clients of these expectations through the transaction. Many clients can have a skewed sense of reality due to watching too many real estate television programs that are concluded in a half hour. In reality, transactions involving a mortgage typically take from 30-60 days, and the Multi-Board sales contract is full of notice deadlines and contingencies that enable the parties to properly terminate the contract at several points along the way. Attorneys should also keep in mind that for many clients, this is an emotional and stressful time. Both the realtor and the attorney should serve as dispassionate professionals that can counsel clients to consider their long-term best interests rather than indulging their short term passions. It is not uncommon for a client's anxiety to manifest in the form of belaboring a relatively minor point like a small repair issue or short extension request.

Aside from the client, the relationship the attorney has with their realtor is also important. They are often useful in providing context to the transaction, including the current perceived negotiating strength of the parties, as well as the demeanor and mindset of the professionals involved. The real estate market is a small world and it is not unusual for seasoned realtors to personally know the realtor or attorney on the other side. Ultimately, the attorney should take the lead role in driving the transaction forward, but attorneys should not be afraid to lean on the realtor for non-legal related input to develop a fuller understanding of the transaction.

An attorney should keep in mind, however, that the client should have the final word on any significant decision in the deal. As helpful as the realtor might be, it is important for an attorney to stay focused on their actual client. And as with all

legal communications, attorney-client privilege may be waived if third parties such as lenders and realtors are party to important conversations that the attorney has with their client. Both realtors should be copied on all important communication sent between the attorneys, but internal discussions involving strategy or formulating substantive responses to the other side should be kept private between attorney and client.

Address Problems Early: Credit Is King

In all real estate contracts, time is of the essence. Thus, attorneys should ensure that all required conditions are on track to be met prior to the Closing Date. The two biggest hurdles from the buy side perspective are the attorney modification/inspection issues, and the mortgage underwriting process. The Multi-Board form contract is engineered to motivate the parties to resolve all attorney/inspection issues within the first ten business days of the contract. Buyer attorneys should counsel their clients to be very selective in their requests and only ask that the sellers address a small number of items that pose true health or safety risks for the occupants of the property. The best way to resolve inspection issues efficiently, however, is for a closing cost credit to be issued to the buyer in lieu of the Seller actually orchestrating repairs. Credits are objective and there is zero risk that a Seller either forgets to complete the repair, or that a Buyer is subjectively unsatisfied with the quality of a repair that was conducted. If credits are issued in lieu of repair, the lender will require a separate addendum to be signed and submitted for their underwriting approval.

The most common delay that buy side attorneys encounter is one involving the underwriting for the loan. It is not uncommon for Buyers to promise Sellers an unrealistically speedy Closing Date to land the contract, but then find themselves

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in a vulnerable position when the lender inevitably needs an extensions to get the job done. If need be, attorneys should ask for more time on the front end of the deal during the attorney review phase if they suspect that the underwriting process will take longer than what the contract currently allows. Once the finance contingency is set, attorneys should regularly communicate with their client's lender to ensure that the underwriting process is running smoothly.

The end goal for borrowers is to receive a written "Clear to Close" approval from the lender. If one is not obtained prior to the finance contingency deadline, the buyer attorney must either terminate the contract to prevent a potential breach of contract or – more commonly – request an extension to a later date. Most sellers will agree to modest extensions without requiring concessions, but problems can arise if the extension is particularly lengthy, or if several small extensions are serialized to the point that the Seller feels like they are getting strung along by the Buyer. In this instance, credits can again help keep the contract together. If the Seller is concerned that the loan might fall apart, the Buyer can offer to "harden" some of the Earnest Money by making it non-refundable in the event that the transaction does not come to a close. Conversely, if the Seller is more concerned about the additional carrying costs of the property due to a delayed Closing Date, the Buyer can agree to let the Seller freeze the prorated tax credits and association dues as of the original Closing Date. This effectively puts into place an accruing daily penalty wherein the Buyer pays for the Seller's property taxes and association dues for each day the closing is delayed.

From the Seller attorney perspective, the biggest potential hurdle that should be addressed as early as possible are issues relating to title. It is incumbent upon the Seller to provide an extended title insurance policy to the Buyer, and the attorney often works with title search examiners to uncover and resolve unexpected liens and other encumbrances on title. The earlier these issues are discovered and disclosed to the buy side attorney, the greater chance the seller attorney has to work in conjunction with the Seller and the title examiner to successfully resolve them. If a new attorney has difficulty in understanding how to read a title commitment, they should not hesitate to call a title search examiner and ask questions. Waiting until the eve of the closing to obtain the Plat of Survey or title commitment is an unnecessary gamble that could jeopardize the transaction.

Closing & Escrow Issues

Once all pre-closing conditions have been met, attorneys should prepare a detailed pre-closing letter for their client that outlines the final duties the client must perform prior to the closing. The letter should also include instructions on how to securely bring funds to the closing as well as the time, place, and phone number of the escrow officer. One useful method is to draft the letter as a checklist that the client can print off and use as a reference.

“ Pre-signing documents can be particularly useful to Sellers who would rather focus on the logistics of moving on the closing day itself

In most circumstances, the Buyer will attend the closing to sign all lending and title/escrow paperwork. However, it is very common for a Seller to pre-sign their documents with their attorney and designate the attorney to represent them at the closing itself with a Power of Attorney. Pre-signing documents can be particularly useful to Sellers who would rather focus on the logistics of moving on the closing day itself. If the parties had a contentious relationship throughout the transaction, or if one of the parties is particularly volatile, Seller pre-signing is also an excellent way to keep a professional separation between the parties.

The closing itself is a paper intensive affair. The sell side attorneys do the vast majority of their paperwork prior to the closing, whereas buy side attorneys do very little ahead of time but are very involved in reviewing and explaining documents to their clients in the closing itself. New buy side attorneys

should consider asking the lender to see the loan packet ahead of time so they can familiarize themselves with the documents before having to explain them to the borrowers in the closing room. New sale side attorneys should call the escrow closer a few days ahead of time to tell them what paperwork they plan on bringing, and to ask if there is anything they might be forgetting.

At the closing itself, the other professionals in the closing room may appear to be in a hurry to efficiently conclude the closing. Attorneys should resist any pressure to rush, particularly if they are still unfamiliar with the process and wish to double check the documents they are reviewing. To assist in this, both attorneys should consider bringing a checklist of all expected documents with them; buyer's attorneys so that they can confirm that they have thoroughly received and reviewed every required document, and sell side attorneys to ensure they did not forget to bring important documentation.

Shortly before the closing, the Buyer will have conducted a final walkthrough with realtor to ensure that the seller has fully vacated the property, that any agreed-upon repairs have been completed, and that the property is in the same general condition as when the initial home inspection occurred. Occasionally issues arise that require attention, but most can be addressed at the closing.

For example, if there is unexpected minor damage or rubbish left behind by the Seller, the parties can arrange for an attorney hold-back. RESPA laws require that all monies in the transaction be disclosed on the TRID Closing Disclosure (former HUD-1 Settlement Statement), but lenders often will not allow a direct credit to the Buyer at such a late date. Having the sell side attorney hold back an appropriate amount of funds from the Seller sales proceeds in his or her IOLTA account is a common solution allowed by lenders. The closing can proceed, and a few days later the new homeowner can send paid receipts to the sell side attorney for reasonable reimbursements, with the balance to be returned to the Seller.

Occasionally the Seller is not in a position to logistically move out of the property on the Closing Date. If the Buyer is amenable, the parties can arrange for a written post-closing possession agreement, in which the Seller is permitted to rent back the property from the new owner for a limited period of time. An attorney hold-back is arranged, and new final walkthrough is set for when the Seller finally vacates the premises.

Of course, if major issues do arise due to the non-performance of one of the parties, the ultimate remedy is to walk away from the closing table and potentially sue the other party for breach of contract. A Buyer should never grant the Seller funds without a proper deed, title insurance, and possession of the property (or a written post-closing possession agreement). Similarly, a Seller should never tender the deed or allow access to the property without receipt of funds. In many cases, however, a delay in funding is merely temporary. In these cases, the transaction can be largely completed via a "dry closing" – all the documents are signed, but the deed, title policy, and keys are left with the escrow agent until they can confirm that the funds have cleared.

When In Doubt, Phone a Friend

Finally, throughout the duration of the transaction, the best way to ensure that one isn't going too far astray is to cultivate a network of experienced real estate professionals for support. Most seasoned real estate attorneys are happy to field the occasional question from a newer attorney, and many non-legal questions can be answered by affiliated professionals such as lenders and title insurance employees. Everyone had their first real estate closing at some point, and the transactional nature of the deal lends itself to a spirit of cooperation and understanding in most circumstances. □

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Chapter 13 Saves the World!

By Arthur W. Rummler

In the pantheon of catchy idioms, Chapter 13 bankruptcy¹ could easily be referred to as: the Rodney Dangerfield, *persona non grata*, odd man out, third wheel or the black sheep of the consumer bankruptcy world. Chapter 13 is just not as popular as Chapter 7. Indeed of the total bankruptcy cases filed in 2016, only 38% were initiated as Chapter 13 cases.² The vast majority of cases were filed under Chapter 7 with a very small percentage as Chapter 11. Further, Chapter 13 cases have a high rate of failure. The exact statistical information can be difficult to measure, but according to one study, only 33% of cases filed received a discharge.³ The remaining 67% were either dismissed without confirmation, converted to Chapter 7 or dismissed after confirmation. Daunting numbers to say the least. But, enough doom and gloom, Chapter 13 may not be perfect for everyone, but it can do some extraordinary things when it comes to restructuring or consolidating debts for the average consumer. It may, in fact, be able to save the world.

Types of Bankruptcy Cases for Consumers

As most practitioners know, there are two general types of bankruptcy cases available to the typical consumer. Chapter 7 is the most common and is sometimes referred to as *liquidation*. Chapter 13 is sometimes referred to as a *wage earners plan* or a *plan of reorganization*. The two Chapters are very different.

Chapter 7

Very briefly, Chapter 7 bankruptcy is filed so that a person can get a discharge of debt and a fresh start. In theory, the debtor gives up his or her assets and property in exchange for a discharge or forgiveness of debt. In practice, debtors can retain

some property as exempt under applicable law⁴. Exemption laws are not overly generous though and a debtor has to consider if her or she is willing to part with some assets in exchange for a fresh start. And just like the late night commercial says, it is possible to keep your home or car in bankruptcy, but only if there is not too much equity to exceed the available exemptions and only if the debtor agrees to pay the loan after the bankruptcy.

Chapter 7 has many facets and can be very complicated. Debtors want to retain their assets. Creditors want their claims paid by the bankruptcy trustee liquidating those assets. Debtors want a discharge of debt. Creditors would prefer the debt not be discharged. Creditors can sometimes prevent a discharge under certain circumstances. For instance, if a debt is incurred by fraud or an intentional tort it can be declared as non-dischargeable. Or, if the debt is of a certain category, such as child support, maintenance or debts owed to the government.⁵ This only scratches the surface of complexity to Chapter 7 cases. So much for a brief explanation!

Chapter 13

The hero of this article is Chapter 13. Chapter 13 is a debt repayment plan. A debtor proposes a plan to repay all or some of his or her debts through a Chapter 13 plan. A plan can be for as little as 36 months or as many as 60. There are many reasons why a person would file a Chapter 13 case instead of a Chapter 7.

1. Chapter 13 is the common name for cases under Title 11 U.S.C. Section 1301 et. seq.

2. As captured on March 12, 2017 from: http://www.uscourts.gov/sites/default/files/data_tables/bf_t2_1231.2016.pdf

3. Captured on March 12, 2017 from https://www.philadelphiafed.org/research-and-data/.../q4/li_chapter-13-filings.pdf

4. See generally 735 ILCS 5/12-1001 et. seq. listing the most common examples, but is not exhaustive.

5. See 11 U.S.C Section 523 for specific debts that are non-dischargeable in bankruptcy.

First and foremost, any bankruptcy case starts with a thorough review and consultation regarding the individual debtor's particular debt situation. There are no cookie cutter cases. Since 2005 and the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") bankruptcy cases are subject to income caps that may disqualify people earning higher incomes.⁶ If someone can't qualify for Chapter 7, then a Chapter 13 may be the answer. However, not everyone can do Chapter 13. If your reasonable monthly expenses exceed your income, you could be disqualified from Chapter 13 because your income is too low. Chapter 13 requires net disposable income to fund the plan of reorganization. An in depth analysis of income and expenses will tell if someone is a good candidate for Chapter 13. Assuming you qualify to file Chapter 13, what are some of the things that you can do through your Chapter 13 case?

Benefits of Chapter 13

Avoiding Foreclosure

One popular use Chapter 13 is to stop a foreclosure. Picture a person who has come through some harrowing financial circumstances and is facing foreclosure. Perhaps they were unemployed for a time or they went through a bitter divorce and got behind on the mortgage. But now things are working out and they have the means to pay the mortgage as it comes due. If they have more income than expenses, then that "disposable income" can be committed to fund a Chapter 13 Plan. The Plan can be drafted to pay back the mortgage arrears and protect the home from foreclosure. The debtor makes 2 payments each month for the house; the current monthly mortgage and a portion of the arrearage (via the Chapter 13 plan). The same can be done with a car loan or other secured debt whereby the debtor faces loss of the asset from non-payment.

Stripping 2nd Mortgage Liens

In recent years, the downfall in the real estate market has highlighted a previously little used provision of the bankruptcy code with respect to Chapter 13. That is the ability to redefine 2nd mortgage liens as unsecured debt and thus eliminate them through a Chapter 13 Plan. This is commonly referred to as *lien stripping*.

6. BAPCPA was enacted due to perceived abuses in the bankruptcy laws. One of the bill's sponsors specifically stated that the bill was designed to make it "more difficult for people to file for bankruptcy". See: <https://www.grassley.senate.gov/news/news-releases/opening-statement-sen-chuck-grassley-bankruptcy-reform-hearing> as captured on March 12, 2017.

Lien stripping is the use of the bankruptcy code to determine the value of collateral securing a second (or third, and so on) mortgage on residential property and then, if appropriate, deeming any liens that have no collateral for the lien to attach to as "unsecured". Once the lien is stripped of its secured status is treated as a general unsecured claim in a bankruptcy case and can be paid less than the full amount of the loan. Depending on the plan proposed by the debtor, the general unsecured creditors could get as little as 10% of their claimed amount, and in extraordinary circumstances even less.

In order to strip a lien, the debtor must provide an honest valuation of the collateral and also analyze the amounts of existing liens. For example, assume that the debtor has a first and second mortgage on a family home of \$200,000 and \$50,000 respectively. If the debtor obtains a fair valuation of the property for less than the balance of the first mortgage, say \$190,000 for this example, then the second or subsequent mortgage liens can be deemed as unsecured. These can then be stripped in a Chapter 13 Bankruptcy Case. Again, they become unsecured claims and are paid according to the provisions in the Chapter 13 plan for those types of creditors.

Cramdown of Car Loans

It is possible in a Chapter 13 to "cramdown" the balance of a loan secured by an automobile to the fair market value of the collateral. Take the example of a debtor who owes \$20,000 on a car loan where the vehicle has a market value of \$12,000. By using the Chapter 13 plan, the debtor can propose to pay only the secured amount back to the creditor in full, with the balance being treated as a general unsecured claim. The mechanics are similar to lien stripping in the real estate example above. There is however one important catch: the loan must be

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Arthur Rummler is a sole practitioner with an office in Glen Ellyn, Illinois. He concentrates his practice in all phases of bankruptcy law and creditor/debtor matters. Mr. Rummler is a 1987 graduate of the University of Michigan Ross School of Business Administration and a 1991 graduate of the Chicago-Kent College of Law. He started representing consumer bankruptcy clients in 1992 and later expanded to representing Chapter 7 Trustees, creditors and small businesses. He is a member of the DCBA Board of Directors and DCBA Brief Editorial Board.

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older than 910 days to qualify for this option. The reasoning being that a car lender who provides purchase money for the car loan (a purchase money secured lender) should have some protection against the loan being modified by Chapter 13 for the first 910 days which is approximately 2.5 years. A refinanced car loan or a title loan would not get the protection since they are not a purchase money secured loan.

Reduction in Interest Rate of Car Loan

Similar to the “cramdown” of a loan secured by property such as a motor vehicle, a debtor can also obtain relief from excessive interest rates charged on a car loan.⁷ Assume that the debtor has a car loan of 25% interest (unfortunately not uncommon for less than A plus borrowers). If the debtor puts the car loan into the Chapter 13 plan and proposes to pay it back through the plan, the interest rate can be reduced to the prime rate plus an additional rate to satisfy the interest on the loan. The additional rate above the prime rate is a moving target based on the circumstances, but is generally about 2 percent. This significantly reduces the interest paid by the debtor on the loan and can be beneficial in cases of very high loan interest rates.

Curing Child Support or Maintenance Arrears

In the arena of family law, it is common to see litigation over past due child support or maintenance. When a client is faced with a large arrearage and possible negative consequences for non-payment, Chapter 13 can be the answer.

First and foremost, Chapter 13 won't change the fact that the debt *must* be paid. The bankruptcy code is very specific that child support and maintenance – or “domestic support obligations” in bankruptcy parlance⁸ – are both non-dischargeable in bankruptcy.⁹ But, that doesn't mean you can't use the Chapter 13 plan to spread those payments out over a 60 month period. It may be much more beneficial to the debtor to opt for a 60 month repayment period over the terms and conditions imposed under other circumstances. But, for the Chapter 13 plan to proceed and remain in good standing, the debtor must be current on all future payments of child support or maintenance that arise during the plan.

Reducing Certain Debts Incurred During Divorce

As demonstrated above, certain debts from a divorce are not

subject to reduction in a Chapter 13 case. Domestic Support Obligations are sacrosanct and cannot be discharged. However, there are other debts sometimes incurred during the process of a divorce that can be modified. Assume that one spouse is ordered to pay the other spouse a sum of \$50,000 as a property settlement and that is a provision contained in the Judgment for Dissolution of Marriage. Perhaps it is for a share of some marital asset that is being divided in the divorce. Whatever the reason, as long as the debt is not in the nature of a Domestic Support Obligation, it can be modified and reduced in a Chapter 13 plan. Debts of this nature are not dischargeable in Chapter 7.¹⁰ But, in Chapter 13, they are dischargeable as long as all of the other requirements of the Chapter 13 plan are being met.

“

A Chapter 13 Debtor must commit all net disposable income to the Chapter 13 plan for the required term of the plan

Payment of Tax Debts

Similar to child support and maintenance arrears, debtors can pay back taxes through a Chapter 13 plan. Income taxes are generally non-dischargeable as priority debts owed to the government. However, in some cases, the tax debts can be discharged if certain requirements are met. Typically, the Internal Revenue Service will file a claim in the bankruptcy case and outline specifically which debts are priority debts (and thus must be paid back 100% over the life of the plan) and which debts are non-priority (and thus treated as general unsecured debt). This can be of great benefit when a debtor is facing collection action or about to lose property due to unpaid taxes.

7. See *Till v. SCS Credit Corp.*, 541 U.S. 465, 479-80 (2004)

8. See 11 U.S.C. Section 105

9. See 11 U.S.C. Section 523(a)(5)

10. See 11 U.S.C. Section 523(a)(15) and 11 U.S.C. section 1328(a)(2). The latter does not include section 523(a)(15) in the exceptions to discharge.

Co-debtor Stay

The well-known “secret” power of the bankruptcy code is the automatic stay.¹¹ Volumes could be written solely about the automatic stay and the effect it has on creditors and debtors. Essentially, the automatic stay ceases almost all actions against a debtor for commencement, continuation and or the collection of a debt. In Chapter 13, the automatic stay is in effect for the duration of the Chapter 13 case (unless relief is granted for cause).¹² As stated above, that can be for up to 60 months. One additional benefit to Chapter 13 is the extension of the automatic stay to co-debtors of the bankrupt debtor.

One example might be a former spouse who was the joint borrower on a mortgage loan that went into default and now has significant arrears. If the debtor proposes to pay the arrears on the mortgage in full through the Chapter 13 plan, then the mortgage lender must cease any collection efforts against the joint borrower. The creditor is stayed as to any action against the co-debtor provided the creditor is getting paid in the Chapter 13 plan.

Proposing a Viable Chapter 13 Case

While the subject of proposing a viable Chapter 13 case that can actually be confirmed by the bankruptcy court is beyond the scope of this article, there are basic elements that can be summarized generally.

A Chapter 13 Debtor must commit all net disposable income to the Chapter 13 plan for the required term of the plan. Thus, in many cases, if you take the Debtor’s income and subtract reasonable living expenses, you can arrive at a disposable income figure.

Adding another level of complexity to the analysis is the BAPCPA bankruptcy amendment from 2005 that mandates certain debtors to pay a minimum amount to unsecured creditors through the Chapter 13 Plan. This minimum amount is determined by averaging the debtor’s income over the prior six months and projecting that into an annualized income. That is then compared to the median income for households in the debtor’s community of the same household size. If the annual income exceeds the median income, 2 things happen: 1) the debtor must be in a 60 month chapter 13 plan (as opposed to

a 36 month case); and 2) the amount of disposable monthly income is determined by application of the Bankruptcy Means Test.

The infamous Bankruptcy Means Test is a long form analysis tool. The bankruptcy attorney analyzes the client’s information and runs it through the means test. The ending result is the disposable income the debtor must commit to pay to unsecured creditors for the term of the plan. “It’s complicated” is the best way to sum it up. But, let’s take an example.

Assume that a debtor has an average income of \$5000 per month over the last six months. His household size is one. He is in debt and he is also most likely lonely.

This analysis computes his annual income at \$60,000. Comparing that to the median income in his DuPage County community, he is over the median income by about \$12,000. Therefore, the term of his Chapter 13 must be 60 months.

Further long form analysis of the debtor reveals that after taking all of the allowable deductions to income allowed in the means test, that there is a bottom line monthly net disposable income from of \$400. Thus, the debtor must pay at least \$400 per month to his general unsecured creditors over 60 months. This will amount to \$24,000 over 60 months.

If the debtor owed \$100,000 in general unsecured debt (e.g. credit cards, medical bills, stripped off 2nd mortgage), those creditors would receive 24% of their claims through the Chapter 13 case. He will get a discharge of the remaining 76% of the unsecured claims. After 60 months, he will be debt free and ready to conquer the world.

Perhaps Chapter 13 can’t really save the world. But it can save your client financial disaster if planned and executed correctly. Fortunately, the custom in our region is for prospective debtors to receive a free initial consultation from almost all local bankruptcy lawyers. So, they have nothing to lose by learning their options. If the client is able to turn around their financial woes through a Chapter 13 case, then who knows, maybe they can be a positive force for good and go out and save the world. □

11. See 11 U.S.C. Section 362

12. See 11 U.S.C. Section 1301(a)



Estate, Asset & Retirement Tax Attorneys

Universal “Lies” Insurance

“Crash and burn” is what’s happening with frightening frequency to many of our senior clients’ life insurance policies which they purchased in their thirties and forties. Senior citizens typically are uninsurable after they lose an existing policy.

The life insurance product in question is “universal life insurance.” It has an almost infinite number of brand and subcategory names, like “flexible premium life”; “guaranteed universal life”; and the most misleading of all—“variable universal life.”

Conceptually, universal life and permanent whole life are the same type of insurance. With universal life, the burden of obtaining the projected death benefit falls onto the insured (the buyer), who has to manage the cost/benefit relationship of the policy. Despite that hidden flaw, life insurance illustration software and unrealistic long term performance assumptions can make them look as if they are providing the same level of permanent life insurance.

While universal life and permanent life insurance are conceptually the same, contractually they are profoundly different.

Permanent whole life insurance promises the following benefits: (1) A true guaranteed death benefit through ages 100-121, if premiums are paid; (2) The burden of fulfilling the guarantee is on the life insurance company.

Universal life insurance is structured as follows: (1) An illustrated death benefit based on long term assumptions with a low probability of fulfillment; (2) Flexible premium payments which are marketed as being in the policy owner’s interest; (3) Failure to warn the policy owners that they have the duty to determine the dollar amount of the ongoing premiums necessary to obtain the promised death benefit.

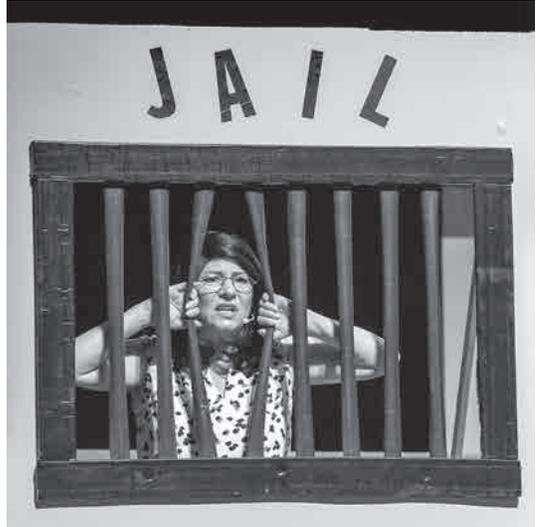


Diana Law, Rick Law & Zach Hesselbaum

If you have any questions or comments regarding our opinion, please feel free to contact me, Rick Law, at ricklaw@lawelderlaw.com

Rick L. Law, Esq.

News & Events



Julie Parker doing her best Sooha Ahmad

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

RECENT CLASS ACTIONS

Breach of Warranty Claims for Consumer Products

We have obtained class certification or are pursuing class actions in numerous state and national product defect cases involving products such as automobiles, facets, infant car seats, laptops, and windows. We achieved trial, appellate and state Supreme Court victories in some of these cases affirming class certification and have entered in settlements in a number of these cases that benefitted class members.

Data Breach and Privacy Violation Cases

We are currently representing consumers in class action claims involving data breach and privacy violation cases affecting tens of million if not hundreds of millions of consumers.

Junk Text Messages, Autodial Voicemail Solicitations

Represented a national settlement class of consumers who received alleged junk text messages from various national chains or corporations such as Domino's Pizza, Cox Media, Burger King and Mattel. Each class member who made a claim to receive \$105 or their pro rata share of the fund if there were not sufficient funds to pay \$105. The total settlement fund was \$16,000,000.

Overcharges in Consumer Invoices Such as Phony Tax Charges

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

Representing national class of consumers that received a \$25 purchase reward card that allegedly did not contain an expiration date but which defendant claims should have contained an expiration date and will no longer honor. Class action certified by District Court and 7th Circuit denied request for interlocutory appeal of class certification. In separate state court suit class certification approved by New Jersey appellate court.

Shareholder Derivative Lawsuits

We have or are representing shareholders of various corporations in shareholder derivative lawsuits involving claims against management including cases against DeVry, Cole Taylor Bank, and Nalco.

Unpaid Overtime Class Actions

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



InBrief

By Terrence Benshoof

InBrief is quite ready for the lusty month of May to commence, with high hopes for a subway series between the Cubs and White Sox this fall. Who needs the rest of the baseball leagues, when the best are already here!

We look forward to the summer, and will watch the upcoming year with a wary eye. The legislature is requiring all Circuit Courts to initiate a Veterans' Court system beginning in 2018. And we can be certain that it will be technically on top of things, as the state court systems all go electronic January 1. *InBrief* plans to cling to his yellow pads and carbon paper!

The DCBA Year Wind-up

The DCBA welcomes Chief Judge **Diane Wood**, of the Seventh Circuit, to Cantigny for Law Day celebrations on May 4. The Le Jardin Room is a beautiful location to honor our system of law, and those who work so hard throughout the year to make it great.

As another DCBA year slows to a close, President-elect **Gerry Cassioppi** invites one and all to his Installation, with a dinner and dancing on June 9 at the Drake Oak Brook. Outgoing President **Ted Donner** will hand over the reins, after a presidential year that saw him handle some events that were, for the DCBA, "interesting." But he steered us through times that were a bit more traumatic, for the association, and personally, that were

not the standard bill of fare. Kudos to Ted, and welcome, Gerry.

And a "hats off" to the cast and crew of Judges' Nite, once again produced by **Christina Morrison**, directed by **Nick Nelson**, and with great assistance from **Cindy Allston** of the DCBA staff. With great attendance at the show, and a sizzling hot silent auction, about \$19,000 was raised for Legal Assistance.

People, Places

Woodruff, Johnson & Palermo has now become Woodruff, Johnson & Evans, with the addition of **Dex Evans** as a name partner. The change in name coincides with the opening of the Palermo Law Group, which **Mario Palermo** has founded in Oak Brook.

Here's one keeping *InBrief* on his toes! It seems like only yesterday (and it darn near was!) that we announced **Joe Fortunato** was joining a new firm. Well, keep your scorecards ready, because that firm just went through a merger, and Joe is now a partner in New York based Kaufman, Dolowich & Voluck, LLP. In *InBrief's* next monthly installment of "Where's Joe..."

InBrief takes a moment to bid a delayed farewell to colleague **Larry Oldfield**, who left us far too soon in March. When a last minute substitute was needed to step in and host the Veterans' Day event

two years ago (still haven't forgiven a Board of Review from an unnamed county for that one), the veteran troop quickly stepped up and ably charged on. Salute, my friend!

Have something to share? Submit your news to tbenshoof@earthlink.net. □

Welcome

Welcome to our new DCBA Members.

Attorneys: David A. Newby, Momkus McCluskey Roberts LLC; Richard G. Larsen, Springer Brown, LLC; John S. Burke, Higgins & Burke, P.C.; Ilene M Schiavone; Richard M. Beuke; Lauren H. Lukoff, Deutsch, Levy & Engel, Chartered; Dorothy A. Voigt, Law Offices of Dorothy A. Voigt; John P. Chapski, Robert A. Chapski, Ltd; Elizabeth Felt Wakeman, Wakeman Law Group PC; Jonathon J. Ibarra, Mulherin Rehfeldt & Varchetto P.C.; Marlene E Siedlarz, Aldrich & Siedlarz Law, PC; Amina A. Saeed; Kathryn McGough, Trust Company of Illinois; Deborah Ness; Scott R. Chandler, Anselmo Lindberg Oliver LLC; Anthony J. Zac, Wator & Zac, LLC; Jeffrey A. Garbutt; Linda G Bal; James J. Hess, Cowlin & Naughton; Geetu R. Naik, Cook County State's Attorney Office; Marc Kowalczyk Pawlus, Piccione, Keeley & Assoc. Ltd.

Student Members: Lauren Ashley White; William Dimas; Gouthami Vanam; Hannah Thayer.

“Catch-All Clinic” Answers Needs of Students and Community

By Annette Corrigan

John Marshall Law School's Pro Bono Program & Clinic

John Marshall Law School is known for its generosity in providing free legal services to its community at-large. With programs like the Fair Housing Legal Support Center & Clinic, the Domestic Violence Clinic and the Business Enterprise Law Clinic, people can find the legal help they need and the students of JMLS gain valuable hands-on experience in working with clients under the guidance and direction of their law professors and supervising attorneys.

In recent years, it became apparent to administrators and professors at JMLS, that there was a *pro bono* niche that needed filling. Calls were consistently coming into the “help line” relating to topics outside the areas of specialty covered by JMLS’s existing legal clinics. In 2009, a new program and clinic targeting a broader base of needs was formed. Known as the *Pro Bono* Program & Clinic, it presently fields more than 1000 calls a year (about 100 calls a month) and in 2016, its students, faculty and supporters have actively assisted over 200 callers.

There are a total of nine (9) community legal programs and clinics available through JMLS. The *Pro Bono* Program & Clinic (PBPC), according to Professor **Damian Ortiz**, will refer on cases relating to family law, bankruptcy, medical malpractice, personal injury, tax matters, or patent/trademark. Though not exclusive, typical areas of representation that Professor Ortiz’s program assists with include

expungements, name changes, evictions, DUIs, criminal misdemeanors, felonies, prisoner rights, foreclosure defense, small claims and all types of appeals.

The process is simple, though thorough. With every call received, a student conducts a detailed in-take on the potential case. The student then drafts a memorandum for the Review Committee which decides whether the case will be accepted, passed onto another JMLS clinic, or is sent elsewhere. The Review Committee has four acceptance criteria: the merit of the case; the need of the client; whether the PBPC, given its resources and expertise of personnel, can handle the case effectively; and the existing case load of the Program.

The PBPC has no financial restrictions, residency or jurisdictional requirements. Clients of means, and those without, are welcome to contact the PBPC. The Program proudly boasts of being “open to all issues and all people”. However, in certain instances, if it is determined that a client has the financial resources, that client would be asked to cover nominal case expenses.

Partnering with Chicago law firms large and small has helped meet some of the resource restrictions the PBPC might otherwise face. On the flip side, the law firms are able to meet their *pro bono* requirements and their new associates receive valuable legal training. In other instances, private practice attorneys who were looking for additional support on complex matters or document heavy

cases have reached out and received assistance from students in the Program. Presently, students of the PBPC are assisting on two Civil Rights cases and 4th Amendment litigation, among a variety of other topics.

The Program is available to second and third year law students and typically accommodates 30 students per semester. Due to popular demand of both students and the community, the Program stretched its resources this semester and added 10 more students. Professor Ortiz explains that, “we do not actively market the *Pro Bono* Program & Clinic; our students and clients do that for us”.

In addition to the practical experience the Program’s law students receive in managing clients, conducting research and investigation of cases, Professor Ortiz states that there is special emphasis on legal writing skills and professionalism. From in-take memos, through pleadings and motion practice, to trial, the students receive necessary, constructive instruction from their professors and supervising attorneys. Professor Ortiz states, “(o)ur goal is to provide the student with the essential tools, knowledge and practical skills necessary for them to be honorable members of the legal profession.”

For more information on the *Pro Bono* Program & Clinic and the eight other community legal clinics available through the John Marshall Law School, please visit them at <http://www.jmls.edu/clinics/>. □

Judicial Profile

By Timothy J. Klein



Diane P. Wood

When she was a little girl, the current Chief Judge for the U. S. Court of Appeals for the Seventh Circuit Court, **Diane P. Wood**, used to think that all of the celebration on the 4th of July was for her birthday. Eventually realizing that was not the case, nonetheless throughout her life Her Honor has kept that special feeling about America's history, particularly during her distinguished legal career and public service to our country as a judge.

A resident of DuPage County for over 30 years, Chief Judge Wood will deliver the keynote address to DCBA's luncheon at Cantigny, based on this year's Law Day theme "*14th Amendment: Transforming American Democracy*." She is in an extraordinary position to assess the impact of the Constitution on those with whom she comes into contact as a jurist, and also brings the experiences of educator and world traveler to the bench. Speaking English, French, Russian and German, she has lectured extensively, visiting and teaching on six continents, in such places as the United Kingdom, France, Germany, Sweden, Switzerland, Russia, China, India, South Korea, the Philippines, Madagascar, South Africa,

Australia, New Zealand, Guatemala, Chile, and Argentina.

Diane Wood received her B.A. in 1971 (Phi Beta Kappa as a Junior) from the University of Texas at Austin after only three years of study, and her J.D. (Order of the Coif) there in 1975. She was an editor of the *Texas Law Review* and member of the Women's Legal Caucus. After graduating from law school, she clerked for Judge **Irving L. Goldberg** on the U.S. Court of Appeals for the Fifth Circuit (1975-76), and for Justice **Harry A. Blackmun** of the U.S. Supreme Court (1976-77). She then spent a brief period at the Office of the Legal Adviser in the U.S. Department of State. From 1978 to 1980, she practiced law at the firm of Covington & Burling, in Washington, D.C.

In 1980, She began her career as a legal academic at the Georgetown University Law Center, moving to the University of Chicago Law School in 1981 where she presently also is a Senior Lecturer in Law. In 1990, she was named to the Harold J. and Marion F. Green Professorship in International Legal Studies, while serving as Associate Dean for five years. She served as Deputy Assistant Attorney

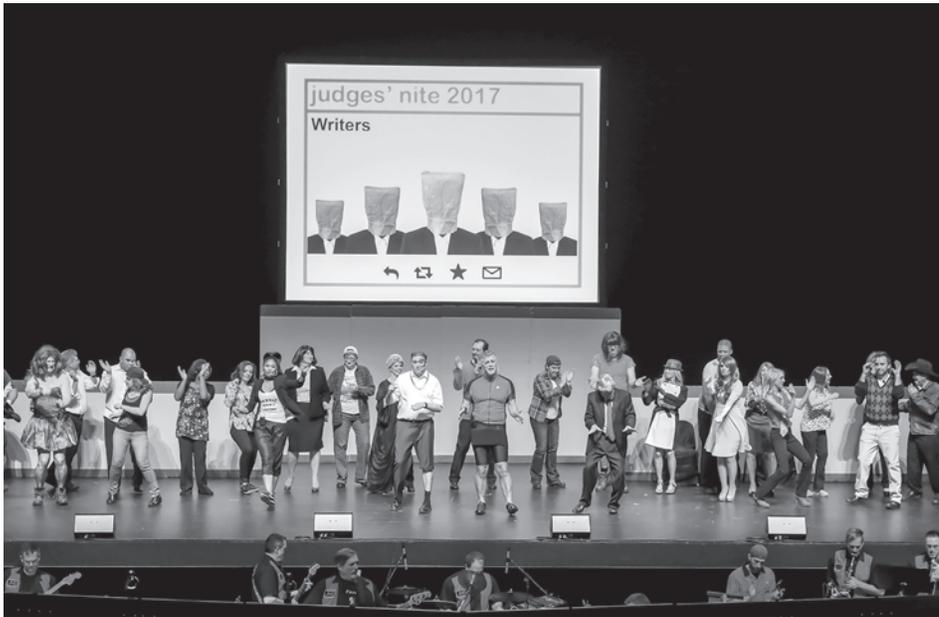
General in the Antitrust Division of the U.S. Department of Justice from 1993 until she was appointed to the Seventh Circuit Court of Appeals in 1995.

In many respects, Her Honor also has to be considered among the "trail blazers" in the legal profession. One of the first women to clerk at the Supreme Court, she is only the second woman to serve on the Seventh Circuit, and is the first as its Chief Judge. She is the first woman to hold a named chair at the University of Chicago Law School, and only the third woman ever hired as a law professor at the U of C – being the only woman on their faculty when she began in 1981.

Her current responsibilities as Chief Judge started when she assumed that office on October 1, 2013, and she can serve in that role for seven years. Prior to that, she sat as a Judge of the Seventh Circuit commencing in June, 1995. She is married to Dr. **Robert L. Sufit**, and has three children and three stepchildren. Aside from her teaching and duties as Chief Judge, she finds time to play the oboe and English horn in several Chicago-area amateur orchestras. □

Let Us Be the Judge

By Jay Reese



Cast and Band Finale

By day the cast, band and crew include an Appellate Court Justice's Clerk, Solo practice people, Partners in Multi lawyer firms and members of smaller firms. We range in age from 27 through 73, and meld together into a cohesive cast and crew.

With at least 47 people in the cast, band and crew, Saturday lunches before rehearsal are opportunities to bond for these Super Heroes, who each donated their over 75 hours of unbilled practice time to entertain the Legal community and raise funds for a most worthy

cause – DuPage Legal Aid.

This year's Judges' Nite performance skewered both sides of the political aisle with rollicking hijinks and pithy dialogue. At least we had fun.

Nick Nelson started writing the songs and script several months ago, and with rehearsals beginning the 1st weekend in January, this plucky bunch has been giving of their time and resources to entertain and enthrall the DCBA membership, and annoy the judiciary in a way that has Judges not mentioned in the show disappointed for the lack of attention.

This was the 42nd year that the extravaganza has been presented. Hope that you came out to the performance; and Note that there is always room for new participants, no matter what your talent level. □



Jennifer Nolen

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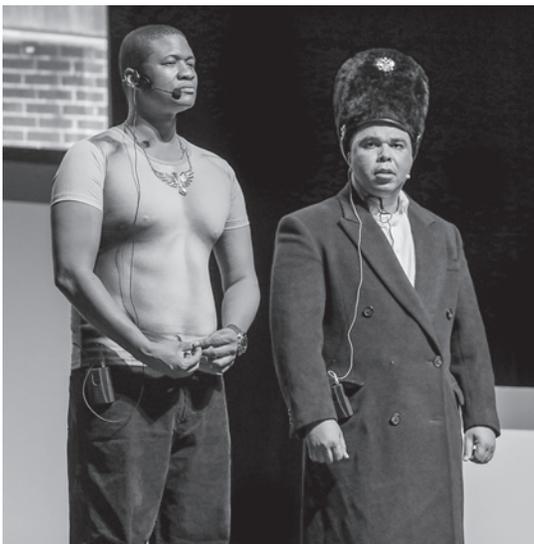
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Chicago's Finest Looks for our Kidnapped President-Elect

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Legal Aid Update



Judges' Nite Rocks and Raises Record Funds for Legal Aid

By Cecilia Najera

Judges' Nite has come and gone, but its jokes and laughs will stay with us for years to come. This year's musical comedy was directed by **Nick Nelson** and produced by **Christina Morrison**. As always the Judges' Nite Band, cast, and crew provided us with an evening of stellar entertainment complete with parodies to tunes from Hamilton, Earth Wind and Fire, **Bruno Mars**, and **Snoop Dogg**. Something for everyone!

Judges' Nite is my favorite of all the DCBA events not just because it's a fundraiser for Legal Aid or because of all of the entertainment and fun it generates, but because it's a night that our legal community really comes together to celebrate each other. Before the show we all love the buzz and anticipation built upon who will get roasted the most. It's a night full of good spirited and sometimes jabby humor that honors our wonderful bench, DCBA leadership, and politicians. We also have so much fun watching the audience react to the show. I never really thought of Judges' Nite as an audience participation show, but this year my favorite moment was when **Stacey McCullough** yelled from the audience to correct the record that she attends Def Leppard concerts not Poison concerts. Clearly Def Leppard is the far superior band despite having one arm less than Poison. Def Leppard drummer,

Rick Allen, is the Eighth Wonder of the World. Rock on!

The Silent and Live Auctions continue to grow! This year the Silent Auction raised \$10,560 and the Live Auction raised \$6,200. From that Live Auction, **Ted Donner** purchased the Firewater BBQ and Brew Backyard Party for 100; **Colleen Thomas** will be sporting a custom suit from Tom James; Candidate for 1st Vice President of the ISBA, **Dennis Orsey**, purchased a week timeshare anywhere in the world donated by County Court Reporters and **Gloria Apostolos-Siolidis**; and the Blackhawks tickets donated by Dr. **Scott Asselmeier** went to **PJ Olzen**. Our 50-50 Raffle raised \$1,750 for Legal Aid, and the winner, **Pam Trojan** went home with the same. In addition, Near North Title donated a Cubs Skybox experience won by the lucky **Janice Anderson** in a drawing of ticketholders.

This year Judges' Nite raised nearly \$19,000 in total for Legal Aid! This would not be possible without our most generous sponsors: Thomson Reuters; Schiller DuCanto & Fleck; Kollias and Giese; DiGiovine, Hnilo, Jordan & Johnson; Wilson Estate Planning & Elder Law; Ice Miller; Ellingsen & Associates Legal Nurse Consulting; and last but certainly not least, the firm from the dark

side that's taking over DuPage County... Momkus McCluskey Roberts.

Judges' Nite is the epitome of the collaborative spirit of the DCBA. The membership attends to cheer on or laugh at their friends. Speaking as a former cast member, your laughs breathe energy into the show. The writers, band, cast, and crew invest countless hours in the show and sacrificing their livers. I'm always impressed by the talent within the DCBA. Who knew **Carmel Mercado**, **Christina Morrison**, and **Meghan Early** were the new TLC? A team of people solicit dozens of individuals and businesses to donate to the auctions (See the list of donors in this issue). Donors and sponsors give of their resources, and the DCBA staff organize it all. Without support staff, donors, sponsors, and attendees, the show wouldn't be a successful fundraiser. Legal Aid is very grateful for all of the efforts. So many people are responsible for making Judges' Nite Legal Aid's largest fundraiser. THANK YOU! □

About the Author

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.

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DCBA Update



Membership, Leadership and Fellowship – Thoughts from the 2017 Bar Leader Institute

By Robert T. Rupp

On March 16-17, President Elect **Gerry Cassioppi**, Third Vice President **Stacey McCullough** and I attended the 2017 American Bar Association Bar Leaders Institute (BLI) at the Marriott Chicago. Now in its 40th year, this program draws together the incoming leadership and executive staff from state and local bars from around the country and never fails to deliver relevant and practical information for those entrusted with leading these organizations. This year's programming featured two speakers whose messages I found very pertinent to our work in the coming months.

Tom Morrison, President and CEO of Tom Morrison and Associates in Jacksonville, FL, shared a simple but powerful observation, especially as we enter into the season when most of you will be considering your dues renewal in the DCBA. Morrison observed that an association engaged in the "membership" business is engaged in a business of dues collection. While this is practical, it is hardly inspiring. Rather, he says associations must be in the "movement business," as this creates believers and revolution. As you renew your membership in the coming months, I hope you have felt a real part of DCBA's "movement" in education, public service, business development and collegiality.

If you ever have the opportunity to hear organizational expert **Vicki Clark** from Memphis speak, it is not something you will soon forget. Her wide ranging presentation at BLI covered the waterfront on the role of volunteerism and the importance of "servant leadership" in today's modern bar association. Clark turned what is usually seen as a challenge for organizations working with a multi-generational audience (like the DCBA) around and pointed out goals that volunteers have in common regardless of generation, like finding an issue or cause with real meaning, being trusted and treated as a valued contributor and learning, growing, and having many positive and rewarding opportunities and experiences.

We have come to the critical point of the bar year when the membership is called upon to consider if and where they might volunteer in the coming year. Besides positions on the Board of Directors and Brief Editorial Board, opportunities exist across the Sections in many roles. Vice chair, CLE co-chair, and opportunities to write and generate content abound. The points Clark raised will be front and center as training and support mechanisms are developed for all who are advancing the work of our association. Volunteers should expect,

as Clark stated, "to use what they know, learn what they don't and have an experience to remember."

A final observation from Clark was good advice to anyone who finds themselves leading others. This advice focused on how a leader can adopt a "servant leader" mindset, devoted to serving the needs of others. This leadership model is exhibited in several behaviors:

- Focusing on meeting the needs of those they lead
- Developing others to bring out their best
- Coaching others and encouraging self-expression
- Facilitating personal growth in all who are involved in the work
- Listening and building a sense of community within the Bar Association

(Continued on page 41)

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.

Candidates Announced for DCBA Directors and Third Vice President

The deadline for nominating petitions closed just as this issue was going to press. These are the biographies candidates submitted with their nominating petitions, printed in the order in which they will appear on the ballot according to a random drawing conducted by

DCBA. There is one Third Vice President position and three Board of Director positions up for election. Members may vote for up to one 3rd Vice President and up to three Director candidates. Information to vote by electronic ballot was distributed on or around April 10, 2017.

Voting members may request a paper ballot by contacting the Bar Center at (630) 653-7779. All paper and electronic ballots must be received by 5:00 pm on May 1, 2017. For more information, contact the Bar Center at (630) 653-7779 or visit dcba.org.

3rd Vice President – 1 Vacancy



Wendy Musielak: I am a Partner at Esp Kreuzer Cores, concentrating in family law. I earned my J.D. from DePaul University in 2003. I currently serve as a Director on the DCBA Board and member of the Planning and Budget Committees. I was previously Chair of the Membership and Family Law Committees. I am committed to furthering growth of the DCBA, creating new possibilities for recently admitted as well as seasoned practitioners, and ensuring that every person and organization knows how much the DCBA offers. I would welcome the opportunity to now serve the DCBA as its Third Vice President.



Scott Pointner is an AV rated (Martindale-Hubbell) Member at Rathje & Woodward, LLC. Scott concentrates his practice in commercial litigation, commercial real estate, corporate, and homeowners association law. He has been a featured CLE seminar speaker since 2002. Scott is General Counsel for the Wheaton Chamber of Commerce (since 2009), and received its 2009 Outstanding Leadership and 2012 Executive Awards. He was DCBA Chair of the Professional Responsibility Committee, is a member of its Planning Committee, and received its 2016 Distinguished Service Award. As both a transactional and litigation attorney, he is uniquely-positioned to be DCBA 3rd Vice President.

Board of Directors – 3 Vacancies



Clarissa R.E. Myers is the owner of Myers Law LLC, and she is the Immediate Past President of the DuPage Bar Foundation. After graduating from DePaul University College of Law in 2006, she worked in private practice and then worked for the DuPage County Public Defender's Office. She is a member of the DCBA, ISBA, and DCCDLA. In the DCBA, Clarissa has held the positions of Law Day Chair and Entertainment Chair. Clarissa is also a *DCBA Brief* author, a Judges' Nite participant, a co-founder of the Law Day Outreach Program, and a volunteer Mock Trial Judge.



Jay Reese is on the DCBA Editorial Board, is Past Chair of Bankruptcy Law & Practice, Court Facilities & Library and Professional Responsibility Committees. He is a 12 Year participant of Judges' Nite. Jay is a Graduate of the Univ. of Illinois College of Law, was employed in government as: ALJ – Illinois Commerce Commission, Assist. Public Defender-Cook County, Assist. Illinois Attorney General-Consumer Fraud and Protection Div. and Counselor to the Commissioners of the Illinois Industrial Commission; before beginning private practice, with offices in Addison & Romeoville concentrating in Bankruptcy and Criminal Defense & Real Estate, for 38 years.



Mark Bishop – is looking forward to continuing his service as a DCBA Director having completed a one-year term following an appointment to fill Stacey McCullough's vacancy last year. He has been an active member of the DCBA for over 17 years and has served as General Counsel, Associate General Counsel, a member of the LRS Committee, and as Chair of both the Civil Law and ADR Committees. Mark has practiced with DuPage firms his entire career and last year founded his own firm, the Law Offices of Mark S. Bishop, LLC in Warrenville.



Kiley Whitty is an active member of the DuPage County community having served DCBA on the Planning Committee, Budget Committee, Membership Committee, as New Lawyer Chair, and, most recently, on the Executive Committee as Assistant Treasurer (2015-2016). Kiley was on the Board of Directors for the DuPage Bar Foundation (2011-2014) and she is a member and Past President of the DuPage Association of Women Lawyers. The rest of her time is spent representing clients in the areas of family law, bankruptcy, estate planning & administration, and creditor negotiations. Kiley joined the firm of Lillig & Thorsness, Ltd. in January, 2017.



James L. Ryan is an associate at Roberts & Caruso in Wheaton and focuses his practice primarily on contested probate, business litigation and construction law. He is the current Editor of the *DCBA Brief* and has served on the Editorial Board for the last 10 years. He has also served the DCBA as a speaker for Estate Planning and Business Law Section meetings and as a mentor through the DCBA Mentorship Program. If elected, Jim's experience on the Editorial Board, in the substantive law sections, and in the mentorship program would allow him to hit ground running as a director.



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ISBA Update



Supreme Court Rejects ISBA Proposed Rule 711 Modifications

By Kent A. Gaertner

The ISBA Board of Governors met in Springfield on March 10, 2017 to go over a full slate of issues and review the financials of the organization. The night before, it was a pleasure to attend the “grand opening” of the totally remodeled Bar Center in Springfield, about a block from the Capital Building. The Bar Center in Springfield was built almost fifty years ago and was in desperate need of remodeling, modernization and accessibility upgrades. The remodeled building is absolutely stunning from an architectural perspective. All members are invited to stop by and visit this impressive building if you find yourself in Springfield.

As you may remember, the Board of Governors recommended certain changes to Supreme Court Rule 711 last fall. These changes would extend the scope of the Rule to allow law students to practice law under the supervision of private attorneys as well as governmental agencies, legal clinics etc. currently allowed under the current Rule 711. The recom-

mendations of the Board were approved overwhelmingly by the ISBA Assembly at the mid-year meeting in December and sent off to the Supreme Court for a decision on implementing the modified rule.

The ISBA felt that the proposed modification to the Rule would allow law students to get experience with practitioners in areas of law they are interested in practicing. This makes the student much more “practice ready” when they graduate. Finding better ways to graduate students who are “practice ready” is one of the main initiatives for the ISBA. ISBA also felt that opening Rule 711 practice to the private practice sector would allow more access to attorneys for poor and modest means individuals who feel they cannot afford to hire counsel. A number of states currently extend their version of Rule 711 to private practice.

Allowing Rule 711 students to be paid a modest wage for their time would also help offset the costs law students face

that are now covered by student loans. The ISBA’s recent report on Law School debt and its effect on law practice showed that the average law graduate has student loan debt in the six figure range. While a modest wage for their time would not cure the student debt problem, it would help offset a bit of their everyday expenses.

Surprisingly, the Illinois Supreme Court recently rejected the proposed modifications. In a letter to ISBA’s General Counsel, the Director of the Administrative Office of the Illinois

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.

Courts advised the ISBA that the Supreme Court had sought input from the Commission on Access to Justice (“ATJ Commission”) on the proposal. The ATJ Commission then “discussed the proposal with representatives from legal aid agencies, law school public interest advisors and law school clinical program directors from across the state. The ATJ Commission reported that these entities expressed unanimous opposition to the ISBA proposal because of concerns that the changes would shift interest away from their programs and lead to a decrease in law students working at government law offices, legal aid agencies and law school clinics.”

The ISBA feels that there may be a miscommunication or misinterpretation of the proposal. Therefore the ISBA intends to reach out to the ATJ Commission to see if they are willing to discuss how this proposal can be structured to alleviate the concerns of the law schools and legal aid agencies. I will continue to keep the DCBA advised on what happens next.

Financially the ISBA is in a strong position. The extensive remodeling of the Bar Center in Springfield and the Chicago Regional Office were completed slightly over budget due to the amount of asbestos removal and abatement

required in Springfield. However, this was offset by the excellent results achieved by the ISBA Investment Committee whose management of the Association’s investments over the past year resulted in significantly less decrease of the reserves of the Association than had been anticipated in the pre-construction planning.

There were other initiatives that were discussed and will be further investigated before the next Board meeting in May. I will report on these when more concrete information is known.

Don’t forget that the ISBA Annual Meeting will be June 15th through 17th this year at The Abbey in Fontana, WI. The Honorable **Russell Hartigan** will be installed as the next ISBA President on Friday night June 16th. The ISBA Assembly will meet Saturday morning June 17th. ISBA members will be receiving notice of the meeting soon. Don’t forget to make your reservations early to get the ISBA rate. Rooms in our block always sell out quickly.

If you have any questions, comments or points you would like me to convey to the ISBA Board of Governors or the officers, please do not hesitate to contact me. □

LRS Stats

2/1/2017 - 2/28/2017

The Lawyer Referral & Mediation Service received a total of 889 referrals, including 34 in Spanish (728 by telephone, 11 walk-in, and 150 online referrals) for the month of February.

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

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DCBA Update

(Continued from page 35)

Thankfully, these behaviors are modeled across the DCBA with regularity. By making them the foundation of our leadership culture, the volunteer experience and outcome of all our collective work will be that much stronger.

As we head into the summer, membership renewal and our volunteer transition for the new bar year, I look forward to working with many of you to apply these lessons and hearing from you how we are doing. □



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President's Message *(Continued from page 6)*

The group discussed what has been going on in the way of public interest programming in each circuit and attended sessions on such topics as “Young Lawyers: Increasing *Pro Bono* Participation and Mentoring,” “Limited Scope Representation,” and “Conflicts of Interest and Assisting Ineligible Clients.”

“We are looking forward to working with PILI and the other Circuit Committees,” said Piwowar. “Our relationship with PILI gives us another source of support for work we are already doing and a unique opportunity to learn what people are doing in other judicial circuits.” That support includes help from speakers who can provide CLE programs for DuPage lawyers interested in *pro bono* work, assistance in developing qualified mentoring programs for those involved in public interest and education, networking opportunities, and ways to better manage new or existing programs based on the experiences of other Circuit Committees.

As the PILI network expands, so too will the reach of our Public Interest and Education Commission. That the two groups are working together is thus particularly good news for all concerned and a welcome step forward. Our thanks, accordingly, to Bergmann, Piwowar, Jackoweic, and the other members of the PIE Commission, including **Susan Alvarado, Michael Sitrick, Kevin Millon, Hon. Rodney Equi** (retired), **Mark Schmidt, Cecilia Najera, Jeanette DeGrange, David Clark, Hon. Paul Marchese, Gerry Cassioppi,**

and **Stacey McCullough**. The DCBA programs under PIE include Lawyers Lending a Hand, the Speakers Bureau, Legal Access/Legal Action Media, and our Veterans Assistance Program. DuPage Legal Aid, DCBA's Lawyer Referral Service, and Prairie State

Legal Services all have liaisons on the PIE Commission. If you are interested in getting involved with any of the PIE Commission programs, please contact **Cynthia Garcia** for more information at cgarcia@dcb.org. □

Near North National Title congratulates Janice Anderson, winner of the Cubs Skybox Experience at the 42nd Annual Judges' Nite.



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Where to Be In May

Law Day Luncheon Coming May 4, 2017 at Cantigny

By Arthur W. Rummler

If you have attended a Law Day lunch in the past, you know that it is a great opportunity to commiserate with other members and to celebrate the importance of the rule of law in our democratic society. Perhaps this year those sentiments are more important than ever. This year the Annual DCBA Law Day Luncheon which will take place on May 4th, 2017 at Cantigny. The theme of Law Day 2017 is “The 14th Amendment: Transforming American Democracy.”

this amendment, most of the protections in the Bill of Rights became enforceable against the states for the first time. It also defined citizenship and barred states from denying any citizen the privileges and immunities of citizenship. This year’s Law Day theme provides an opportunity to explore how the Fourteenth Amendment has transformed American law and society and furthered the cause of assuring liberty and justice for all

This year the DCBA is honored to have Chief Judge **Diane P. Wood** from the United States Circuit Court for the Seventh Circuit as the keynote speaker for the luncheon. In addition, the DCBA will present annual awards to attorneys who have gone above and beyond in their representation of Legal Aid clients as well as the annual Liberty Bell Award, given to a non-attorney who has served the legal community in a significant way.

In addition to the annual luncheon, DCBA Law Day has included a variety of activities over the years as we celebrate Law Day from mid-April through the month of May. This year activities include our annual Ask a Lawyer Day and grade school Mock Trials. Ask a Lawyer Day is where lawyers take over the phones at the DCBA and answer legal questions from the general public. Ask a Lawyer Day is set for Saturday, April 29.

The successful Law Day Mock Trial program introduces grade school age kids to the courthouse and the inner workings of a hypothetical trial. Mock Trials were run on April 21. If you are interested in volunteering for Ask a Lawyer, please contact **Cynthia Garcia** at cgarcia@dcba.org. □



SAVE THE DATE
For these upcoming Events

Thursday, May 4	Law Day Lunch, Le Jardin, Cantigny
Friday, May 19 & Friday, June 16	11th Hour PRMCLE Attorney Resource Center
Friday, June 9	Installation of Officers/Presidents' Ball—The Drake, Oak Brook
Thursday, Aug. 24	Golf Outing, Cantigny

For more information and to register for events, go to www.dcba.org or call 630.653.7779.

Constitutional law buffs will recognize the importance of the 14th Amendment to the United States Constitution. The law, which was ratified and went into effect on July 9, 1868 had a profound effect on law and society in America.

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