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Table of Contents

Mike Drabant, Cynthia Petersen, Christina Morrison and Kevin McSwain playing a game of "Trumpy Feud".

3 Editor's Message

5 President's Message

Articles

8 The Top Five Causes of Action Related to Wills and Trusts and How to Defend Against Them
- By Matthew T. Caruso and James L. Ryan

12 Two Supervisions in Twelve Months: Where This Limit Is Only Sometimes True
- By Jason A. Wilkins

16 Helping Pets of Domestic Violence Victims
- By Kimberly Backman

20 Illinois Law Update
- Editor Tim Hickey

News & Events

25 InBrief
- By Terrence Benshoof

26 ISBA Update
- By Kent A. Gaertner

28 Legal Aid Update
- By Cecilia Najera

30 Law Day Celebrates the First Amendment: A Look Back at All Those "Fighting Words" Published in the DCBA Brief Over 30 Years
- By Ted A. Donner

36 Candidates Announced for DCBA Directors and Third Vice President

39 DCBA Update
- By Robert Rupp

41 Judges' Nite 2019 Hits a New High

47 Classifieds

48 Where to be with DCBA

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Volume 31, Issue 9
May 2019

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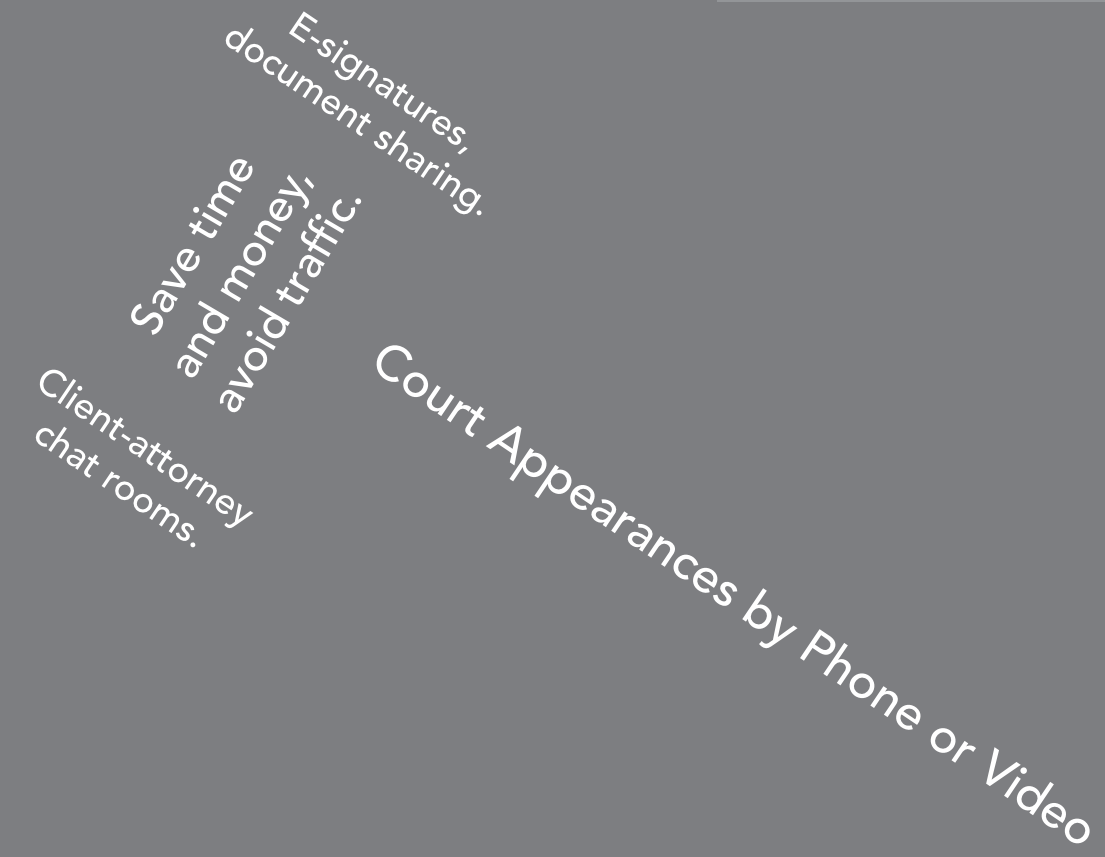
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From the Editor

The Notorious ...

By Brian Dougherty



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Sorry MMA fans; this is not a piece about Conor McGregor. With Law Day on the horizon and having just had International Women's Day (March 8), it would be a fitting topic to discuss the work of Justice Ruth Bader Ginsburg a/k/a Notorious RBG. I watched the documentary *RBG* a few weeks ago. I will admit that I thought I rented the movie with Felicity Jones in the titular role, but I was glad I made the mistake that I did.

I knew virtually nothing about Justice Ginsburg's pre-SCOTUS legal career, and as it turns out, she argued 6 cases before the U.S. Supreme Court, winning five of those. Her work centered on gender equality and challenging laws that stereotyped and disadvantaged women. Her first case was *Frontiero v. Richardson,* 411 U.S. 677 (1973), which challenged a federal law on spousal benefits in the uniformed services. Her strategy was simple: teach the all-male court about the history of the treatment of women in the U.S. and how perceptions that treated them differently were outdated and ill-advised. Her argument worked, as she prevailed in finding the federal law violated the Due Process Clause of the Fifth Amendment.

An interesting side note is that she was one vote short of having the Court find that gender was a suspect classification, like race and national origin, that would be subject to "strict scrutiny" standard of review. Instead, gender-based distinctions would be subject to intermediate level of review. Three Justices concurred in the judgment. Justice Powell disagreed that gender was a suspect classification in light of Congress' approval of the Equal Rights Amendment (ERA). Justice Powell said that it should be left to the will of the people to make that decision. Had Congress not passed the ERA, one could only speculate whether Justice Powell's reasoning would have been different. Unfortunately, the ERA was not ratified by the requisite number of states by the 1982 deadline (Illinois was one such non-ratifier).

Justice Ginsburg's next case was *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975). This was a genius move. She represented a widower who could not claim Social Security benefits for himself after the death of his wife. She was now arguing the flip side: a law that pigeon-holed men as the breadwinner of the family and was thus disadvantageous to men. The outcome was a no-brainer after *Frontiero* – seven Justices concurred in the opinion.

One of Justice Ginsburg's most famous opinions was *U.S. v. Virginia*, 518 U.S. 515 (1996), where the federal government challenged the all-male admissions policy at the Virginia Military Institute (VMI), one of the country's first state military colleges. Virginia could not meet its burden of showing that VMI's admission policy served an important governmental objective and that the discriminatory means employed was substantially related to achieving that objective. Based on that standard of review, the result was preordained and the federal government prevailed. VMI provides extraordinary opportunities for military training and civilian leadership development, said Judge Ginsburg, and preventing women from taking advantage of those opportunities violated the Fourteenth Amendment.

Her dissenting opinions could also be notable. Such was the case in *Ledbetter v. Goodyear Tire & Rubber Co.,* 550 U.S. 618 (2007), where she disagreed with the majority's view that under Title VII, a discriminatory pay practice was a discrete act and a charge of discrimination must be filed within 180 or 300 days. Justice Ginsburg discussed how promotional pay decisions are subjective and shielded from employees to such an extent that they might not

(Continued on page 6)


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President's Message

Protecting Our Profession: The Case Against Fee-Splitting

By J. Matthew Pfeiffer



J. Matthew Pfeiffer is the President of DCBA. He is the owner of Pfeiffer Law Offices, P.C., in Wheaton, which concentrates its practice in the areas of civil litigation, employment matters, business law, estate planning, and commercial real estate. Matt also serves as the current Chair of the Board of Visitors for his alma mater, Northern Illinois University College of Law. In his scant spare time, Matt patronizes area golf courses.

The Illinois Rules of Professional Conduct have been around seemingly forever. One of the rules – Rule 5.4: Professional Independence of a Lawyer – expressly prohibits a lawyer or law firm from sharing fees with a non-lawyer except in very specific circumstances (to the lawyer's estate or specified persons after the lawyer's death; to non-lawyer employees of the lawyer in a compensation or retirement plan; and to a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter). Rule 5.4 also expresses limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. These traditional limitations on sharing fees are designed to protect the lawyer's professional independence of judgment.

Historically, the concern over fee-splitting revolved around "ambulance chaser" lawyers making payments to "runner" or "capper" non-lawyers for solicitation and referrals of personal injury clients. During the last two decades, the fee-splitting rule has been front and center in the face of proposals to allow multidisciplinary practices (MDPs), such as partnerships between accountants and lawyers. The MDP debate ended with lawyers holding fast to the proposition that the practice of law is a profession as opposed to other ordinary businesses and that avoiding the sharing of fees with non-lawyers is essential to the protection of lawyers' professionalism and preservation of the profession's core values.

In recent years, a whole new debate has brought the fee-splitting rule to the forefront: for-profit lead generation companies for lawyers. Organizations like Avvo and LegalMatch, to name a couple, have been trying to capitalize on our profession for years. They entice lawyers and law firms to sign up with them for monthly service fees that vary depending on the level of promotion and lead generations sought. In some proposals, a lawyer would be paired up with a client for the former to represent the latter for a flat fee on a legal matter and then remit to the matching-service organization a percentage or fixed amount of the total fee charged. These organizations have commercialized the practice of law, turning it into a business-focused endeavor versus a legal services-focused one. And they are going to be a significant catalyst for the ruination of bar associations' lawyer referral services – and the legal profession in general.

In addition to the commercialization aspect of fee-splitting with non-lawyers and for-profit lead generation organizations, other concerns about such fee-splitting include the lack of independence and professional judgment of the lawyer, the possible departure from self-regulation in our industry and being subject to regulation by outsiders to our profession, and the for-profit organization's motive to increase its profits. A for-profit lawyer-matching service has no real connection to the legal profession aside from promoting lawyers who pay the most to be promoted the most and matching those lawyers to would-be clients looking for a lawyer in a specific practice area. Such a service would have little to no incentive to maintain the integrity of our profession, safeguard the public, and ensure the effective administration of and access to justice. *(Continued on page 46)*

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From the Editor *(Continued from page 3)*

realize discrimination until years after the fact. At the end of her dissent she invited Congress to weigh in to right this perceived injustice: "Once again, the ball is in Congress' court." Congress took up that invitation by passing the Lilly Ledbetter Fair Pay Act of 2009 which amended Title VII to make pay discrimination claims easier to file and it was signed into law on January 29, 2009 by President Obama.

What Thurgood Marshall did for African-American civil rights, Justice Ginsburg did for gender equality. Early on in her SCOTUS career, she tried being a consensus builder, as other Justices were more liberal leaning than her. Over time, with the composition of the Court changing, especially in recent years, she has become more liberal in her decisions. Most likely because cases involving same-sex marriage and LGBT rights have taken the place of race and general discrimination. She is certainly ushering in a new age and her opinions now on new gender rights issues are a natural evolution of her legal acuity. Whether you agree with her or not, the one thing you must respect is her tenacity in tackling the issues that she holds most dear.

In this issue, we have an array of topics. **Matthew T. Caruso** and **James L. Ryan** discuss the various causes of action under Illinois law in actions invoking estates and trusts. **Jason A. Wilkins** gives us an in-depth analysis of supervision under the Illinois Vehicle Code. **Kimberly Backman** addresses the importance of protecting pets in domestic abuse litigation. **James L. Ryan** was the Articles Editor and **Timothy Hickey** is the Illinois Law Update Editor, and their assistance is appreciated. □

Articles



8 The Top Five Causes of Action Related to Wills and Trusts and How to Defend Against Them
- By Matthew T. Caruso and James L. Ryan

12 Two Supervisions in Twelve Months: Where This Limit Is Only Sometimes True
- By Jason A. Wilkins

16 Helping Pets of Domestic Violence Victims
- By Kimberly Backman

20 Illinois Law Update
- Editor Tim Hickey



Articles Editor

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The Top Five Causes of Action Related to Wills and Trusts

and How to Defend Against Them

By Matthew T. Caruso and James L. Ryan

It is no secret that America's population is getting older. In a recent housing study, researchers from Harvard noted that the number of American households headed by a person over the age of 80 has risen 71 percent in the last 25 years.[1] The Baby Boomers have started to retire and will continue to do so in record numbers. America's older generations have amassed large sums of wealth that will be transferred to younger generations in the decades to come. Estate planners utilize wills and trusts as instruments to facilitate these transfers of wealth, but simply preparing a will or a trust is no guarantee that an effective transfer of wealth will take place to an intended beneficiary. Whenever there is a transfer of money, there is a risk that litigation over the transfer may result.

What does litigation involving estates and trusts look like? How do you defend a party to that litigation? Are there any drafting techniques that estate planners can utilize to prevent or deter future litigation? This article answers these questions by describing the top five most common causes of action that arise in contested trusts and estates and common defenses to them. This article also offers some techniques to avoid future litigation over the estate plans.

Cause of Action #1: Undue Influence

In the authors' experience, undue influence is the most common cause of action used to attack an estate plan when a deceased parent leaves assets in a will or trust contrary to the expectation that all children must be treated equally. When one child is disinherited or when one child receives substantially more assets under the terms of a parent's will than her siblings, an undue influence cause of action is one way an unhappy child can try to set aside the will and get her "fair share" of "what Dad wanted."

The Illinois Pattern Jury Instructions defines undue influence as "influence exerted at any time upon the decedent which causes him to make a disposition of his property that is not his free and voluntary act."[2] There are two ways to prove undue influence under Illinois law.[3] The first way is to prove undue influence is through proof of specific conduct constituting the undue influence, such as conduct that is excessive, improper, or illegal.[4] Isolation is just one example of specific conduct showing influence that is excessive. Proof of misrepresentations or

1. Harvard University Joint Center on Housing Studies. *Housing for Older Adults*, 2018 ed., pg. 2.
2. Illinois Pattern Jury Instruction No. 200.09
3. Illinois Pattern Jury Instruction No. 200.04.
4. *Estate of Glogovsek,* 248 Ill.App.3d 784 (1st Dist. 1993).

concealment of material facts can also establish undue influence.[5] The second way to prove undue influence is through a legal presumption of fraud that arises whenever a fiduciary participated in the preparation or execution of a will or trust that provides the fiduciary with a disproportionate share of the estate or trust.[6] For example, if a child is acting as power of attorney for an elderly parent and arranges for an attorney to change the parent's estate plan that benefit that child, the presumption of fraud arises. When an adult child calls an estate planning law firm on behalf of a parent, it is a good practice to ask: "why are you on the phone with us instead of your mother?"

An estate planning attorney should keep careful records of his client communications to deter future undue influence claims. In a will contest, there is no attorney-client privilege between the decedent and the drafting attorney.[7] The drafting attorney is almost always the critical witness at trial. Thus, a careful attorney should write out detailed, contemporaneous notes of all discussions with the client. Potential influencers should not be in the room when the client tells the attorney of his intentions. The first thing a plaintiff does in an undue influence case is to subpoena the records of the attorney who wrote the estate plan and tries to figure out who was at the attorney's office with the client and who arranged the appointments. If the client states his intentions are something that someone might challenge later, such as favoring one child over another, then a careful attorney should videotape those conversations with the client's consent. A video of a signing ceremony during which the lawyer asks open ended questions and the client provides explanations for the decisions that he made in his estate plan can become powerful evidence of the client's wishes in the event of a challenge.

A lawyer defending an undue influence case should use discovery to determine what is "undue" about the alleged influence, particularly in cases where a husband or a wife is the alleged undue influencer, because it is expected that a spouse will influence a spouse, and there is nothing "undue" about a spouse influencing a spouse's estate planning decisions absent some other improper conduct such as misrepresentation.[8] The lawyer defending undue influence should get the file from the attorney who wrote the will or trust and contact disinterested witnesses who knew the decedent and the alleged influencer. Those disinterested witnesses may provide excellent background on why the decedent made the choices that he did.

Cause of Action #2: Lack of Testamentary Capacity

When a person changes his estate plan toward the end of his life, a typical challenge is that the person lacked testamentary capacity to make a will. The Illinois Pattern Jury Instructions provide the elements to a lack of testamentary capacity cause of action. "A person does not have testamentary capacity to make a will if, at the time he executes the document, he does not have: (1) The ability to know the nature and extent of his property; (2) The ability to know the natural objects of his bounty; or (3) The ability to make a disposition of his property in accordance with some plan formed in his mind."[9] Please note that testamentary capacity is not the capacity to transact ordinary business. A person who has been declared disabled by a court may have testamentary capacity if he has the abilities set forth above. In fact, the Probate Act contains specific procedures to be followed when a disabled person wants to write a will.

Lack of testamentary capacity is also not a medical diagnosis. Thus, medical diagnoses like Dementia or Alzheimer's disease must be linked to the abilities set forth above in order to be probative at trial. A great way to establish testamentary capacity at the time of signing is to have the client complete a neuropsychological evaluation with a qualified professional who

5. *Estate of Hoover,* 155 Ill.2d 402 (1993).
6. Illinois Pattern Jury Instruction No. 200.04.
7. *See e.g. Adler v. Greenfield, 2013 IL App (1st) 121066, ¶62.*
8. *See DeHart v. DeHart,* 2013 IL 114137.
9. Illinois Pattern Jury Instructions, No. 200.05.

About the Authors



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prepares a written report linking the client's cognitive functioning with the specific elements of testamentary capacity. Again, a videotaped signing ceremony with open ended questions and detailed responses can go a long way to establish a valid defense. However, when making a video at the signing ceremony, it is crucial to ask the three "capacity questions" referenced above; "who are your children?", "how much money do you have?", "what is your plan for distributing your assets in your will?" It is not helpful to simply ask, "is this your will?" on the video. The best evidence of capacity is the testator himself answering the capacity questions on a video at a time that he was alleged to have lacked capacity to sign a will.

"Estate planners utilize wills and trusts as instruments to facilitate these transfers of wealth, but simply preparing a will or a trust is no guarantee that an effective transfer of wealth will take place to an intended beneficiary.

Defending a challenge of lack of capacity often requires hiring an expert, such as a psychologist or a psychiatrist, in cognitive impairments of the elderly. It is often the case that the attorney bringing a challenge against a will based on lack of capacity does not understand the concept of capacity. The authors have seen complaints challenging wills due to lack of capacity that allege simply that the testator had "dementia", and the attorney might embellish that word to "severe dementia" using poetic license rather than medical evidence to assert that the testator lacked capacity because the person had the word "dementia" in his medical records. However, a person with dementia can have capacity to sign estate planning documents, particularly if the dementia was caused by a temporary condition such as a blow to the head. An expert is crucial in these cases in determining whether the medical records indicate a lack of capacity at the time of the signing, which is the relevant time that capacity is required.

Cause of Action #3: Accounting

The first two causes of action mentioned above involve challenges to the estate planning documents themselves. The next two causes of actions involve the execution of that plan by a fiduciary. A cause of action for accounting is generally used to compel a person who is in control of the decedent's money to disclose how that person has used the decedent's money. There are several statutes that require accountings. The Trust and Trustees Act requires annual accountings to any person then entitled to receive income or principal from a trust.[10] The Probate Act requires annual accountings of estate assets to all interested persons.[11] The Power of Attorney Act requires an agent to produce an accounting of the assets under his control as power of attorney within 21 days of a request of any interested person to a principal's estate.[12] Illinois courts also recognize a cause of action for an equitable accounting if there is an absence of an adequate remedy at law and one of the following: (1) breach of fiduciary duty, (2) a need for discovery, (3) fraud, or (4) the existence of mutual accounts which are of a complex nature.[13]

When a client is served with a complaint for an accounting, the client is usually serving in a fiduciary capacity with a duty to account. In most circumstances, arguing that a duty to account does not exist is not a worthwhile endeavor. Thus, the best way to insulate a client named as a defendant in an accounting cause of action from potential liability is to outsource the preparation of the accounting to a professional CPA. That is particularly the case when a client walks in the office with a box full of receipts and bank statements and says he is being sued for an accounting. Because accountings are administrative expenses, the CPA gets paid out of the trust or estate funds for performing the accounting for the client. The client becomes protected from claims that the accounting is performed incorrectly in terms of math or formatting. Using a professional CPA is an effective way to assure a sibling that things are being handled correctly. However, if the sibling persists in pursuing an accounting cause of action after a CPA sends the sibling a

10. 760 ILCS 5/11(a).
11. 755 ILCS 5/24-1.
12. 755 ILCS 40/2-7(c)(1).
13. *People ex rel. Hartigan v. Candy Club,* 149 Ill.App.3d 498, 500-01 (1st Dist. 1986)

full accounting based on supporting documentation, then the CPA would become the star witness to prove up the accuracy of the accounting at a hearing. If the numbers add up and have supporting documentation for most things, at least the CPA can narrow the issues to the items that are not supported by documentation such as receipts.

Cause of Action #4: Breach of Fiduciary Duty

When a beneficiary believes that the person in charge of the decedent's money has mishandled the decedent's money, the most common cause of action to remedy that wrong is breach of fiduciary duty. To state a claim for breach of fiduciary duty, it must be alleged that: (1) a fiduciary duty exists, (2) the duty was breached, and (3) the breach proximately caused damages.[14] This cause of action is most commonly used because the proof for the plaintiff's side is relatively easy. An executor of a will and a trustee of a trust owe fiduciary duties as a matter of law. Thus, the first element is an easy hurdle to clear. Moreover, the law imposes a legal presumption of fraud in all self-dealing transactions by a fiduciary.[15] Thus, the plaintiff simply must point to a transaction in which the trustee or executor benefits to meet its burden of proof. These transactions are generally described on an accounting or on a bank statement. Once a self-dealing transaction is identified, the burden of proof shifts to the fiduciary to establish by clear and convincing evidence that the transaction was fair and did not result from undue influence over the principal.[16]

Presumptively fraudulent transactions occur frequently in the course of estate and trust administration. For example, a fiduciary may reimburse himself for expenses he advanced. The fiduciary may forgive pre-existing loans either to himself or to a relative; the fiduciary may compensate himself for services rendered, or the fiduciary may take the proceeds of a "convenience account" with joint account features that the fiduciary had been using to pay for his parents' living expenses. If a disgruntled sibling complains about the fiduciary's actions, then the burden of proof will be on the fiduciary to overcome the presumption of fraud for each one of these types of presumptively fraudulent transactions.

A good estate plan will build in a defense for each of these common, but presumptively fraudulent transactions. For example, a well-written estate plan may require a trustee to keep receipts for expenses and obtain multiple quotes for large dollar expenses. Practitioners should include language in a trust that directs a trustee to forgive all unpaid loans prior to death, unless the loan is of a large amount or reflected in a promissory note. With respect to compensation for services rendered, it is recommended to include language specifying that a trustee is entitled to reasonable compensation and provide a formula if necessary. Whenever a client says that he added a child as an authorized signer on a bank account, one should include a "Convenience Account Designation" or a "Gifting Document" form in the client's estate planning documents to instruct the fiduciary of the client's wishes for that account. These planning techniques can go a long way to help accomplish the client's wishes and minimize the risk to the person trusted to effectuate the client's wishes.

Cause of Action #5: Petition for Instructions

Sometimes, it is simply not possible to stop a disagreeable, grieving sibling from pursuing litigation over their deceased parent's estate and trust. In those circumstances, it is often better for a trustee or executor to initiate the litigation through the filing of a petition for instructions. A petition for instructions simply requires a *bona fide* dispute as to the true meaning and intent of the trust instrument or as to the particular course which a trustee ought to pursue.[17] Proving a *bona fide* dispute can be easy when considering that disagreeable siblings tend to show their displeasure in vitriolic e-mails that span multiple pages that could be printed and attached to a complaint.

Petitions for instructions tend to lead to court orders directing a trustee or executor to take certain actions. Court orders add a layer of protection for a trustee confronting an unhappy beneficiary. In the meantime, a trustee is entitled to maintain the lawsuit at the expense of the trust estate. Thus, there is no good reason for a trustee to ever guess about what to do or to put himself at risk of breach of fiduciary duty for taking steps that a beneficiary might challenge.

Keeping in mind the potential causes of action available to attack wills and trusts as you draft the estate planning documents will serve the interests of your client and will make life easier for you as the attorney if you ever receive that subpoena. □

14. *Lawlor v. N. Am. Corp. of Illinois,* 2012 IL 112530, ¶69.
15. *Estate of Alford v. Shelton,* 2017 IL 12119, ¶23.
16. *Id.*
17. *Kaull v. Kaull,* 2014 IL App (2nd) 130175, ¶76.

Two Supervisions in Twelve Months: Where This Limit Is Only Sometimes True

By Jason A. Wilkins

The phrase "two in twelve months" is a litany heard across many traffic courts. It forms the bar against which court supervision is often limited. There is, however, far more nuance to this rule than meets the eye and opportunities for leniency exist in much greater abundance. To provide context, the text of this rule can be found at 730 ILCS 5/5-6-1 which forms the basis for court supervision and its limitations. The "two in twelve months" rule can be found at paragraph (k) which states:

> *"The provisions of paragraph (c) shall not apply to a defendant charged with violating any provision of the Illinois Vehicle Code or a similar provision of a local ordinance that governs the* ***movement of vehicles*** *if, within the 12 months preceding the date of the defendant's arrest, the defendant has been assigned court supervision on 2 occasions for a violation that governs the* ***movement of vehicles*** *under the Illinois Vehicle Code or a similar provision of a local ordinance. The provisions of this paragraph (k) do not apply to a defendant charged with violating Section 11-501 of the Illinois Vehicle Code or a similar provision of a local ordinance"[1] (emphasis added)*

In context, the paragraph (c) mentioned in the above citation refers to the provisions of court supervision. What follows is approximately two dozen paragraphs with exceptions to the availability for court supervision; paragraph (k) is one such exception. Perhaps the strangest component is the language that this rule only applies to offenses governing the "movement of vehicles" giving rise to a simple question – what is a moving violation?

What is a Moving Violation?

Throughout the entire traffic code, the definition of moving violation is wholly absent. In the Illinois Administrative Code however, the meaning is supplied. Under 92 Ill. Admin. Code § 1030.1, a traffic regulation governing the movement of vehicles is defined as "a violation for which points are assigned pursuant to 92 Ill. Admin. Code § 1040.20."[2] Section 1040.20 of the Illinois Administrative Code is known as the Illinois Offense Table and lists not only the point values but also the proper classifications for recording such offenses to the driving record. While not all inclusive, this list defines most traffic issues under several categories with their corresponding "Type Actions": immediate action offenses (Type Actions 82, 83, 93, & 94), withdrawals (Type Action 89), record items (Type Action 68), non-points assigned offenses (Type Actions 95 & 96), and points assigned offenses (Type Actions 87, 97, & 99).[3]

It is this last category that makes up the entirety of moving violations. Any offense listed on this chart with a corresponding point value is a moving violation. Offenses which seem to be entirely equipment related, such as head, tail, and side light violations, find themselves with point values despite being under Chapter 12 of the Vehicle Code, which is dedicated to equipment. Meanwhile, Illinois Vehicle Code offenses such as driving with a suspended license,[4] passing a school bus that is unloading children,[5] and street racing[6] fall outside of moving violations despite what the nature of their offenses imply. These fall into the category of immediate action offenses. Put simply, an offense constitutes an immediate action offense if, solely upon one conviction, it is possible that one's driving

1. 730 ILCS 5/5-6-1(k).

2. 92 Ill. Admin. Code § 1030.1.
3. 92 Ill. Admin § 1040.20(a)(1). Type Actions 82 is identified as immediate action elsewhere at paragraph (u).
4. 625 ILCS 5/6-303.
5. 625 ILCS 5/11-1414.
6. 625 ILCS 5/11-506(a).

privileges can be terminated.[7] Similarly, withdrawals, another non-points assigned category, are the negation of valid driving privileges by the state as a result of sanctions taken against driving privileges.[8]

Next are record history items which are stated as non-points assigned matters on the Illinois Offense Table.[9] The final category constitutes what may simply be referred to as non-points assigned offenses that, in conjunction with other factors, may result in sanctions against driving privileges (e.g. receiving a violation during a suspension or revocation).[10]

This view of what constitutes a moving violation is further supported by the language of moving-violation based suspensions or revocations found in the Illinois Vehicle Code. Under the discretionary suspensions or revocations available under 625 ILCS 5/6-206(a), there are several references to moving-violation based suspensions stemming from "traffic regulations governing the movement of vehicles."[11] This language is used for the three major moving-violation based suspensions:

1. Three convictions for moving violations issued within a 12-month period;[12]
2. Two convictions for moving violations issued within a 24-month period when under 21 years of age;[13] and
3. A moving violation conviction for an offense issued prior to 21st birthday following a prior suspension or revocation for two convictions for moving violations issued within 24 months when under the age of 21.[14]

When one reviews the Illinois Administrative Code for the comparable provisions that advise the Secretary of State to terminate driving privileges, we see that the only offenses that trigger suspensions or revocations are points-assigned offenses as described in the Illinois Offense Table at 92 Ill. Admin. Code § 1040.20. In the footnotes for the preceding moving- violation suspensions, the analogous sections codifying these provisions in the Illinois Vehicle Code and Illinois Administrative Code have been provided to show this connection.

Returning to our previous restriction on supervision at 730 ILCS 5/5-6-1(k), since anything classified as withdrawals, record items, immediate action, or non-points assigned inherently have no points assigned under 92 Ill. Admin. Code § 1040.20, they necessarily are not traffic regulations governing the movement of vehicles. As such, 730 ILCS 5/5-6-1(k) has no bearing on the eligibility of court supervision for offenses without point values. This has two profound consequences. First, a defendant charged with any offense without a point value can never be denied eligibility for supervision based solely on having been assigned supervision on two occasions in a prior twelve-month period. Second, a defendant is not ineligible for supervision on a moving violation unless both of the prior two occasions of court supervision in the twelve months preceding the arrest date were for points-assigned offenses.

Two in Twelve?

Upon a close reading of 730 ILCS 5/5-6-1(k), we see that the idea that two court supervisions are the limit in the "twelve months" rule arises out of an assumption in the language. The provisions of court supervision are not available if one has been assigned court supervision on two occasions within a twelve-month period. This much is true. The devil, however, is in the details as the twelve months runs one direction from a specific point. Reasonable minds have differed as to the exact way to draw such a period, but the statute prescribes very specific instructions on this question. The measurement according to the statute prohibits supervision if:

> *…within the 12 months preceding the date of the defendant's arrest, the defendant has been assigned court supervision on 2 occasions…*[15]

This restriction on supervision bars court supervision on a new offense if, within the past twelve months preceding the arrest date of the offense for which court supervision is sought, there are two occasions where court supervision was assigned. It

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7. https://www.cyberdriveillinois.com/publications/pdf_publications/dsd_dc19.pdf. Special thanks to Andrew Holton for providing this resource.
8. 92 Ill. Admin. Code § 1040.1. Special thanks to Theodore Harvatin for providing this resource.
9. 92 Ill. Admin. Code § 1040.20(t).
10. https://www.cyberdriveillinois.com/publications/pdf_publications/dsd_dc19.pdf.
11. 625 ILCS 5/6-206(a).
12. 625 ILCS 5/6-206(a)(2) which corresponds with 92 Ill. Admin. Code § 1040.30.
13. 625 ILCS 5/6-206(a)(36) which corresponds with 92 Ill. Admin. Code § 1040.29.
14. 625 ILCS 5/6-206(a)(44) which corresponds with 92 Ill. Admin. Code § 1040.28.
15. 730 ILCS 5/5-6-1(k).

“The public is best served by avoiding the imposition of criminal records for traffic offenses and this is highlighted by the already strong tendency in many counties towards seeking court supervision wherever possible.

should be noted that the language of “occasions” would treat multiple judgments of court supervision issued simultaneously as one occasion. For a hypothetical situation, let’s assume a defendant receives three speeding tickets. Two tickets have been given court supervision while one ticket is still pending. Each one would be a points-assigned moving violation so they would qualify as offenses subject to 730 ICLS 5/5-6-1(k). For these three offenses, let’s also assume the issuance and supervision dates were as follows:

Ticket 1 – Issued: 2-1-18	Supervision: 2-28-18
Ticket 2 – Issued: 3-1-18	Supervision: 4-2-18
Ticket 3 – Issued: 4-1-18	Seeking Supervision

Applying the rule for Ticket 1, we would have no court supervisions in the twelve months preceding the arrest date of 2-1-18. For Ticket 2, we would see one supervision on February 28, 2018 in the twelve months preceding March 1, 2018. For Ticket 3, only one court supervision has been assigned in the twelve months preceding the arrest date of April 1, 2018 as the second supervision was assigned after this ticket was issued. In this situation, a defendant is eligible for three supervisions within a twelve-month period.

One may reasonably conclude that simply being eligible for court supervision does not a good candidate make. This may very well be true. That being said, the court has broad discretion as to the duration of court supervision and can be certain that any future moving violations for many months will not be eligible for court supervision following a third court supervision. This fact, combined with the ability to revoke said court supervision for new violations potentially triggering a license suspension, may well serve as a strong deterrent against a future violation. A third supervision, rather than an excuse for future conduct, may serve to curb behavior and prevent further traffic offenses.

Addressing Inconsistencies

From the reading of 730 ILCS 5/5-6-1(k), it is clear that the intended limits of this statute only apply to offenses governing the movement of vehicles. A strange inclusion of the Driving Under the Influence (DUI) statute seems out of place. In the closing portion of paragraph (k), it states:

> *The provisions of this paragraph (k) do* ***not apply to a defendant charged with violating Section 11-501 of the Illinois Vehicle Code or a similar provision of a local ordinance.”***[16] (emphasis added)

In the context of what an offense governing the movement of vehicles is, this section of the statute seems superfluous. After all, a DUI is an immediate action offense under the Illinois Offense Table and would thus not be an offense governing the movement of vehicles.[17] In reviewing the language of the supervision statute at 730 ILCS 5/5-6-1(d), we see the restriction on supervision for a person facing a second DUI after a previous finding of guilt. This restriction, in part, states:

> *The provisions of paragraph (c)* ***shall not apply to a defendant charged with violating Section 11-501 of the Illinois Vehicle Code or a similar provision of a***

16. 730 ILCS 5/5-6-1(k).
17. 92 Ill. Admin. Code § 1040.20(b).

> ***local ordinance*** *when the defendant has* previously been…[18] (emphasis added)

From all appearances, it looks as though the legislature used the bolded phrase from the previous restriction on supervision for a second DUI in the later written paragraph (k). With the implied meaning of a moving violation, one could be forgiven in believing that a DUI would constitute a moving violation under the law. Given the extreme penalties if one concluded a DUI was a moving violation, the legislature most likely copied and pasted this language from the DUI supervision restriction at paragraph (d) as the overwhelming evidence points to the interpretation of paragraph (k) and offenses governing the movement of vehicles outlined in this article. Seeing as how we currently treat immediate action offenses as subject to this rule from time to time, it is likely a court could err by refusing supervision on a DUI merely because of court supervision on two petty tickets in the past twelve months. In the absence of explicitly and superfluously stating that DUIs are exempt from this rule, it is hard to refute at least one defendant may have been denied supervision on a first time DUI based on a mistaken belief that it is a moving violation.

Conclusion

A review of what we call the "two in twelve months" rule provides a clearer guideline as to the eligibility of court supervision as the legislature intended. Most importantly, it empowers the court to concern itself less with the question of eligibility and more with the question of appropriateness. Some may bristle at the thought of three supervisions for moving violations within a one year period given the mental inertia produced by assumptions in the so called "two in twelve months" rule. Understandably so, the incorrect *per se* ineligibility based on statutory misinterpretation will necessarily cloud our judgment of what is appropriate. To this, we should look to the standards set in 730 ILCS 5/5-6-1(c)(1-3), where the court should consider court supervision if:

> *(1) The Offender is not likely to commit further crimes; (2) the defendant and the public would be best served if the defendant were not to receive a criminal record; and (3) in the best interests of justice an order of supervision is more appropriate than a sentence otherwise permitted under this Code* [19]

As stated previously, any third supervision will be a strong deterrent against future violations as a new citation during a third supervision will likely result in a suspension once a petition to revoke is pursued. The court, in an effort to ensure this, has discretion to enter longer supervision periods when necessary. The public is best served by avoiding the imposition of criminal records for traffic offenses and this is highlighted by the already strong tendency in many counties towards seeking court supervision wherever possible.

The best interests of justice are certainly served by offering a third supervision. Traffic courts often involve *pro se* defendants unaware of supervision and its limits. By handling supervision eligibility as outlined in this article, the court has the opportunity to warn a defendant that supervision is no longer available at the very moment of their second assignment of court supervision. This will not only serve to deter future violations, but it will result in a more just process for defendants who may not have counsel to warn them.

Finally, as to the question of appropriateness, this will vary from case to case. What is most important is that this analysis not be tainted by our current mistaken interpretations of what has become known colloquially as the "two in twelve months" rule. Not every defendant will be a good candidate for supervision and the past conduct of some will render a third supervision inappropriate even if legally available. That being said, the worthiness for court supervision should be determined on an individual basis rather than a cookie-cutter belief that two in one year should be the maximum; from time to time, that may mean that, in the best judgment of the court, a third court supervision may be appropriate for a situation that our past understandings determined was inappropriate based solely on an incorrect *per se* interpretation of the statute.

For those deemed worthy, we can only hope that additional bite of the apple is just as sweet. □

18. 730 ILCS 5/5-6-1(d).

19. 730 ILCS 5/5-6-1(c)(1-3).

Helping Pets of Domestic Violence Victims

By Kimberly Backman

The Illinois Coalition Against Domestic Violence reports that during the 2018 fiscal year, there were 42,924 adult survivors of domestic violence statewide, extending across all age groups, ethnicities, and socio-economic classes.[1] What those statistics do not reflect, however, is how many of the victims were also pet owners and what, if anything, was done to assist those animals. While pet care may not initially stand out as an important element within a domestic violence case, the American Society for the Prevention of Cruelty to Animals (ASPCA) provides that 71% of pet-owning domestic violence victims report animal abuse and 25% of such victims return to an abusive relationship based on concern for the animals,[2] making it an important consideration for practitioners working with such victims.

It was not that long ago that family law attorneys and advocates focused their attention on the physical safety of domestic violence clients without giving much thought to any pets or companion animals that shared the victims' lives. The legislature recognized pets, including service animals, as personal property,[3] allowing abusers to maintain control over their victims by threatening to harm, injure, or even kill dogs, cats, and other animals. Federal and state statutes have since been enacted and/or amended to address the intersection where pet ownership and domestic violence cross while new resources to support victim/pet owners have emerged providing attorneys with additional tools needed to advocate for their clients.

New Federal Legislation

Based, in part, on the numerous studies confirming the connection between the abuse of animals and violence against their human caregivers,[4] federal legislation known as the Pet and Women Safety Act (PAWS) was introduced in February 2017 as H.R. 909.[5] The bill, renamed Protecting Animals with Shelter (PAWS), was included in the Agriculture Improvement Act of 2018 and signed into law by President Trump in December 2018.[6] Among other things, the new law modifies the federal criminal code to broaden the definition of stalking to include conduct that causes a person to experience a reasonable fear of death or severe bodily injury to a pet and expresses that states should include protection against violence or threats against a pet via the entry of domestic violence protection orders.[7] The statute also makes crossing state lines to injure a pet a federal offense and redirects the Department of Agriculture to award grants for shelter and housing assistance and support services for domestic violence victims with pets.[8]

State Legislation

On the state level, twenty-eight states, District of Columbia, and Puerto Rico have adopted legislation authorizing the inclusion of pets in civil protection orders.[9] In 2008, the Illinois Domestic Violence Act was amended to authorize courts to issue an order concerning *"exclusive care, custody, or control of any animal owned, possessed, leased, kept, or held by either the petitioner or the respondent or a minor child residing in the residence or household"* and ordering a respondent to *"stay away from the animal and forbid the respondent from taking, transferring, encumbering, concealing harming, or otherwise disposing of the animal."*[10]

Penalties

In addition to civil and criminal orders of protection, those individuals found guilty of abuse toward animals can face several different criminal charges. The Humane Care for Animals Act[11] provides that individuals must provide sufficient food and water, adequate shelter including protection from the weather, as well as humane care and treatment. Convictions under the Act constitute a Class B misdemeanor or a Class 4 felony for

1. https://www.ilcadv.org/resources/statistics/default.html
2. https://www.aspca.org/blog/protecting-all-victims-domestic-violence
3. See Gary L. Francione, Animals, Property, and the Law (1995)
4. Ascione, F.R., Weber, C.V., Thompson, T.M., Health, J., Maruyama, M., & Hayashi, K. (2007)
5. https://www.congress.gov/bill/115th-congress/house-bill/909
6. Agriculture Improvement Act of 2018; PL 115-334, December 20, 2018, 132 Stat 4490.
7. *Id.*
8. *Id.*
9. https://www.animallaw.info/article/domestic-violence-and-pets-list-states-include-pets-protection-orders
10. 725 ILCS 5/112A-14 (criminal order of protection) and 750 ILCS 60/214(b)(11.5)(civil order of protection)
11. 510 ILCS 70

second and subsequent convictions with every day that the violation continues constituting a separate offence.[12] Section 3.01 of the Act further provides that an owner may not "*beat, cruelly beat, torment, starve, overwork or otherwise abuse any animal.*"[13] Further, owners are prohibited from abandoning any animal where it may suffer injury, hunger, or exposure, with violations constituting a Class A misdemeanor or a Class 4 felony for second or subsequent convictions.[14]

Effective January 1, 2019, the Humane Care of Animals Act was amended to provide:

> *"(c-10) Nothing in this Section shall prohibit a law enforcement officer from taking temporary custody of a dog or cat that is a companion animal that is exposed in a manner that places the dog or cat in a life-threatening situation for a prolonged period of time in extreme heat or cold conditions that may result in injury or death of the dog or cat or may result in hypothermia, hyperthermia, frostbite, or similar condition. Upon taking temporary custody of the dog or cat under this subsection (c-10), the law enforcement officer shall attempt to contact the owner of the dog or cat and shall seek emergency veterinary care for the animal as soon as available. The law enforcement officer shall leave information of the location of the dog or cat if the owner cannot be reached. The owner of the dog or cat is responsible for any costs of providing care to the dog or cat."*[15]

This amendment to the statute allows law enforcement personnel to take pets and companion animals into their custody and to reunite them with domestic violence victims and/or obtain medical treatment on an emergency basis.[16]

Practical Application

These different shifts in the law, as well as the expanding use of service and emotional support animals, make it critically important for all domestic violence professionals to engage in a dialogue with their clients regarding the existence of any animals in or out of the home, possible abuse directed toward those nonhuman companions and, where appropriate, to include those animals in any requested relief when filing a Petition for Order of Protection. Family law and other practitioners understand the type of background information necessary to assist a domestic violence victim, as well as the testimony and evidence required to successfully obtain an Order of Protection on their behalf, but many attorneys do not include any questioning in their initial consultations concerning animals. Questions to support a victim with an animal companion might include:

1. Ask the abuse victim about the existence of any pet, service animal, and/or therapy animal;
2. Inquire if the alleged abuser injured or harmed any animal or threatened to cause harm to any animal;
3. Confirm the length of time the abuse victim remained in or returned to the residence and/or the abusive relationship out of concern for their animal;
4. Determine if a pet required veterinary services as a result of any injury as well as the extent of those injuries;
5. Review the manner in which the animal abuse affected the human caregiver;
6. If applicable, include animal abuse in the Petition for Order of Protection;
7. Discuss what relief the victim needs both for themselves and their pet including custody of the animal with a restriction against the abuser from having contact with the animal.

If the abuser threatened to harm the victim's pet, it is necessary to obtain as much information as possible regarding those specific statements which may constitute admissions by a party opponent.[17] Additionally, inquiries should be made as to the existence of any witness who may have overheard the threats

About the Author



Kimberly Backman is the founder of Animal Rights and Advocacy of Illinois, a non-profit dedicated to the protection of animals, their legal rights, and their environment. She is also the 6th Congressional District Leader for the Humane Society of the United States, participating in ongoing federal, state, and local legislative animal protection advocacy.

12. 510 ILCS 70/17
13. 510 ILCS 70/3.01
14. 510 ILCS 70/3.01(d)
15. 510 ILCS 70/3.01(c-10)
16. *Id.*
17. 68 Ill.Adm. Code §1110.220

smart | strategic | secure

secure (sĭ-kyo͝or′) *adj.*

1. A situation that you can depend on because it is not likely to change.

2. Affording safety, as a place: *He needed a secure hideout.*

3. Feeling confident and free from fear or anxiety: *everyone needs to have a home and to feel secure and wanted.*

4. Firm and not likely to fail; stable.

[*syn.* defendable, defended, dependable, insured, protected, safe, shielded, sound, strong, trustworthy, watched over]

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> **Federal and state statutes have since been enacted and/or amended to address the intersection where pet ownership and domestic violence cross while new resources to support victim/pet owners have emerged providing attorneys with additional tools needed to advocate for their clients.**

made against the animal. In those instances where the animal was injured or killed, it is critical to determine if and when the pet received medical attention and whether or not it is appropriate to subpoena veterinary records or even the treating veterinarian.

Not every member of the bar or judiciary acknowledges the link between animal abuse and domestic violence directed toward their human caregivers. The testimony and evidence offered at trial should demonstrate the manner in which the abuser maintained psychological control over their victim by threatening or inflicting harm on a pet or service animal thereby linking the two forms of abuse together.

Finally, in addition to obtaining information necessary to move forward with the legal proceedings, it may be necessary to refer victims to pet friendly domestic violence shelters or other resources which can be difficult to locate especially for an individual with a stressful home life or relationship. Possible referral sources include:

Safe Place for Pets
On-site housing, Off-site Housing, and Community Programs for people and pets who need a safe escape from domestic violence.
safeplaceforpets.org

Chicago Metropolitan Battered Women's Network
bit.ly/briefBWN

PAWS Chicago
1997 N. Clybourn Avenue
Chicago, IL 60614
773-474-9426
bit.ly/briefPAWS

Conclusion

When representing a domestic violence victim, their personal safety and that of any children should always remain the focus. But if you are a practitioner that does not address the existence of any nonhuman companions, you may unintentionally allow the abuser to continue to maintain control over the victim you are trying to protect. Additionally, if you fail to secure a safe environment for your client's cat, dog, or other animal, he or she may return to the home of their abuser in an attempt to rescue their pet thereby subjecting themselves to further emotional and/or physical abuse. ☐

Illinois Law Update

Editor Tim Hickey

A Corporate Employee Working Primarily from Home May Make the Defendant Corporation a Resident of that County for Venue Purposes

***Tabirta v. Cummings,* 2019 IL App (1st) 172891-B (March 26, 2019)**

The First District Appellate Court held that a corporate employee working primarily at home made the corporate defendant a resident of that county for venue purposes because the employee's residence constituted "a fixed location purposely selected to carry on an activity in furtherance of the corporation's business activities." ¶ 30.

The plaintiff, a Cook County resident, filed suit in Cook County against a Missouri corporation, Glister Mary Lee Corporation (GML), claiming negligence relating to a vehicle accident that occurred in Ohio. Jurisdiction in Illinois was proper because GML's principal place of business is in Randolph County, Illinois. However, GML filed a motion to transfer venue from Cook County. GML argued that it was not a "resident" of Cook County under the venue statute (735 ILCS 5/2-101 (West 2014)) because GML does not own or lease property in Cook County, has no registered agent or other office in Cook County, and does not conduct substantial business in Cook County.

Section 102(a) of the venue statute provides that a corporation "…is a resident of any county in which it has its registered office or *other office* or is doing business." [emphasis added] 735 ILCS 5/2-102(a) (West 2014). The plaintiff argued that venue in Cook County was proper because GML maintained an "other office" in Cook County. James Bolton had worked as a part- time sale representative for the past five years from his residence in Cook County. GML had hired Bolton to have a "point person" in the Chicago area. Bolton was not a traveling salesman, but serviced three GML customers by email and telephone from his residence. The trial court denied the plaintiff's motion to change venue because Bolton servicing GML clients from Bolton's Cook County residence made GML a "resident" of Cook County under the venue statute.

The appellate court affirmed, reasoning that GML's lack of an ownership or lease interest in Bolton's residence did not change the fact that Bolton was servicing GML clients from an "other office" in Cook County. Instead of examining any interest of the corporation in the property, the appellate court concluded that, "the relevant inquiry was whether the property was a 'fixed location purposely selected to carry on an activity in furtherance of the corporation's business activities'" ¶ 30 (quoting *Melliere v. Luhr Bros., Inc.,* 302 Ill. App. 3d 794, 800 (5th Dist. 1999). The appellate court further noted that, "questions of venue are fact specific and that our conclusion is based solely upon the facts present in this case" – presumably to distinguish other cases where an employee only occasionally works from their home office. ¶ 32.

Illinois Unlawful Use of Weapons Statute's Ban on Possessing or Carrying a Stun Gun or Taser Violates Second Amendment

***People v. Webb,* 2019 IL 122951 (March 21, 2019)**

A unanimous Illinois Supreme Court held that the ban on possessing or carrying a stun gun or taser, under the Illinois Unlawful Use of Weapons (UUW) Statute (720 ILCS 5/24-1(a)(4) (West 2016)), violates the Second Amendment to the United States Constitution. Two DuPage County defendants, Webb and Greco, were charged with carrying concealed stun guns in violation of the UUW. The trial court granted both defendants' motions to dismiss after concluding that the UUW constitutes an unconstitutional complete ban on stun guns and tasers, rather than a constitutionally permissible regulation.

The State appealed to the Illinois Supreme Court, arguing that the UUW is not a complete ban on stun guns and tasers because subsection (a)(4)(iv) of the UUW exempts weapons "carried or possessed in accordance with" the Firearm Concealed Carry Act (Carry Act) (430 ILCS 66/1 *et seq.* (West 2016)). Both the trial court and the Illinois Supreme Court rejected the State's argument because the Carry Act restricts the issuance of a license to a concealed handgun, expressly excluding a stun gun or taser from the definition of "handgun." The Carry

Act exception to the UUW could not apply to a stun gun or taser because the stun gun or taser could not be "carried or possessed in accordance with" the Carry Act if the Carry Act expressly excludes a stun gun or taser.

Illinois Long-Arm Jurisdiction over Out of State Trustee
***Burgauer v. Burgauer,* 2019 IL App (3rd) 170545**
(Feb. 8, 2019)
A son brought a declaratory judgment action against his mother to determine the mother's right to continue acting as trustee of her own trust. The son (the contingent beneficiary) requested that the court remove the mother (the sole current beneficiary) as the initial trustee based upon the mother's alleged waste and mismanagement of trust assets from 2001 through 2016. The mother had moved from Illinois to Florida in 2013, then to Nevada in 2016.

The trial court dismissed the son's complaint for lack of personal jurisdiction over the mother who resided in Nevada. A majority of the appellate court reversed, holding that longarm jurisdiction existed under 735 ILCS 5/2-209(a)(11), for breach of any fiduciary duty within Illinois, and under subsection (a)(13), for ownership of an interest in a trust administered within Illinois.

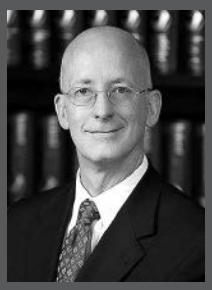
Under subsection (a)(11), the majority concluded that the complaint sufficiently alleged that the mother, while still living in Illinois, breached her fiduciary duty, as trustee, to the son, as a contingent beneficiary. The majority noted that a contingent beneficiary has a right to bring an action against a trustee to protect his potential interest in the trust from mismanagement and misappropriation. The trustee's fiduciary duties are not diminished because she is also the current beneficiary. Because the mother's alleged mismanagement of trust assets while living in Illinois gave rise to the son's cause of action, the majority held that the son's complaint property triggered specific person jurisdiction over the mother under subsection (a)(11).

Under subsection (a)(13), the majority concluded that the trust was administered solely in Illinois through October of 2013, when the mother moved to Florida. Even after the mother left Illinois, the trust was still at least partially administered in Illinois because certain trust assets were held in Illinois financial institutions.

The dissenting justice concluded that the son improperly disguised an action to declare his mother a disabled person under the Probate Act (755 ILCS 5/11a-2) (West 2016)) as claims for breach of fiduciary duty and waste of trust assets.

After-Acquired Title Doctrine May
Apply to a Conveyance with a "Sale"
***Trust Co. of Illinois v. Kenny,* 2019 IL App (1st) 172913**
(Jan. 23, 2019)
The First District Appellate Court held that the after-acquired title doctrine, as codified in § 7 of the Conveyances Act (765 ILCS 5/7 (West 2016)), may apply to a conveyance that does not constitute a "sale." This quite title action arose out of a dispute between the successor trustees of various trusts created by a now-deceased husband and wife (the Ruzickas). The named defendant, Kenny, was the successor trustee of the revocable trust of the late husband (the first spouse to die); the named plaintiff, Trust Company of Illinois, was the successor trustee of the revocable trust of the late wife (the second spouse to

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die); and the other plaintiff, Marquette Bank, was the trustee of a land trust created by the couple to hold their residence.

Title to the residence had been clouded by several attempts to convey the property in and out of land trusts. First, in 1976, the previous owners of the property (the Stachniks) conveyed the property into a land trust. Second, in 1977, the Stachniks, in their individual capacities, executed and recorded a warranty deed attempting to convey the property to the Ruzickas as joint tenants for $130,000. The Ruzickas thereafter continuously lived and paid all real estate taxes on the property for the next thirty years. Third, in 1981, the Ruzickas executed and recorded a deed in trust purporting to convey the property into their own land trust, with themselves holding the power of direction as joint tenants. Fourth, in 2010, in their individual capacities, the Ruzickas executed and recorded a deed in trust purporting to convey their interests in the property to themselves as trustees of their new revocable trusts.

Both the trial and appellate courts applied the adverse possession rule and the after-acquired title doctrine to conclude that upon the husband's death, his interest in the land trust passed to his surviving wife through joint tenancy; and upon the wife's death, her interest in the land trust passed to her revocable trust through her pour-over will. Both courts reasoned that (1) the Stachniks' 1977 attempted conveyance to the Ruzickas was invalid because the Stachniks' land trust was the actual owner of the property at that time; (2) the Ruzickas acquired ownership of the property by way of adverse possession seven years later in 1984, after the Ruzickas had attempted to convey the property to their land trust in 1981; (3) because the after-acquired title doctrine applied to the Ruzickas' 1981 attempted conveyance, the Ruzickas' land trust became the owner of the property in 1984; and (4) because the Ruzickas' land trust owned the property in 1984, the Ruzickas' 2010 attempted convey the property to their revocable trusts was invalid.

The main legal discussion in the appellate court's opinion was whether the after-acquired title doctrine applied to the 1981 attempted conveyance because that conveyance was not a "sale" of the property. The appellate court agreed with the circuit court that it did, meaning that the Ruzickas' land trust did in fact eventually take ownership of the property, even though it did not do so in 1981 as apparently intended. This case provides a good lesson in the dangers of changing title to real estate for estate planning purposes without jumping through all the proper hoops.

The trustee of the late husband's revocable trust had argued that the after-acquired title doctrine should not apply because § 7 of the Conveyances Act states, "[i]f any person shall ***sell and*** convey to another… [emphasis added]." (765 ILCS 5/7 (West 2016)). The appellate court concluded that the statutory language in § 7 was ambiguous because the same paragraph also included the phrases "sell and convey", "sale or conveyance", "grantee or vendee", and "grantor or vendor". Based upon the ambiguity of this statutory language, and the fact that Illinois courts apply § 7 to mortgages (which do not constitute "sales"), the appellate court held that the after-acquired-title doctrine applies to a conveyance into trust, absent a "sale." ☐

News & Events



25 InBrief
- By Terrence Benshoof

26 ISBA Update
- By Kent A. Gaertner

28 Legal Aid Update
- By Cecilia Najera

30 Law Day Celebrates the First Amendment: A Look Back at All Those "Fighting Words" Published in the DCBA Brief Over 30 Years
- By Ted A. Donner

36 Candidates Announced for DCBA Directors and Third Vice President

39 DCBA Update
- By Robert Rupp

41 Judges' Nite 2019 Hits a New High

47 Classifieds

48 Where to be with DCBA



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InBrief

By Terrence Benshoof

It's May!! In just another few months the last of the January snow will have melted!

As we wind down the DCBA fiscal year and head into our summer vacation season, we have a goodly number of new judges in place at the courthouse or out in the traffic venues. Many of those before whom we've practiced for years are now retired. The world of the Law moves ever onward.

Outgoing President **Matt Pfeiffer** tees it up one last time at the beginning of June, without another formal golf tournament. Incoming President **Stacey McCullough** takes the DCBA installation back to the more staid black tie event. But Matt will be happy; it's at a golf course!

The Editorial Board will be welcoming some new members. Candidates are being vetted as we write. **Chris Maurer** will take the helm of our stellar publication, to keep its quality and tradition top-notch.

InBrief will be hanging up the goose quill, chisel, and stone tablets at the end of this edition. The column was started by **Ted Donner,** who handed over the inkwell as he moved on to loftier DCBA positions. Currently the "who's who" of the DuPage legal community is cranked out from a windowless dungeon, scribed in the glow of a dimly flickering candle. What will follow? Be of good cheer brave souls! **Jay Reese** and **Dave Schaffer** have stepped forward to carry on the snarky tomfoolery that is *InBrief,* fearing nothing but a killer rabbit and an occasional libel suit! Is the E & O coverage premium paid?

The DCBA Year Wind-up

Judges' Nite, once again produced by **Christina Morrison,** and directed by **Nick Nelson,** put together another fantastic performance to pull in the funds that Legal Assistance needs for its vital tasks. The silent auction, live auction, and ticket revenues netted over $37,000, a new record.

People, Places

David Weiss is now an associate attorney with The Peskind Law Firm.

The Law Office of David W. Clark welcomes **Ninette Gregory** as an associate in the fields of personal injury, estates, and general practice.

Eric Telander has joined the Stogsdill firm, continuing his family law practice.

Selected as a Crane's 2019 Notable Residential Real Estate Broker is Glen Ellyn's **Pattie Murray.**

And since the DCBA is kinda Super, *InBrief* noticed:

Mirabella, Kincaid, Frederick & Mirabella, LLC, sported 9, with **Lynn Mirabella, George Frederick, Henry Kass** and President-elect **Stacey McCullough** making the Supers list, with a galaxy of Rising Stars, **Lindsay Stella, Megan Harris, Britni Bartik, Josh Bedwell,** and **Jolianne Alexander.**

Looking to the east, the Mevorah Law Offices have 4 Supers: **Steve Mevorah. Megan Gieseler, Jason Shore,** and **Matt Sperry.**

And continuing with DCBA Supers, we have **Dex Evans** from Woodruff, Johnson & Evans; **Peggy O'Connell** from A. Traub & Associates; **Shawn Kasserman** of Tomasik Kotin Kasserman; and Second Vice-President, **Wendy Musielak** and **Andy Cores,** of Esp Kreuzer Cores.

Meanwhile, *InBrief* is searching for his Superman costume and a phone booth…. Well, it's one way…! □

ISBA Update



A Busy Time for the ISBA Board

By Kent Gaertner

The ISBA Board of Governors will be meeting twice before the ISBA Annual Meeting June 13th to 15th at the Grand Geneva in Lake Geneva, WI. These meetings will be early April and mid-May. The Scope and Correlation Committee will also meet twice during that time frame. Items that will be discussed for possible action by the Board will include the following:

Leadership Structure

In my report published in the last issue of the *DCBA Brief*, I discussed the downward trend in petitions being filed to serve on the Assembly and even the Board of Governors. Approximately 40% of the vacant seats had no one file to run for the seat. In DuPage, we had just eight petitions filed for 16 Assembly seats available. One downstate Board of Governors seat also had no one file a petition to fill the seat. The Board will be discussing why this is happening and whether to downsize the Assembly. This would save significant costs ISBA incurs for reimbursement of lodging and travel for Assembly members. Attendance of elected Assembly members at the Annual and Mid-year meetings has also been declining. Proposals have also been made over the years to downsize the Board while still providing representation to ISBA members throughout the state in roughly proportional numbers of Board member to represented members. This will also be discussed.

Section Council and Committee Membership

The Scope Committee has also been discussing possible changes to the rules on appointing members to various Section Councils and Committees. In many of these Sections/Committees there are more requests to serve than there are spots available. Bringing new blood into these entities is essential to keeping new leadership coming into ISBA. The Sections/Committees produce the product the ISBA sells. They lead the way in suggesting new legislation or rules of practice. They lead the way in continuing legal education. They lead the way in reviewing proposed legislation that comes out of Springfield. They lead the way in connecting ISBA with the public and non-attorney groups interested in various areas of law.

At the same time, to make the Sections/Committees the best they can be, you need experienced members who have the leadership skills, experience and desire to make things happen within the Sections/Committees. It is very difficult to tell a hard-working experienced leader that they can no longer be a member of the group because they have been there too long. One of the ideas is to have a second level of Section/Committee membership that allows participation without the right to vote on positions the Section/Committee takes. Finding a way to balance these interests will be discussed by the Scope Committee and the Board prior to the Annual Meeting in June.

Video Conferencing of Meetings

Dennis Orsey, Chair of the Scope Committee and ISBA 2nd Vice President brought forth the idea of requiring each Section/Committee to video conference at least one of their meetings on a trial basis for one year. The goal, of course,

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 Pfeiffer Law Offices, PC where he concentrates his practice in bankruptcy and workouts. He was president of the DCBA in 2009/2010

is to increase meaningful participation and take advantage of technologies that are easily available at the Springfield and Chicago offices. After the one-year trial, the Board will evaluate the policy again.

New Food Law Section Council

The Scope Committee and the Board have been asked to consider the creation of a new Section Council for Food Law. I must admit, at first blush, I thought why would we want that to be its own Section? We already have a Section on Agriculture. However, in reading the supporting memorandum by the proponents of the proposal, I realized that, in actuality, this area covers an immense amount of ground. Consider the following areas of regulation which would be of interest to that Section:

1. Food handling, safety and storage.
2. Consumer protections and labeling.
3. Cottage food industries such as small brewers and distillers.
4. Food technology such as creating in vitro meats.

I would be happy to provide a copy of the detailed memorandum referred to above outlining the numerous legal areas which a Food Law Section would be involved in. The Scope committee has sent this proposal up the ladder to the Board for its consideration.

Creation of the "Carole Bellows Advocate for Women Award"

The Standing Committee on Women and the Law has asked the Scope committee to consider adding a new award to those ISBA currently gives annually. The proposed award will be the Carole Bellows Advocate for Women Award. It will "honor an individual that raises awareness to the unmet legal needs of women, advocates for women addressing women's issues or promotes involvement by women in the legal community at all levels". Two awards will be given annually. One will be given to a recipient licensed less than 15 years and the second to a recipient licensed 15 years or more. Past chairs of the Committee will be ineligible for five years after they leave the Committee chair position. This will also be referred to the Board at its next meeting.

Lodging reservations are now being taken for the June 13 through 16 Annual Meeting at the Grand Geneva. Please consult the ISBA website for full details. ☐

LRS Stats

2/1/2019 – 2/28/2019

The Lawyer Referral & Mediation Service received a total of **1035 referrals, including 35 in Spanish** (909 by telephone, 123 online referrals and 3 walk-ins) for the month of February.

We receive calls in the following areas but currently have no attorneys in these areas: Civil Rights, Health Care Law and Mental Health. If you practice in these areas and would like to join LRS or add any of these areas to your current profile, please call **Barb Mendralla** at (630) 653-7779 or email bmendralla@dcba.org.

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

Administrative	1
Animal Laws	0
Appeals	9
Bankruptcy/Credit Law	39
Business Law	9
Collection	70
Consumer Protection	9
Contract Law	1
Criminal	310
Elder Law	23
Employment Law	59
Estate Law	58
Family Law	169
Federal Court	0
Government Benefits	9
Immigration	3
Insurance	17
Intellectual Property	2
Mediation	0
Military Law	0
Personal Injury	115
Real Estate	109
School Law	2
Social Security	14
Tax Law	3
Workers' Compensation	4

Legal Aid Update



Judges' Nite 2019: Cutting the Cord and Breaking Fundraising Records

By Cecilia Najera



Jim Reichardt gives (almost) his all for the Legal Aid cause.

Judges' Nite has come and gone, but Judges' Nite 2019 was one that will be remembered by Legal Aid Supporters for many years to come. This year's musical comedy, "Cutting the Cord," was once again directed by **Nick Nelson** and produced by **Christina Morrison**. As always, the Judges' Nite Band, cast, and crew provided us with an evening of great entertainment complete with parodies to tunes from "Hairspray," "Rocky Horror Picture Show," "Game of Thrones," and even a Beatles Medley. Something for everyone! The Judges' Nite Band proved once again that they are nothing less than stellar.

Judges' Nite 2019 was full of hilarious media and video complete with "Game of Thrones" spoofs. The Judges' Nite crew also outdid themselves this year and acquired a dragon and created their own Iron Throne to add to this year's visual treats including a battle scene between our county board members. This year's show was full of great energy and a night full of great times. It even included a huge shout out to the women of our judiciary "Lady Marmalade" style and a semi-strip tease done by **Jim Reichardt.**

The Silent and Live Auctions continue to grow along with the Cash Call! This year the Cash Call garnered over $10,000 in straight donations. Legal Aid is so grateful for everyone that attended and made bids and donations in all forms. For just the second time, the Silent Auction was put on line ahead of the show, thanks to our website sponsor, **OVC Online Marketing.** The investment paid off because the Silent Auction alone brought in $18,603 – over $2,000 more than last year. The Live Auction brought in an additional $6,700. I would especially like to thank **Lisa Giese, Christina Morrison, Mary Downard** and **Emlyn Bertsche** for investing so much of their time and energy to help ensure that both auctions brought in as much income as they could Again, I was astounded by the generosity of our bidders and donors. From the Live Auction, **Denise** and **John Pcolinski** purchased the Hassle-Free Party to be hosted at **Ask Aunt V's Professional Kitchen; Patti Mellot** from OVC will enjoy a week's condo stay in Maui donated by **John** and **Sara Malm;** and **Carol Asselmeier** purchased a full week timeshare anywhere in the world donated by **County Court**

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.

Reporters and **Gloria Apostolos-Siolidis. Andy Cores** was most generous and went home with a few Silent Auction items and made huge donations to Legal Aid. Our 50-50 Raffle raised $1,940 for Legal Aid, and the winner, **Daniel Cummings** went home with some extra spending money. **Pete Economos** won the second chance raffle prize of a $100 gift card to DOC Wine Bar and PRP In House Wine Tasting Experience. This year Judges' Nite amassed a record setting net proceeds of $37,477.16 total for Legal Aid (over $14,000 more than last year)! This would not be possible without our most generous sponsors: **Pattie Murray; Schiller DuCanto and Fleck; Esp, Kruezer, Cores & McLaughlin; Ice Miller; Momkus LLC; Citywide; Kollias & Giese; Chicago Title; Law Office of Mark Bishop; OVC; Huck Bouma; Monahan Law Group; Mary McSwain; McNees and Associates; Kim DiGiovanni; and Burke Warren Mackay & Serritella.**

Judges' Nite is the epitome of the collaborative and generous spirit of the DCBA. The membership attends and their laughter breathes energy into the show. The writers, band, cast, and crew invest countless hours in the show practicing two nights a week and every Saturday for at least two months. A team of people solicit dozens of individuals and businesses to donate to the auctions. 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 our community's efforts to help our less fortunate neighbors. Your investment stays right here in DuPage. THANK YOU! □



Law Day Celebrates the First Amendment:

A Look Back at All Those "Fighting Words" Published in the DCBA Brief Over 30 Years

By Ted A. Donner

It is a fitting moment to celebrate the DuPage County Bar Association's magazine, the *DCBA Brief*. Founded in 1989 by its first editor, **Paul Brinkman,** the *DCBA Brief* is now celebrating 30 years of publication just as the American Bar Association is asking lawyers throughout the country to honor the Law Day theme, "Free Speech, Free Press, Free Society." This magazine has sometimes been a lightning rod for debate over the role of a free press, it thus bears remembering, but it has also provided an important, vital forum for the members of this community.

A Lightning Rod for Debate

In June of 2000, one criminal defense attorney used the *DCBA Brief* as a forum to criticize those who pursued charges against a group of lawyers and judges who had worked on the prosecution of a murder case in which it turned out there had been bad evidence. He wrote that, "[t]he entire case brought against the DuPage Seven... rested on the testimony of a self-admitted pathological liar. Given such shoddy evidence, the question must be asked: why were these defendants ever indicted in the first place?"[1]

A law student at Northern Illinois University School of Law wrote an article for the *DCBA Brief* in which he focused on how politically motivated the Supreme Court was in deciding *Bush v. Gore*.[2] "While there are several decisions of the Supreme Court that are too clearly motivated by ideological bias rather than objective decision-making," he wrote, "no other case of recent memory evoked as much controversy as *Bush v. Gore*. The 2000 Election stands as the pinnacle of impermissible judicial interference in a political decision that should have been left to Congress or to Florida's judiciary."

And DuPage County Chairman, **Dan Cronin,** while still serving as an Illinois State Senator, co-authored a piece for this magazine in which he sharply criticized one recent Supreme Court case. He and **Peter Baroni** wrote, for example, that "[t]he watershed change in constitutional law brought about by [the Court in this instance] has wrought havoc on criminal justice in Illinois [and is] ...a harbinger of likely increasing confusion."[3,4]

1. Patrick Tuite, *The DuPage Seven Case From My Perspective*, DCBA Brief (June 2000).
2. *Bush v. Gore*, 531 U.S. 98 (2000).
3. Senator Dan Cronin and Peter Baroni, *The Apprendi Problem: House Bill 1511's Intent in the Face of Unclear Precedent and Disparate Case Law*, DCBA Brief (March 2001), citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
4. D.J. Evans, How One Overcomes Temptation: When Members of the Supreme Court Abandon Their Political Ideologies, DCBA Brief (March 2005).

Over the years, the *DCBA Brief* has provided a forum for such commentary, and for the great many political, legal and philosophical debates which have come with it. **Matt Caruso** wrote a number of stories on "truth," for example, which stirred debate long before "truthiness" was even recognized as a word.[5] The magazine's editors and authors have argued with each other, both in conference and in print, over who should be sitting on the bench, who should be on the cover, and the subtext in films like *The Passion of the Christ*. Past bar presidents and executive directors have used the pages of this magazine to argue over how the DCBA should be serving its members.[6] And members of the Editorial Board and DCBA Executive Committee have argued over topics as fundamental as whether the magazine should or should not have autonomy in deciding what should see print.[7]

Indeed, the *DCBA Brief* has long been an important force in this community. The association's members reference it, in surveys conducted year after year, as an important reason for belonging to this organization. Its audience is frequently expanded by lawyers who make it available to their clients in waiting rooms throughout the county. And, in recent years, the *DCBA Brief* has been repeatedly recognized by the National Association of Bar Executives with its Luminary Award for excellence in publication.[8]

Historical Focus on the First Amendment

A number of stories in the *DCBA Brief*'s first few years touched on the importance of the First Amendment. In April 1991, for example, **Joseph Sjostrom** wrote on *Covering the Courthouse; A Newspaper Reporter's Perspective*. **Stephan Brundage** had the honor of writing the first *DCBA Brief* article to directly focus on the First Amendment, however, when his article, *Fighting Words and the First Amendment: It's Time to Take the Punch out of Their Protection*, appeared in the September 1992 edition.

In that first article, Brundage argued in favor of one specific limitation on the First Amendment. Concerned with the aggravations and risks which police endured when people they were confronting would call them names or threaten them, he observed that "Illinois courts continue to apply the wrong test when police officers are confronted with 'fighting words.'" Brundage distinguished between an objective standard first enunciated by the Supreme Court in 1942[9] and a more subjective standard adopted by the Court some 30 years later.[10] Noting that a subsequent disagreement could be found among the state appellate courts with regard to when "fighting words" could be properly restricted by the government, Brundage went on to say:

> *"We, as a society deem it a more serious offense if an otherwise simple assault or battery is directed to a police officer, instead of a citizen. To change the rules in the context of fighting words is inconsistent, if not illogical.... The objective standard offers consistency and equal protection to everyone from being attacked by verbally abusive language. Justice Jackson captured the idea when he said, '[t]he choice is not between order and liberty. It is between liberty with order and anarchy with either. There is danger that, if the Court does not tempter its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.' Practical wisdom beckons Illinois courts to resurrect the original fighting words doctrine."*[11]

Since Brundage wrote those words almost 30 years ago, the Second District has indeed come to essentially agree with him, concluding as recently as this last February that there are circumstances when the First Amendment does not protect a criminal defendant from a conviction for disorderly conduct.[12] The Court thus found that, "[w]ords that are expressed in such an unreasonable manner as to provoke, make or aid in making

5. Matthew T. Caruso, *Some Truths About Lies - Sympathy for the Liar,* DCBA Brief (March 2011). *See also* Oxford Dictionary, Truthiness. n. "The quality of seeming or being felt to be true, even if not necessarily true."
6. The Hon. James F. McCluskey, for example, prior to his term as ISBA President, wrote *How Bar Associations Can Be Relevant to New Lawyers in Today's Legal Climate* for the April 2016 edition. The DCBA's Executive Director at the time, Leslie Monahan, penned a "DCBA Response."
7. The DCBA Bylaws, which were amended in 2012 after one such debate, now provide specifically that the Editorial Board has "sole control and authority over the content and publication of the *DCBA Brief* magazine." *See* DCBA Bylaws, Sec. 10(C).
8. The magazine received its first Luminary during Eric Waltmire's tenure as Editor-in-Chief (2011-12). The *DCBA Grief*, an annual parody issue edited in its early years by Melissa Piwowar, was granted its own Luminary in 2013 for an issue which focused on criticizing "The Powers That Be." And, most recently, the magazine won the award in 2016, following Christine McTigue's stint as Editor-in-Chief.
9. Stephan Brundage, *Fighting Words and the First Amendment: It's Time to Take the Punch out of Their Protection*, DCBA Brief (Sept. 1992), *citing Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942)
10. Stephan Brundage, *Fighting Words and the First Amendment: It's Time to Take the Punch out of Their Protection*, DCBA Brief (Sept. 1992), *citing Gooding v. Wilson*, 405 U.S. 518 (1971).
11. Stephan Brundage, *Fighting Words and the First Amendment: It's Time to Take the Punch out of Their Protection*, DCBA Brief (Sept. 1992), *quoting Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).
12. *People v. Swenson,* 2019 IL App (2d) 160960, ¶25 (2d Dist. 2019), citing *Schenck v. United States*, 249 U.S. 47, 52 (1919) and *City of Chicago v. Morris,* 47 Ill. 2d 226, 230-31 (1970) ("Defendant next argues that, because his words were not lewd, profane, obscene, libelous, 'fighting words,' or 'true threats,' they were protected by the first amendment, such that the disorderly-conduct statute cannot be read as criminalizing them. We disagree. Words that are expressed in such an unreasonable manner as to provoke, make or aid in making a breach of peace do not come within the protections of the first amendment.... Indeed, as Justice Holmes famously observed, one cannot falsely yell 'fire' in a crowded theater").

a breach of peace do not come within the protections of the First Amendment."[13]

So, has this magazine's role been to honor the First Amendment most by advocating its limits? Well, if Stephan Brundage thought the First Amendment should be construed in a narrower way than that embraced by the Supreme Court, **Ryan Dowd** struggled with a much different problem some years later when he first wrote for the magazine. Dowd, whose first article appeared in the *DCBA Brief* in November 2002 (while he was a student at Northern Illinois University School of Law) appeared to think the First Amendment's protections could use some emboldening when he concluded that an "American Civil Religion" had developed from our jurisprudence.

A judicially recognized quasi-religion had emerged, he posited, which restricted some religious speech in the halls of government but inexplicably still allowed for Christmas Trees and money inscribed with "In God We Trust."[14] He wrote that:

> *"The courts have simply gotten it wrong. They pile up all the sticks and twigs of religious elements that have existed in our government for the last two centuries and then use that pile to justify the constitutionality of each individual stick. The end result is neither a masterpiece of logic nor constitutionally acceptable. It gets to the very heart of what the First Amendment seeks to protect, namely the "establishment" of religion by government. One can only hope that the Supreme Court will one day come to its senses and use this pile as the funeral pyre for American Civil Religion."*[15]

Dowd was one of a number of NIU students who wrote for the *DCBA Brief*'s "Northern Exposure" series and have since gone on to do some invaluable public service work. Dowd himself currently serves as the Executive Director of the Hesed House in North Aurora, an organization dedicated to "ending homelessness - one person, one family at a time." Others include **Charlotte LeClercq,** who wrote *The Status of Child Pornography in Illinois after Ashcroft v. Free Speech Coalition* for the May 2004 edition and went on to work for the Winnebago States Attorney's office, and **Michael T. Delcomyn,** who wrote *Martha Stewart v. 'Son Of Sam' and the First Amendment* in October of that same year, and now serves as General Counsel for the Illinois Department of Innovation & Technology.

In the intervening years and the years since, a great many other legal professionals have written on the subjects of free press and protected speech for this magazine. **Stephen P. Trimper** wrote *The New Illinois Right of Publicity Act* for the March, 1999 edition. **Christina Schmucker** wrote *Picture This: DuPage County Court Bans Camera Phones* in December, 2004. In January of 2008, **Mark Perlaky** provided *An Illinois Court's Response to the "Day of Silence."* **Abigail M. Chiesa** wrote *"Don't Ask, Don't Tell" – What Lies Ahead for Gays in the Military* for the July 2009 issue. And the October 2011 edition had two stories on speech; **James H. Knippen II** and **Elizabeth M. Farmer** authored *Does Prayer before Public Bodies Violate the Establishment Clause of the First Amendment?* and **Carrie L. M. Thompson** contributed *Let's Talk About Sext: Illinois' Legislative Response to Sexting.*

Brent Christensen wrote *Sacrifice, Lies, and the First Amendment: How the Supreme Court Struck Down the Stolen Valor Act* for the November 2012 edition. **Matthew J. Hafeli** wrote *Say What?!: A Look at the Right to Speak at Public Meetings Under the Illinois Open Meetings Act and the First Amendment* in January, 2013. And most recently, in June 2013, DCBA counsel **Charles G. Wentworth** authored *Don't Deface My Painting! Artists' Rights Under Illinois and Federal Law.*

Looking Forward

When Paul Brinkman arrived at Ki's on North Avenue this last November, to attend the annual gathering of past presidents of the DCBA, he wasn't moving quite as quickly as he had been when he served as the founding editor of this magazine 30 years ago. But he sure still cared about it. He paid attention to how the graphics were changing, what was being written about and by whom, and how things were generally evolving at the *DCBA Brief*.

"The committee that put out the magazine," Brinkman recalled when we spoke with him, "it was the most non-ego driven group I've ever been around.... Now, 30 years later... that's a long time."

"It's crazy," he continued when we asked how the magazine got started, "I fell off my horse. No, actually, the credit for that goes to one of our former presidents, the president of the bar that year, **Lester Munson.** It was a strange thing. He was

13. *People v. Swenson,* 2019 IL App (2d) 160960, ¶25 (2d Dist. 2019).
14. Ryan Dowd, *In a Monotheistic Non-Sectarian Civic Deity We Trust: The Establishment Clause of the First Amendment & Governmentally Created American Civil Religion*, DCBA Brief (November 2002).
15. Ryan Dowd, *In a Monotheistic Non-Sectarian Civic Deity We Trust: The Establishment Clause of the First Amendment & Governmentally Created American Civil Religion*, DCBA Brief (November 2002).

elected president and then he came and told me he'd gotten an offer to serve as the editor for a sports magazine. It was Lester who had the imagination and the guts to think that what we had been putting into a little bi-fold newsletter could be much bigger and better and actually cost less if we handled it right."

Brinkman attributed Munson's decision to invite him to be the first editor to the fact that he "hung around" and apparently had some skills. "I believed the dream too," he told us. "I believed that this little bi-fold could become something that really looked good and was good in content for such a strong bar association. Articles about substantive matters that were professionally written and well edited, that's what I considered good content."

"I wish I could say I had something to do with **Hollis Webster** being chosen as the next editor after me," Brinkman added. "She's such a good person and she was such a good editor. When she took over, I just backed away and did whatever I could to help her do what she wanted to do and that was easy to do with her. Like the other editors since then, the people on the committee, they've kept it up. I'm very pleased with the progress of the magazine after all these years."

"There were times when people were a little bit jealous of the control of the content," he concluded. "There were some people who thought that was too big a mouthpiece for one group to control. And it was very much a valuable mouthpiece. We tried to keep the content independent and to make sure the writers were people from across the bar association so the focus would be on the article, not on politics. We had a strong committee organization at the time and whoever served as the chair was in an important role, we worked with them to get the articles for each issue. Then I'd talk with the Chief Judge frequently, at least once a month, to see what he thought. It seemed like the judges appreciated what we're doing. We were conveying information about the legal system in DuPage which was hard for them to convey."

As the American Bar Association emphasizes in its promotional material for this year's Law Day theme, "Free Speech, Free Press, Free Society," it will always be important for us to maintain free and open forums in which we can exchange ideas and engage in debate:

> *"In the United States and around the world, freedom of speech and the press are among the most important foundations for a free society. Free speech and free press are prominent topics in public discourse and litigation. It is impossible to imagine a free society without these individual liberties, yet historical and current debates surrounding them continually challenge us to consider their boundaries and resilience. Changes in technology have reshaped how free speech and free press work in the everyday world."*

Within that community which is the DuPage County Bar Association, that forum is the *DCBA Brief,* a long-standing, critically acclaimed and award-winning publication which, over 30 years, has certainly challenged the boundaries and resilience of these liberties. They may not be fighting words, the words we find in these pages, but they should always be words that force us to think, to deliberate and to struggle with what we think we know. And that's 30, folks. ☐



DCBA Affinity Discount Programs

DCBA has partnered with businesses to provide exclusive discount rates on products and services that benefit attorneys and their firms. The programs are only available to DCBA members and a firm must have at least 50% of their attorneys as members with DCBA in order to qualify for the discounts. Please be sure to mention that you are a DCBA member or use the provided links to ensure you are getting the lowest rate. If you have questions on the Affinity Program, contact DCBA at 630-653-7779.

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Career Center - Job and Internship Posting and Searching

The DCBA has partnered with Community Brands to provide a state of the art online Career Center. Whether you are a student looking for that all important first job, an attorney or paralegal looking to make a change, or a hiring partner looking to fill positions in your firm, the career center has a solution for you. Job or internship seekers can create a profile, search listings and post resumes for no charge. DCBA members seeking to fill a position enjoy a significant discount on all postings and recruitment services. **Thirty-day internship postings are always free** so make the DCBA part of your intern recruiting. Visit the DCBA Career Center at www.dcba.org/careers.

Staples Advantage: Office Products and Services

DCBA and Staples Advantage are excited to provide you with a cost-saving program to help keep your office running smoothly. Staples has all the products and services you need, at great savings. Staples advantage is committed to making it easy for DCBA members to buy a wide range of office products, including supplies, technology, facilities, and business services. As a member, advantages include DCBA negotiated pricing, a full range of products and services, easy online ordering, next-business day delivery and award-winning customer service and dedicated account management. To register for the DCBA/Staples Program contact Kevin Schoepke, email: Kevin.Schoepke@Staples.com.

To see all DCBA affinity partner opportunities, log in to the dcba.org website.

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Welcome

Welcome to the new DCBA members.

Attorney Members: Kevin M. Gallaher, Winick & Gallaher, P.C; Thomas L. O'Carroll, Hinshaw & Culbertson LLP; Eric James Malnar, Huck Bouma PC.

Affiliate Member: Elliot L Hershik, Supporting Strategies | Chicago Far West Suburbs; David R. Ratkovich, ETS Intelligence, LLC.

Legal Community: Sabrina Mazur, Puchalski & Martyn.

Students: Corey Joseph Fotre; Kristen Tomcza; Karin Mandigo; Anastasiia Hul; Julie Van Dyke; Angela Meller.

Candidates Announced for DCBA Directors and Third Vice President

The deadline for nominating petitions closed as this issue was going to press. These are the biographies candidates submitted with their nominating petitions, printed in the order in which they appear on the ballot according to a random drawing conducted by DCBA. There is one Third Vice President position, three Board of Director positions and one New Lawyer Director position up for election. Members may vote for up to one 3rd Vice President, up to three Director and one New Lawyer Director candidates. Information to vote by electronic ballot was distributed on or around April 10, 2019 per DCBA bylaws. 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 p.m. on May 6, 2019.

For more information, contact the Bar Center at (630) 653-7779 or visit dcba.org.

3rd Vice President – 1 Vacancy



James L. Ryan of Roberts & Caruso is a current member of the DCBA Board of Directors, a member of the Editorial Board of the *DCBA Brief*, a past editor-in-chief of the DCBA Brief, and a member of the DCBA Lawyer Referral Service steering committee. Jim has also served the association as a speaker for Estate Planning and Business Law Section meetings and as a mentor through the Mentorship Program. If elected, Jim's experience in the DCBA's leadership will allow him to effectively serve as Third Vice President.



Raleigh D. Kalbfleisch is a solo practitioner and active member of the DuPage County Bar. She held the following leadership positions: 2017-18 President of the DuPage Bar Foundation and 2016-17 President of the DuPage Association of Women Lawyers. She is a current Editorial Board member and the 2014-15 Editor-In-Chief of the *DCBA Brief* Magazine. She is a New Lawyer Mentor, 2-time winner of the DuPage Legal Aid *Pro Bono* Service Award, a Small Business Owner, Member of the DCBA and ISBA since 2001, a former DuPage County Special Assistant State's Attorney and trained Guardian *ad litem* and Arbitrator in DuPage County.



Angel M. Traub is the Principal of A. Traub & Associates, Lombard and Arlington Heights, practicing in Family Law, Adoption, Estates, Guardianship and Real Estate. She is a strong advocate for children. She is qualified as a GAL in domestic relations, adoption and guardianship. She is also a certified mediator. Past President of DAWL 2007-2008, DCBA Board of Directors 2007-2012, Current DCBA Assistant Treasurer, Family Law Section Chair, Real Estate Section Chair, Judiciary Committee member and Judges' Nite Producer 2009-2014. Recipient of two DCBA Directors Awards and four DLAF *Pro Bono* Awards. Current member of the College of DuPage Foundation Board.

Board of Directors – 3 Vacancies



James S. Harkness It is my pleasure to request your vote to continue serving as a Director for the DCBA. I have served the Bar for fourteen years on the following: Director, 2015–Current; Planning Committee, 2013–2017; and both Chair and Vice Chair of CLE, 2015–2017; Business Law Committee, 2013–2015; Law Day Committee, 2013–2014; Professional Responsibility Committee, 2009–2011; Civil Law & Practice Committee, 2007–2009; Alternative Dispute Resolution Committee, 2006–2008. If you would like a list of ISBA, community, political and charitable activities, please let me know. Thank you for your consideration.



Joseph J. Bogdan is a Pharmacist and an Attorney who is active in healthcare and legal associations. He understands the importance of the role of an Association's Board of Directors; serving the past five years on the Board of the Illinois Pharmacist Association. He would like to expand his involvement with DCBA by joining its Board. Dr. Bogdan has been involved with the DCBA Health Law Section, serving on its Council and presenting several CLE sessions. His legal practice focuses on healthcare matters. He represents healthcare practitioners and entities before regulatory agencies including the Illinois Department of Professional Regulation, DEA, etc.



John J. Pcolinski, Jr. is a jurisprudential monument (in his own mind). Prominently endorsed: "His leadership skills are best described as droll," MTS Wheaton. "Once or twice yearly he shows flashes of mediocrity in his accomplishments," DHP, Naperville. "He regularly cracks himself up," NJN, Villa Park. "Our Mom is a pretty good lawyer," EEP and MSP Bloomington, IN. "Not going to happen on my watch." DJG Wheaton. If reelected, John promises to keep coming to meetings, mostly on time, "because it's only a short walk from my office."



Jay M. Reese University of Illinois College of Law 1975. IL Commerce Commission (1975-1976), Asst. Public Defender (Cook) 1976-1977, Asst. IL Attorney General (1978), in private practice since 1979. Editor of *DCBA Grief* in 2017 and 2018 and past Chair Court Facility and Library Committee, Professional Responsibility Committee, and the Bankruptcy Section. "I am looking forward to bringing a spark of energy and humor to the Board of Directors and continuing the Board's work to achieve practice excellence and camaraderie among the members. I will promote inter-association activities and continue support for the Bar Foundation through new and creative fundraisers."

New Lawyer Director – 1 Vacancy

Notice is hereby given to the DCBA membership that no nominations were made prior to the March 29th nomination deadline for the position of New Lawyer Director. Pursuant to the DCBA Bylaws, the Board will fill this seat by appointment at their regular meeting scheduled for May 21, 2019 at 4:30 p.m. Any DCBA Attorney Member in good standing who will have been admitted to the practice of law for seven years or less on July 1 is eligible to be considered for this appointment. Those desiring to be considered for appointment by the Board should submit a 100 word statement of nomination outlining his or her qualifications for service as a Young Lawyer Director to the DCBA Executive Director at rrupp@dcba.org, no later than the close of voting at 5 p.m. on May 6th.

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What Are We Missing?
A Town Hall Conversation on Diversity & its Impact on the Legal Profession

Thursday, May 16th 2019

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2:00pm-5:00pm (1:30 Registration)

Arab American Bar Association of Illinois

Chinese American Bar Association

NWSBA
NORTHWEST SUBURBAN BAR ASSOCIATION

Moderator: Hon. Vincent F. Cornelius, 12th Judicial Circuit (Will County)

Speakers

Joseph Flynn, Associate Director for Academic Affairs - Northern IL University Center for Black Studies

Jennifer Adams Murphy, Shareholder and Senior Attorney - Wessels Sherman

Alex Karasik, Associate - Seyfarth Shaw LLP

Topics for Discussion

The Past: Where are we and how did we get there?

The Present: How is diversity shaping the current landscape in the workplace?

The Future: Where should we go and how do we get there?

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For full agenda and online registration, visit www.dcba.org/diversity

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DCBA Update



Bar Leadership Institute Thoughts for All Leaders

By Robert Rupp

The American Bar Association Bar Leadership Institute was held downtown March 13–15, and this year I had the pleasure of attending with DCBA President Elect **Stacey McCullough**, Assistant Executive Director **Emlyn Bertsche** and over 400 leaders and staff members from bar associations around the country. The program is always practical, timely and valuable, and the 2019 edition was no exception. I always come away from BLI revived and renewed with new ideas and insights, some of which I take this column to share with you.

The role of a Bar Leader is to increase clarity, capacity and confidence to accelerate sustainable progress.

This observation, made by Jeffrey Cufaude of Idea Architects, rung very true for me. The most effective chairs, officers, and directors I have seen or had the pleasure of working with lived this role out in all that they did. While I certainly took tips away to do more of this myself as the DCBA's Executive Director, nearly all of you are in some leadership role whether it is in the DCBA, in your workplace or out in the community. Ask yourself, are you clearly communicating with those you are leading? Are you burning off or building on resources? Does your leadership give a reason to follow? The honest answers to these question will determine the prospect of the sustainable progress for which any leader strives.

What does leaving a place better than you found it really mean, and how uncomfortable are you willing to be to get there?

Mary Byers is best known for her books *Race for Relevance* and *The Road to Relevance*. Her revolutionary work in the area of organizational relevance has changed the way associations look at themselves, but in her presentation, she pointed out that the desire of volunteer leaders to "leave the association better than I found it" has been a common thread across the history of associations. What has changed is the way "better" is measured. Sure, the finances may be better. Sure, membership may be larger. But is the organization truly better off? Is the "better" the sort of sustainable progress mentioned above? This year, under the leadership of DCBA President **Matt Pfeiffer,** we have taken some chances and experimented with new programs, replacing some time-honored traditions. The success metrics are still being measured on many of these, and some of the change was uncomfortable to say the least, but we took that all important first step. Leaders need to always push the comfort zone if they are to make meaningful and lasting improvements on any organization.

Law is a profession based on avoiding risk and cashing out, not chancing innovation with an eye beyond the horizon.

ABA Deputy Executive Director James Dimos shared this observation, somewhat tongue-in-cheek, as the set up to his sharing of case studies in risky projects taken on over the years in his various bar leadership roles. As with all humor though, it springs from grains of truth. Significant research (see the work of Dr. Larry Richard at Lawyer Brain) tells us that lawyers score much higher than the general public in skepticism, urgency and abstract reasoning. Lawyers also have been shown to have the lowest resilience (bouncing back or dealing with a setback) of any profession. These traits can be challenges to innovative, creative thinking, but when tempered, they provide valuable tools for evaluation and deliberative thinking.

This is just a sampling of the great thinking that comes from this program and I thank the Association for supporting the attendance of staff and member leadership at this program each year. ☐

About the Author

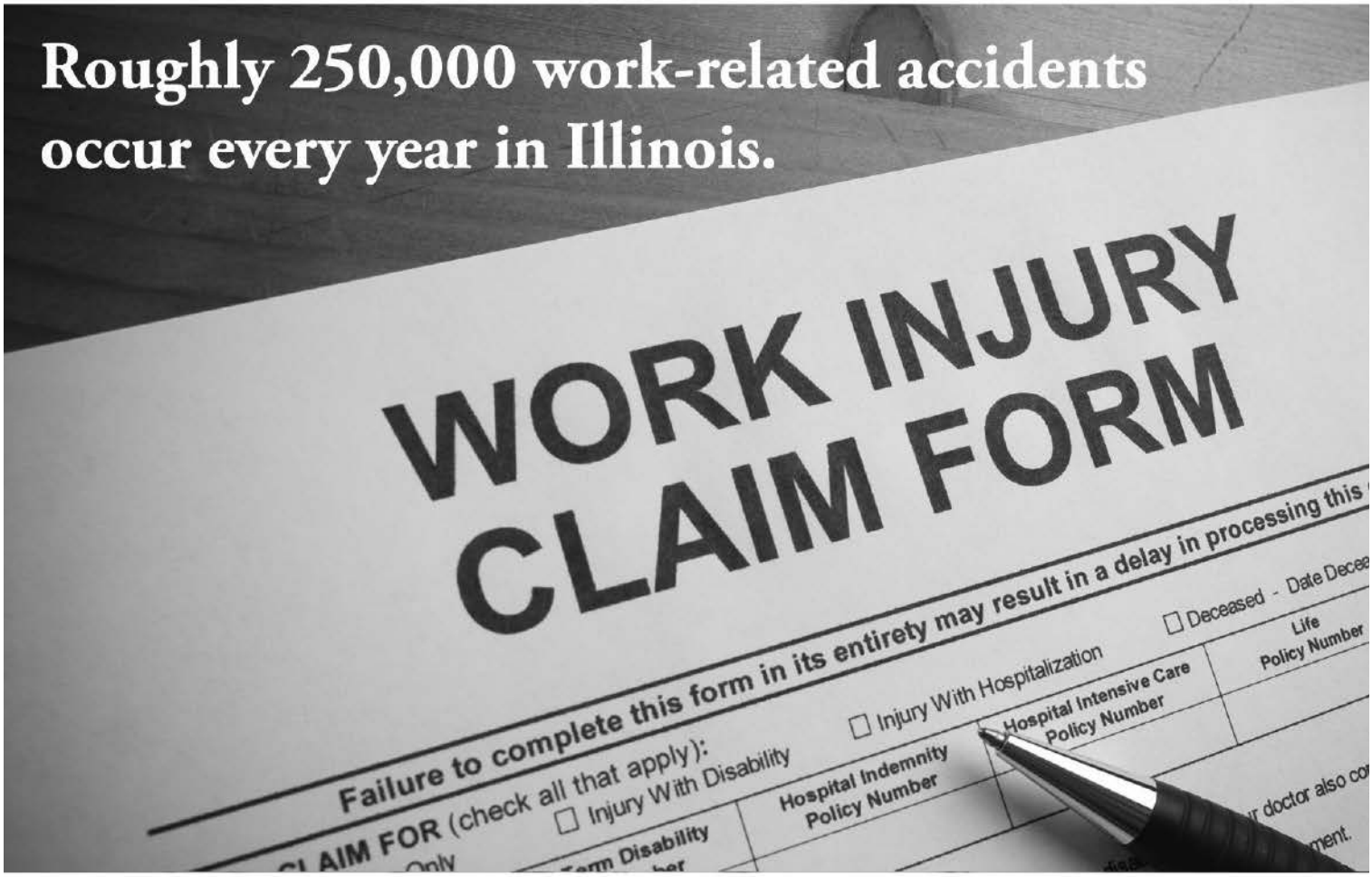
Robert Rupp is the Executive Director of the DuPage County Bar Association. He has worked in professional association management since 1994, serving a variety of national and international medical and legal associations, including the American Bar Association.

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Photos by Jeffrey Ross

Cast, crew and band members take their final bows.

Judges' Nite 2019 Hits a New High

March certainly roared in like a lion for Legal Aid this year! Held once again at the beautiful Belushi Performance Hall of the College of DuPage's McAninch Arts Center, the audience of over 325 people came together for a night of entertainment, generosity and camaraderie. Outstanding fundraising efforts led by **Lisa Giese,** Christina Morrison and the Legal Aid Fundraising Committee culminated in a combination of silent and live auctions along with a very generous cash call and great split-the-pot raffle resulting in a record-breaking net of more than $37,400 for the DuPage Legal Assistance Foundation.

Very generous sponsorships and donations were the underlying reasons for the terrific financial outcome of the 44th annual **Judges' Nite - *Cutting the Cord,*** produced and directed once again by the very talented duo of **Christina Morrison** and **Nick Nelson,** respectively. Together with a wonderfully warped team of writers, cast, crew and band members, that included many veterans as well as newcomers, the night was filled with song and dance, laughter and tears, goodwill and generous hearts.

The evening began with President **Matt Pfeiffer** welcoming the crowd and the coveted "Deep Gavel" award was presented to a gracious Judge **Brian McKillip** by **Ian Conner** who portrayed him in last year's show.

This year's concept brought together a series of acts that included scenes from DCBA bar life, the 18th Circuit, local, state and federal political references with

parodies of popular culture as the background. Highlights included:

DCBA vice presidents, **Stacey McCullough, Wendy Musielak** and **Kiley Whitty** as "Matty's Angels" played by **Elizabeth Jessen Holtquist, Rhonda Lorenz-Pignato** and Christina Morrison. **Pat Edgerton** weighed in as Matt Pfeiffer.

A scene from state government was played out in the Maddie Horror Picture Show with **Chris Ward** strutting his stuff to songs inspired by the Rocky Horror Picture Show, backed up by **Kevin McSwain, Sharon Falen, Ian Conner, Mary Gaertner** and **David Weiss.**

A first this year, the audience was entertained with breaks from the stage action by 2 video "Commercial Breaks" produced by the talented **Brent Christensen** with players **Mike** and **Pat Edgerton, Huck Bouma** and **Don Ramsell.**

The US Supreme Court took a turn at entertainment as well with the nine justices all portrayed, featuring **Connie Gessner** as Justice Ginsburg and **Kendall Hartsfield** as Justice Thomas. In another scene, some of the Circuit's female judges were featured in the Girls Rule, Boys Drool scene with **Emily Rapp, Cynthia Petersen, Alycia Fitz** and **Mary Gaertner** having fun with the theme.

Another highlight of the night was a play on Game of Thrones that brought a terrific Iron Throne, created by the JN props crew, as well as a fire-breathing dragon to the MAC spoofing local DuPage County politics. While **Jeff Jacobson** stretched



Judges' Nite band members take a break from the show.



Mark Schmidt leads the cast in the show's finale.



Chris Ward vamping in the "Maddie Horror Picture Show" scene.



Rachel Boehm and Mike Drabant singing the crowd toward Intermission.



Cast plays out "MKFM Wars" in a Star Wars inspired scene.

his acting chops by playing himself, other actors included **Mike Drabant, Carole Mallen, Mike Sitrick, Jess Defino, Dexter Evans, Raleigh Kalbfleisch, Miley Sparrow, Rachel Boehm** and **John Pcolinski.**

The firm of Mirabella Kincaid Frederick Mirabella took the spotlight in a Star Wars-inspired scene, featuring **Kevin Millon** and **Amar Moolayil** as the firm's founders, followed by parodies of songs from Sgt. Peppers Lonely Hearts Club band providing the background for humorous observations of Republican and Democratic lawmakers, past and future when the Family Feud theme song served as background in another scene of political observation with cast playing a game of "Trumpy Feud," featuring the talents of **Art Rummler** and his son **Jackson Rummler**.

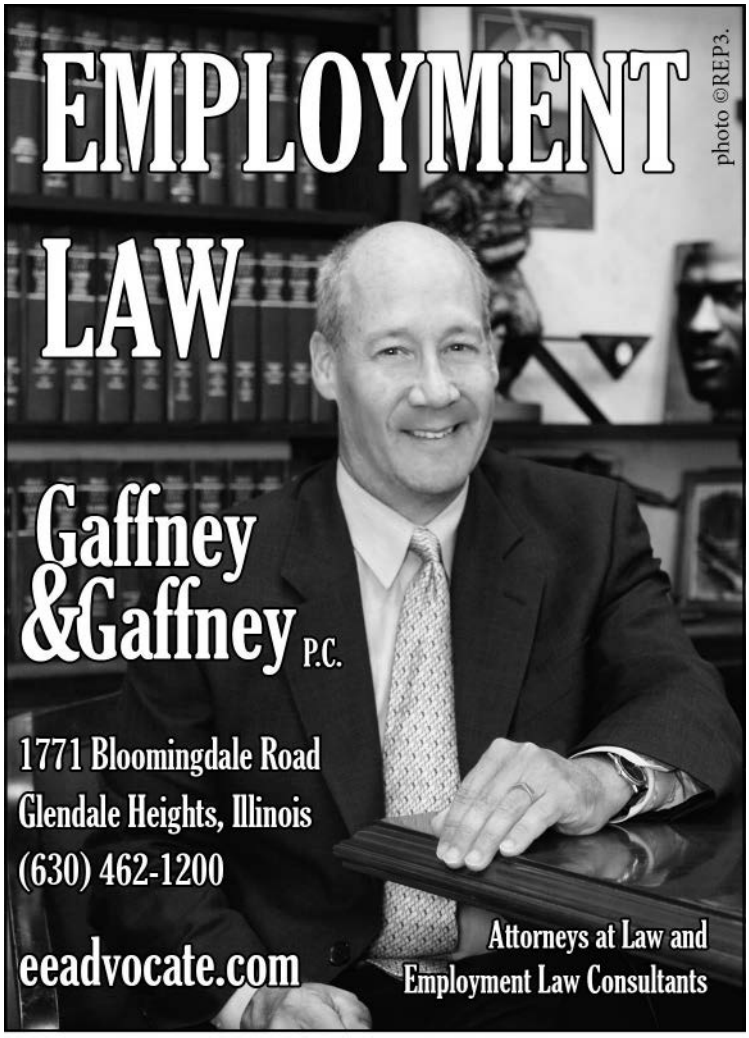
18th Circuit judges, new and retiring, were celebrated in several scenes, lamenting judging on a Friday; looking toward retirement and competing on Survivor. The show ended with a rousing finale featuring long-time JN player, **Mark Schmidt,** bows from the band and crew and well-earned standing ovations from the crowd.

Intermission found auctioneer, **Jim Reichardt** stripping to encourage the audience to keep bidding up the live auction items which included: a one week stay anywhere in the world donated by **Gloria Apostolos-Siolidis** and County Court Reporters; Host your gathering for up to 20 at the Ask Aunt V Kitchens in downtown Naperville donated by Veronica Porter of Aunt V and **Debra Greenwood;** and a 2-bedroom beach-front condo in Maui donated by **John** and **Sara Malm**. A wealth of silent auction items were also very well received and added to the successful auctions.

Our thanks to DCBA and Legal Aid staff as well as all who attended and supported this most critical Legal Aid fundraising event! ☐



A scene inspired by Game of Thrones brings out the dragon.



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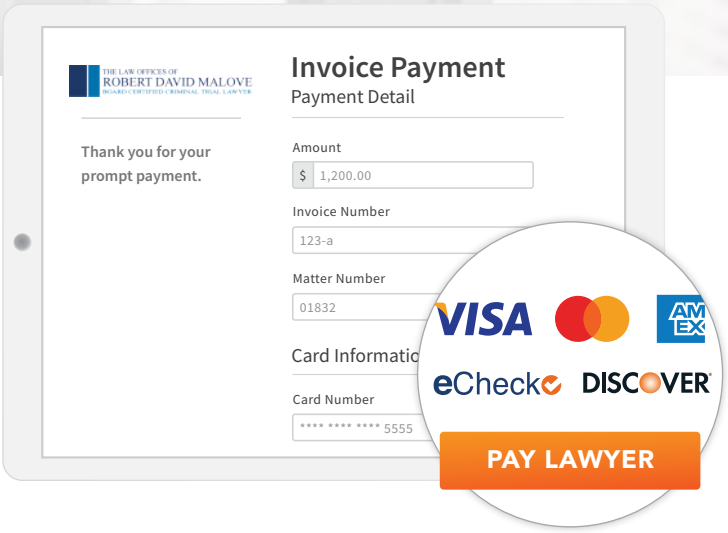
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Full registration information can be found at www.dcba.org.

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DuPage Judicial Center, Room 2017

May 16—Diversity in the Legal Profession
Double Tree by Hilton, Lisle

May 16—Happy Hour
Double Tree by Hilton

May 23—Ask a Lawyer Help Desk
DuPage Judicial Center, Room 2017

May 30—DAWL Installation of Officers
Top Golf

June 7—DCBA Presidents Ball/Installation of Officers, Prairie Landing, West Chicago

June 13—Ask a Lawyer Help Desk
DuPage Judicial Center, Room 2017

June 20—11th Hour Seminar
Attorney Resource Center

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

On the other hand, bar associations like DCBA are highly motivated to ensure the integrity and competency of the lawyers it refers. They have a vested interest in protecting their largest constituency – lawyers – and the image of the profession as a whole. Thus, there is a lesser likelihood that the public will perceive a bar association's referrals as the sale of a client and a greater likelihood that it will perceive the referrals as a professional service by a nonprofit law-related organization available to help the general public.

The DCBA and other similar bar associations do not seek individual profit but the fulfillment of public and professional objectives. They have a legitimate, nonprofit interest in making legal services more readily available to the public. Unlike for-profit matching services, a bar association, particularly one in a smaller county or city, often knows who its lawyer members are, have a professional relationship with that member, and has confidence about that member's ability to properly render services in a professional and ethical manner.

Most importantly, bar associations are highly unlikely to impair or control the independent professional judgment of the attorneys to whom its referrals are made because, simply put, they aren't in the business of making referrals as a pillar of revenue. The DCBA isn't generating income hand over fist through its Lawyer Referral Service; the referrals are made because it wants to help potential clients find the right lawyers to address those potential clients' legal needs.

Rule 5.4 has more importance than many lawyers realize. It arguably is more relevant and critical to our profession now than when it was first adopted. To protect our profession, to protect our core values and ideals about the practice of law, and to adhere to our responsibility as lawyers, we should continue to abide by Rule 5.4 as written, avoid fee-splitting with non-lawyers and for-profit organizations, and support the referral services run by our industry's bar associations – especially our very own DCBA. ☐

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with DCBA

McCullough Invites the DCBA to Soar



Prairie Landing Golf Club is the venue for this year's Presidents Ball and Installation of Officers and Directors which will feature the installation of **Stacey McCullough** as the DuPage County Bar Association's 98th President. Ms. McCullough has chosen a theme designed to honor her parents who were her strongest supporters throughout her pursuit of a law degree and successful career. "*Don't Just Fly, Soar,* is my way of honoring my Dad whose lifelong career in aviation allowed me to pursue my own career in law. My dad joined the Air Force at age 17 and became a flight engineer. After his service to our country, he started as an aircraft mechanic at Eastern Airlines in New York before joining American Airlines in Chicago. Dad was flying airplanes out of the DuPage Airport in an effort to become a commercial pilot, but age restrictions back then forced him down a different path in the industry. He worked the night-shift at O'Hare for over 40 years, being wisely frugal enough to thankfully leave me with far less debt after college and law school than my classmates. Beyond his hard work, Dad was dedicated to me and my younger brother, often running on 4 hours of sleep, but always the first to volunteer as my brother's coach no matter the sport. Not to be outdone in the #1 parent department and equally as significant to me, my Mom was and continues to be the epitome of selflessness: volunteer Brownie and Girl Scout Troop leader, field trip chaperone, active PTA member, sport coach, team mom, and first to lend a hand to family, a friend or neighbor in need. Together they taught me that volunteering and giving of one's self is essential and incredibly rewarding. I want to encourage our members to honor our profession by volunteering for the betterment of society and the profession. As attorneys, we already have the means to 'fly,' but we can truly 'soar' by doing more."

Stacey's initial venue of choice was a hangar at the DuPage Airport but that could not be realized and Prairie Landing Golf Club, which is run by the DuPage Airport Authority just south of the airport, became the logical, beautiful venue. Festivities will be on June 7, 2019 with cocktails beginning at 6 p.m. and dinner at 7 p.m. Entertainment will be provided by Felix & Fingers dueling pianos. This event is black tie preferred.

In addition to the installation festivities, the annual Lawyer of the Year and Gabric Awards will be announced as well as the presentation of Director Awards for service to the DCBA.

Tickets for the full evening of cocktails, dinner and entertainment are $145 ($120 New, Government or Public Service Lawyers) with a $20 discount available for all tickets purchased before May 24th. Tables of ten will also be available for $1,100 (full payment required with reservation). A limited number of exclusive sponsorships are available and advertising in the program book is open as well. Contact **Robert Rupp** at rrupp@dcba.org for details. Prairie Landing is located at 2325 Longest Drive, West Chicago, IL which is on the southwest corner of the airport accessed by Kautz Road. □



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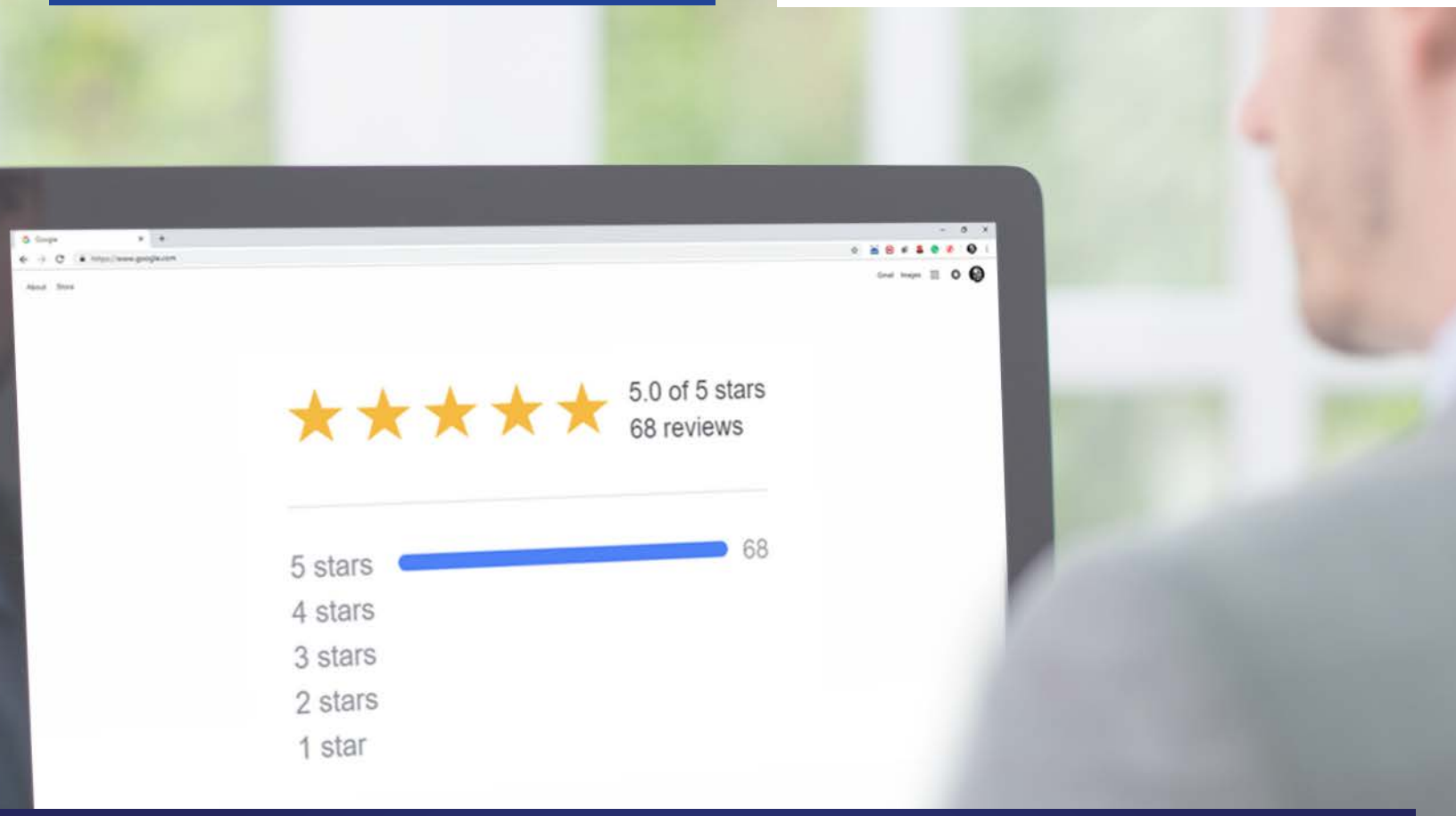
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