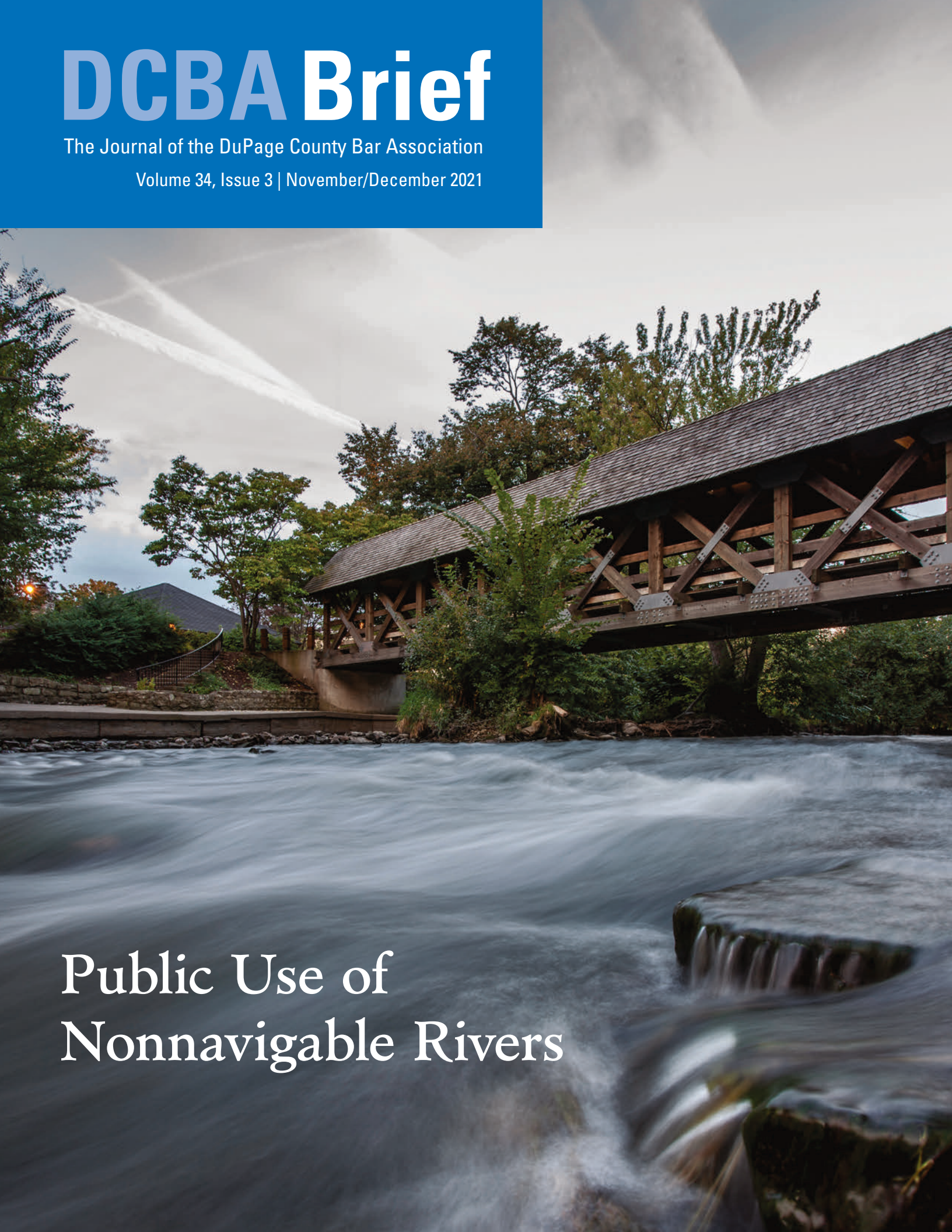
DCBA Brief
The Journal of the DuPage County Bar Association
Volume 34, Issue 3 | November/December 2021



Public Use of Nonnavigable Rivers

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Table of Contents

2 Editor's Message

3 President's Message

Articles

6 Public Use of Nonnavigable Rivers: An Illinois Dilemma
- By Richard F. Bales

10 The Game's Afoot: Game Theory Applied to Contested Divorce Actions
- By Christopher J. Maurer

16 Rethinking Fairness: The Scope of Assignor Estoppel Doctrine After *Minerva*
- By Sheng Tong

20 Changes to the Real Property Transfer on Death Instrument Act
- By Richard F. Bales

24 Law Update
- By Hilary Wild and Anne Fung

News & Events

32 ISBA Update
- By J. Matthew Pfeiffer

34 Barbeque Between the Raindrops – DCBA Families Celebrate Fall with a Cantigny Picnic

39 Judicial Profile: DuPage Associate Judge Leah Bendik
- By Tony Abear

43 Legal Aid Update
- By Cecilia Najera

47 Legal Resources

DCBA Brief

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Volume 34, Issue 3
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From the Editor

Happy Holidays!

By Jordan M. Sartell



Jordan M. Sartell's class action litigation practice with Francis Mailman Soumilas, P.C. focuses on consumer protection claims arising from inaccurate employment background checks and consumer credit reports. He graduated *summa cum laude* from the DePaul University College of Law and does pro bono work with local legal aid and consumer advocacy groups.

As this issue will reach you in the thick of the holiday season, I hope that you have been enjoying the cooler weather, autumnal colors, and seasonal libations.

Thanksgiving is still on the horizon as I write this column. On balance, family gatherings tend to be more of a source of stress than calm for me. Indeed, spending hours around the dinner table with folks who inevitably want to share their profoundly different views on every topic imaginable reminds me more of work than rest and relaxation. This year, however, I am going to try to lead with gratitude and do my best to appreciate the fact that everyone made the time to meet together. Having lost an uncle this year, I realize that the mere fact that everyone *can* share a meal is something for which to be grateful.

I am also grateful to everyone who contributed their hard work to this issue of *The Brief*. DCBA members **Richard Bales**, **Christopher Maurer**, and DePaul College of Law student Sheng Tong submitted excellent articles and **Anne Fung**, **Hilary Wild**, and **Andrew J. Mertzenich** contributed case law updates. Thank you, all!

Thinking further ahead to the winter holidays, *different* family gatherings, *different* seasonal libations, and gift-giving come to mind. This year, give your colleagues at the DCBA the gift of your expertise in the form of a legal article or case law summary![1] Email your submissions to my attention at email@dcbabrief.org.

Finally, in this month's consumer protection corner, I want to share some hard-won wisdom about how to obtain a copy of your credit report (or "file disclosure" in the jargon of my corner of the legal world). Everyone should regularly review the contents of their credit files for accuracy and to determine whether an identity thief has opened any fraudulent accounts. Did you know that many "free" means of accessing your credit report, be they smartphone apps or offers through a credit card, are incomplete? (They may also contain forced arbitration provisions and class action waivers.) The only means of obtaining a complete disclosure of your credit file from the "Big Three" credit reporting agencies—Trans Union, Experian, and Equifax—is by visiting www.AnnualCreditReport.com. Under normal circumstances, as the website's name suggests, consumers are entitled to a free copy of their credit file disclosure once every 365 days. However, you may access a free copy of your credit file from www.AnnualCreditReport.com every week through April 2022 thanks to a silver lining of the COVID-19 pandemic.[2]

Take care and have a wonderful holiday season! ☐

1. For his part, your favorite editor-in-chief hopes that Santa will bring him the LEGO Star Wars Ultimate Collectors Series Millennium Falcon, set number 75192, which contains more than 7,500 pieces and includes young *and* old Han Solo minifigures.
2. Federal Trade Commission, *Free Weekly Credit Reports During COVID Extended Until April 2022, available at* https://www.consumer.ftc.gov/blog/2021/03/free-weekly-credit-reports-during-covid-extended-until-april-2022/.

President's Message

By Kiley M. Whitty



DCBA President Kiley M. Whitty is a partner at Laraia & Whitty, P.C. in Wheaton and concentrates her practice in the areas of family law and estate planning. Kiley graduated *magna cum laude* from Miami University in 2006. She received her J.D. from Loyola University Chicago School of Law in 2009 and was licensed by the Supreme Court of the State of Illinois the same year. Kiley is a Past President of the DuPage Association of Women Lawyers and has been actively involved in the DCBA throughout her legal career.

Fall has flown by and, just like that, we are on the eve of another holiday season. We jumped right into a bustling fall calendar of events starting with wine tasting at our first Unwind of the year at 64 Wine Bar, followed by the President's trip to Napa Valley, California. I was thrilled to have the company of DCBA members **Lee Ann Conti, Angela Iaria, Chris Iaria, Vicki Kelly, Dan Kordik, Rebecca Krawczykowski, James J. Laraia, Sue Makovec, Karen Mills, Patti Murray,** and **Wendy Musielak** on this bucket list adventure, together with my husband, family, and friends, new and old. We savored the charcuterie stylings of James Laraia, a CLE presentation from attorney and vintner Bahaneh Hobel, tasted the grapes straight from the vine, and enjoyed each other's company in the beautifully serene landscape. It truly was the trip of a lifetime!

In October, the DCBA hosted its first Fall Family Food Truck Festival at Cantigny, complete with a corn maze, train rides, three different food trucks, and a private showing of Rookie of the Year. The DuPage County Circuit Court Clerk, **Candice Adams**, also hosted the Expungement Clinic, which we were proud to sponsor, together with PILI, Prairie State Legal Services, and DuPage Legal Aid. Volunteer attorneys from local organizations, including the office of DuPage County State's Attorney **Bob Berlin,** DuPage County Public Defender **Jeff York,** ReedSmith LLP, DCBA Past President **Stacey McCullough** and DBF Past President **Mia McPherson**, were instrumental in carrying out this pro bono mission which allowed more than 100 individuals to consult with attorneys about their rights to expunge or seal their records. In the same spirit of public service, Lawyer Lending a Hand brought volunteers to the Wayne Township Food Pantry in September, Northern Illinois Food Bank in October, and held its annual coat drive in November. Most recently, we co-hosted the Fifth Annual Joint Veterans Day CLE seminar with the DuPage Association of Women Lawyers and were honored to share the stories of World War II veterans and-impress upon our members the varying legal needs of our veterans.

After the excitement of the last months, I am looking forward to slowing down and taking time to appreciate the holidays and the traditions that define my family. Growing up, we put the Christmas tree up the day after Thanksgiving and the children place their boots outside the door on the eve of St. Nicholas Day hoping for a surprise in the morning. Christmas Eve is for midnight mass. Christmas Day had my brothers and I anxiously waiting on the stairs until our parents were ready to parade us downstairs to see what Santa had left behind. Beyond the gifts, sauerkraut, prime rib, champagne toast (and fried rice that one odd year), the common theme for my holiday celebrations has always been family. I can't recall a holiday celebrated alone, and they are usually adorned with siblings, aunts, uncles, and cousins alike. No matter where journeys, careers, and family obligations may take us throughout the year, we always made it a point to eat, drink, and be merry together over the holidays. *(Continued on page 4)*

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President's Message

(Continued from page 3)

The fact that my in-laws value family time in the same way has made the holidays even more joyous over the years. As my husband and I merge our traditions by embracing matching Christmas pajamas, a ride on the Polar Express, late night shenanigans with Twinkle (our Elf on the Shelf), seeing palm trees strung with white lights, and casseroles on Christmas morning, I hope we are giving our children the best of both worlds.

In the same way, the DCBA has a strong tradition of holiday celebrations and we hope that you will get in the holiday spirit with us. The Grand Holiday Gala will take place at Hotel Arista on December 8, 2021, bringing all the local bar association celebrations into one room as we again jointly celebrate with the DuPage Association of Women Lawyers and the DuPage Justinian Society of Lawyers. In this season of giving, please also consider dropping off a new, unwrapped toy at the DCBA office for our annual Toys-for-Tots Toy Drive or joining the DuPage Bar Foundation at its annual holiday breakfast on December 16, 2021 and contributing to their efforts to raise funds for law student scholarships and local grants.

We truly have so much for which to be thankful – our community and each of our members give us cause for celebration. After COVID effectively canceled the holidays in 2020 for many, my wish for all of you is that this year you can share the holiday season with those who are most important to you. Wishing you all the best as we celebrate the holidays and ring in a new year, paying homage to old traditions and new ones. □

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Articles

6 Public Use of Nonnavigable Rivers: An Illinois Dilemma
- By Richard F. Bales

10 The Game's Afoot: Game Theory Applied to Contested Divorce Actions
- By Christopher J. Maurer

16 Rethinking Fairness: The Scope of Assignor Estoppel Doctrine After *Minerva*
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Public Use of Nonnavigable Rivers: An Illinois Dilemma

By Richard F. Bales

In July, the Chicago Tribune ran a story about a Plainfield resident who filed a complaint about a company, Plainfield River Tubing, and its recreational use of the DuPage River.[1] The resident was upset about the company's customers allegedly trespassing on his riverfront property and leaving trash (mostly beer cans) on his land. According to the article, the resident maintains that "people with riverfront property own the riverbed halfway into the river and therefore anyone accessing that area is trespassing." The article states that the resident "only wants the stretch near his home temporarily closed while the state gathers the information needed to make a decision and there's a reassessment of local recreational water use regulations."

Is the Plainfield resident correct? Are kayakers floating down the DuPage River trespassing on his property? The Illinois Administrative Code provides the first clue in unravelling this question. The first paragraph of its list of "Public Bodies of Water" reads as follows:

> The following public bodies of water were navigable in their natural condition or were improved for navigation and opened to public use. The entire length and surface area in Illinois, including all backwater lakes and sloughs open to the main channel or body of water at normal flows or stages, are open to the public unless limited to a head of navigation as stated.[2]

The bodies of water named in this list do not include the DuPage River. The DuPage River is not a navigable river.

Ironically, less than a month earlier, the Third District Appellate Court issued a decision that is on point with this issue.[3] The first paragraph of the decision sets the tone of the court case:

1. Rafael Guerrero, *State Reviewing DuPage River's Public Use Rules*, Chicago Tribune, (July 10, 2021, 2:38 PM), https://www.chicagotribune.com/suburbs/naperville-sun/ct-nvs-dupage-river-public-private-st-0711-20210710-h425h5z7tbaljpcsxnyrlnd4iy-story.html (last visited Oct. 21, 2021).
2. 17 Ill. Admin. Code § 3704 App'x A.
3. *Holm v. Kodat*, 2021 IL App (3d) 200164.

> Plaintiffs and the individual defendants own separate parcels of property situated along the Mazon River in Grundy County, Illinois. Collectively, the individual defendants object to plaintiffs' use of kayaks on the portions of the Mazon River that abut their parcels of property. Plaintiffs filed a declaratory action, seeking an order recognizing their right, as riparian owners, to kayak along the entire Mazon River.[4]

The plaintiffs owned 33 acres of unimproved landlocked property and 9.2 acres of unimproved road-access property. They used the Mazon River for access from their road-access property to their landlocked property.

The trial court granted summary judgment in favor of the plaintiffs, relying upon *Beacham v. Lake Zurich Property Owners Association*, 123 Ill. 2d 227 (1988). But this case concerns a nonnavigable lake, not a nonnavigable river. The trial court quickly realized that there was a whole body of case law relating to rivers and it reversed its decision, stating that the plaintiffs were "excluded from using or accessing, in any way, the surface of the Mazon River on the portion that runs adjacent to any property that is owned by" the defendants.[5] The plaintiffs appealed.

On appeal, the court telegraphed its decision in the first paragraph of its analysis:

> [O]ur court must determine whether downstream riparian owners of property on a nonnavigable river, in this case defendants, may lawfully bar other upstream riparian owners of property on that same river, in this case plaintiffs, from traversing the various segments of the river that comprise defendants' private property. Based on well-established case law governing riparian rights and the navigability of Illinois rivers and streams, we conclude this question must be answered in the affirmative. As a result, the trial court's grant of summary judgment for defendants was correct and must be affirmed.[6]

The court stated that deeds of land bounded by rivers or streams convey title to the center of the river or stream. However, if a river or stream is navigable in fact, the conveyance is subject to a public easement to use the river for navigation. A river or stream is navigable in fact if it naturally, by customary modes of transportation, is of sufficient depth to afford a channel for use for commerce. The court stated that the fact that there is enough water in a river or stream to float rowboats and small launches does not make a river or stream navigable. The court stated that when a river or stream is not navigable, then the river or stream is not subject to an easement for navigability, and the riparian owner owns the bed of the stream "free from any burdens in favor of the public."[7]

The appellate court's decision in this case is certainly contrary to the desire of Plainfield River Tubing to keep recreational kayaking on the DuPage River.

More than forty years ago, Professor Margit Livingston wrote an article on point with the concerns expressed in both this *Tribune* article and this appellate court decision.[8] The epigraph of her article is as timely today as when it was originally written:

> The increase in public recreational use of rivers and streams currently enjoyed in some states has not

4. *Id.* at ¶ 1.
5. *Id.* at ¶ 13.
6. *Id.* at ¶ 15.
7. *Id.* at ¶ 22 (citing *People ex rel. Deneen v. Economy Light & Power*, 241 Ill. 290, 318 (1909)).
8. Margit Livingston, *Public Recreational Rights in Illinois Rivers and Streams*, 29 DePaul L. Rev. 353 (1980).

About the Author



Richard F. Bales is underwriting counsel for the Naperville office of Proper Title. He has worked in the title insurance industry since 1977. He graduated from Illinois College in Jacksonville in 1973. He received his juris doctorate degree from Northern Illinois University (NIU) in 1983 and is admitted to practice law in Illinois.

“The court stated that deeds of land bounded by rivers or streams convey title to the center of the river or stream.

> occurred in Illinois due to a number of archaic laws that restrict public access to state waterways. In this article, Professor Livingston examines these laws, as well as the limited recreational rights currently enjoyed by Illinois residents. The author then explores judicial and statutory changes in Illinois doctrines that should serve to align Illinois with the contemporary use of waterways as public recreational and aesthetic assets.[9]

Professor Livingston admits that any attempt of the courts or the legislature to impose recreational boating, swimming, or fishing on nonnavigable streams or rivers would surely invite a constitutional challenge; the waterfront landowners would argue that this would be an unconstitutional taking of private property for a public purpose without just compensation.[10]

Professor Livingston cites, for example, the Submerged Lands Act:

> The State of Illinois for the benefit of the People of the State and in pursuance of protecting the trust wherein the State holds certain lands for the People, hereby elects and determines to assert and reclaim the title to lands of the State of Illinois now submerged and lands that were formerly submerged, but that have been illegally filled in, reclaimed and occupied, and also any such lands that may have been allotted to any person or corporation, public or private, and which have been illegally filled in, reclaimed and occupied, or which are not used and occupied for the purposes for which they were allotted.[11]

Using the Submerged Lands Act, Prof. Livingston suggests that the attorney general could bring suit to reassert the state's title in the submerged lands of certain waterbodies. She notes, though, that the bed of a river is a property right that the state cannot take from private individuals except upon payment of just compensation. This statute makes no provision for such payment, and so she concludes that it is probably unconstitutional.

She offers up other possible solutions in this article:

- A local government like a municipality or park district could purchase or otherwise acquire land along a waterway. This would allow public use of the adjacent waters. However, unless the entity could acquire long stretches of riparian land, it is doubtful that this would be of any real benefit.
- Perhaps the municipality or park district could purchase just the stream bed rather than the more expensive adjoining waterfront property.
- Perhaps riparian landowners would be willing to either dedicate or donate water rights to the public.
- Perhaps the public has acquired an easement by prescription to use waterways for recreational purposes.

All of these ideas are interesting, but they may not be feasible.

9. *Id.* at 353.
10. *Id.* at 376-77.
11. 5 ILCS 605/1.

Consider, though, this idea. The legislature could pass legislation giving the public a recreational easement in certain waterbodies, even the waters of nonnavigable rivers and streams. This recreational easement would include the right to boat, swim, and fish on these waters. The public's exercise of these rights would be subject to state and local regulations.

The allowing of private recreation on nonnavigable waters will obviously have an impact on the rights of the adjoining landowners. Note, though, that the rights of private interests in nonnavigable waters have eroded over the years, with many of these waters being subject to the jurisdiction of the Department of Natural Resources.[12]

These waters are also subject to state and federal pollution laws and regulations. Even so, the imposition of a recreational easement on nonnavigable waterways does raise constitutional questions, as it could be attacked as an unconstitutional taking of property for public use without the payment of just compensation. However, this intrusion could be minimized. For example, only those waterways that have a significant potential for public recreational use would be affected. A statute could specify that the public is permitted only a reasonable use of a certain waterway for recreational purposes. What constitutes a reasonable use would vary depending on the characteristics of the waterway. For example, the statute might allow no motorized boats of any kind on some rivers and streams. The statute might allow for only swimming, canoeing, and kayaking on other bodies of water.

How would such a statute survive a constitutional challenge? The Illinois Tax Code has several tax exemptions that lower property taxes, such as the Senior Citizens Homestead Exemption.[13] This statute gives senior citizens that are 65 years of age or older a tax exemption if they own their home, live in their home, and are liable for the payment of the real estate taxes. The maximum reduction in assessed valuation is $5,000. Similarly, any new legislation could give the owners of riparian land adjacent to any affected waterway a "recreational water use" tax exemption that would be equivalent in value to the "taking" resulting from the imposition of the recreational easement.

In the alternative, perhaps the Illinois legislature could amend 35 ILCS 200/9-145(e), making it clear that a recreational easement over the bed of a nonnavigable river would result in a lower valuation of the land.

Currently, this section of the Property Tax Code reads as follows:

> In the assessment of property encumbered by public easement, any depreciation occasioned by such easement shall be deducted in the valuation of such property. Any property dedicated as a nature preserve or as a nature preserve buffer under the Illinois Natural Areas Preservation Act, for the purposes of this paragraph, is encumbered by a public easement and shall be depreciated for assessment purposes to a level at which its valuation shall be $1 per acre or portion thereof.[14]

In ending her law review article, Professor Livingston said that "Illinois water law in general and the law regarding public recreational rights in waterbodies in particular need to be revamped and clarified."[15] What is taking place along the DuPage River and the Mazon River indicate that what she wrote forty years ago still holds true today. □

12. *See, e.g.*, 615 ILCS 5/5 ("The Department of Natural Resources shall upon behalf of the State of Illinois, have jurisdiction and supervision over all of the rivers and lakes of the State of Illinois.").
13. 35 ILCS 200/15-170.
14. 35 ILCS 200/9-145(e).
15. *Supra* Livingston at 380.

The Game's Afoot: Game Theory Applied to Contested Divorce Actions

By Christopher J. Maurer

Litigating and negotiating a divorce action can have many complex moving parts. At times, comparatively trivial matters can loom large in the minds of the litigants (not to mention their attorneys), often in ways that can lead to parties fixating on the wrong things, which in turn leads to sub-optimal decisions about important matters affecting the case. To avoid this, it is important that the attorneys' step back from time to time and look at where the case is headed, what both parties are trying to achieve, and what paths will lead to the best likely outcome for both parties. This is where the concepts used in game theory can be of use.

Game theory is the study of the interactions between rational, self-interested decision makers in a competitive scenario. It has been applied in social science, economics, finance, psychology, philosophy, computer science, and military strategy. Game theory is a broad field of study harkening back to the work of mathematician John von Neumann, who in 1928 published the article, *On the Theory of Parlor Games*,[1] which led to his later work with economist Oskar Morgenstern, *Theory of Games and Economic Behavior*,[2] published in 1944.

Many game theory concepts flow from complex math theorems and equations that are beyond the mental faculties of most attorneys (the author included). However, game theory does cover some concepts that can be useful for litigators and that don't require mastery of the slide rule or a working knowledge of calculus. In the area of family law in particular, many attorneys, judges, mediators, and other professionals working with divorcing couples will find that basic game theory concepts can lead to clearer thinking about reasonable paths toward resolution of disputes. Three such concepts are utility, fair division, and equilibrium.

In game theory, the players (*i.e.*, the divorcing parties) are two separate economic agents with their own distinct set of preferences. Each party measures changes to their welfare that will result in a particular event (or in the case of a divorce, a particular ruling by the court). Those events or rulings that would positively affect a party's welfare are higher in value, or as game theory puts it, have higher utility.

At first glance, the concept of utility does not seem to have much...utility. A dollar is a dollar after all, whether it is awarded to Spouse A or Spouse B. However, further analysis shows that the measure of utility may be subjective between two parties because what one party ranks of high importance to his or her welfare (whether rationally or emotionally) may be of drastically lower importance to the other's perceived welfare.

Some assets subject to division in a divorce will have virtually equal utility to both parties (*e.g.*, cash in a joint bank account). Others will have much higher utility to one spouse than the other separate from their fair market value. Examples of this might include a motorcycle that only one spouse has a license to operate, collectibles with sentimental value to one spouse, or even a retirement account that one spouse perceives as "Mine!" because of contributions made to it through that spouse's efforts during the marriage. These feelings go beyond the dollar values listed on an asset and liability spreadsheet.

1. Von Neumman, J. (1928) "Zur Theorie der Geselleschaftspiele", *Mathematische Annalen, 100*, 295-300.
2. Von Neumann, J. and Morgenstern, O., (1994) *Theory of Games and Economic Behavior*, Princeton University Press (1944).

Considering whether a particular asset ranks as having high or low utility to either spouse can be an important step toward settling a case and reaching what can be described as a fair division, which is another game theory concept worth reviewing.

Game theory describes "fair division" as the problem of how to divide a finite amount of resources among two or more parties in a way that results in each party receiving their fair share. This is often referred to by game theorists as "cake cutting." A "cake" in game theory can be made up of divisible items (*e.g.*, retirement funds) or indivisible items (*e.g.*, a Picasso painting). A cake can also be made up of good parts (*e.g.*, cash) as well as bad parts (*e.g.*, debt).

In a divorce action, state law will often lay out the criteria for what constitutes a fair division of the cake that is the marital estate. In Illinois, Section 503 of the Illinois Marriage and Dissolution of Marriage Act ("IMDMA") lists factors the court needs to consider to achieve an equitable result, including considerations such as:

- Each party's contribution to the increase in the value of the assets;
- Each party's dissipation of marital assets;
- The length of the marriage;
- The relative economic circumstances and income of the parties;
- The desirability of awarding the marital home to the spouse with whom the children will reside;
- The age and health of the parties; and
- Whether one spouse will be paying the other spouse maintenance.[3]

Another way to move toward a fair division that is wholly separate from factors laid out in the IMDMA is by using the game theory concept of attaining an envy-free division. An envy-free division would be one where neither party would prefer the other party's awarded share to their own. Because of the game theory concept of subjective utility discussed above, this envy-free division can, in theory, be achieved even in cases where one party receives a larger share of the marital assets, when the party getting the smaller share is assigned assets that have a higher utility as defined or perceived by that party in lieu of an equal division of the overall estate.

Thinking about achieving an envy-free division of the estate is one way to move the parties and their attorneys away from thinking exclusively about the market values of the assets on the spreadsheet and to move them toward thinking about the subjective satisfaction of the parties. For example, if the wife is arguably entitled to receive assets totaling 60% of the value of the marital estate because of the factors that the court must consider under Section 503(d) of the IMDMA, the husband may be more likely to agree to a 60/40 division of the estate if he is assigned particular assets that have a higher utility to him

About the Author



Christopher J. Maurer is a founding partner of Suburban Law Group, LLC, and concentrates his practice in divorce and family law. He is a certified mediator and has been appointed as *guardian ad litem* in domestic relations and adult guardianship cases.

3. 750 ILCS 5/503(d).

that to the wife, such that he would never consider switching his share for hers, even with the disproportionate nature of the division.

The risk (or opportunity) of this approach is that if one spouse assigns a higher-than-market-value level of utility to a particular asset, the other spouse may attempt to hold that asset hostage (by demanding that the asset be liquidated and divided) as a way to negotiate receiving a larger share of the cake that is the marital estate.

Another practical point to consider when doing a fair division analysis is that there are more than just the spouses involved when dividing the proverbial cake. Assuming both spouses are represented, their attorneys are required to diligently and zealously advocate on behalf of their clients.[4] Such advocacy costs money, and in the context of divorce proceedings, as long as the litigation continues, attorney's fees, expert witness expenses, and other litigation costs will continue to nibble away at the marital estate. Doing a cost-benefit analysis that includes consideration of prospective litigation costs is essential and brings us to the game theory concept of equilibrium.

Those who have read the book or seen the film, *A Beautiful Mind*,[5] will be familiar with John Forbes Nash, Jr., a Nobel Prize winning mathematician who suffered from delusions stemming from paranoid schizophrenia. In the world of economics and mathematics, Nash is known not for his mental health problems, but rather for his contributions to game theory. In particular, he is known for developing the concept now known as the "Nash Equilibrium," which is defined as a set of strategies between two players in which no player can get a better payoff by changing his or her strategy.

The Nash Equilibrium can be applied in divorce litigation if we consider the possible strategies each party can take following a pretrial settlement conference between the parties' attorneys and the court. We can come up with a matrix of strategy options if we assume the following facts to be true:

"Parties to an acrimonious divorce tend toward a cognitive bias known as 'zero-sum thinking' and treat every facet of divorce as a zero-sum game.

1. Assume the divorcing parties have a marital estate worth $1 million;
2. Assume that at the pretrial conference the judge recommends that the parties divide the marital estate such that 60% of the assets are awarded to the wife and 40% to the husband;
3. Assume each party's costs additional of litigating the case through trial will be $50,000;
4. Assume that if both parties spend the requisite money to litigate through trial (*i.e.*, $50,000 apiece) the result at trial will still be a 60/40 split, minus costs of litigation;
5. Assume that if neither party spends any money to litigate, the trial (or settlement) result would be a 60/40 split without any reduction for litigation costs; and
6. Assume that if one party spends the funds to litigate and the other does not, that party can move the needle 10% in his or her favor (70/30 split in wife's favor if wife spends to litigate, 50/50 split if husband spends to litigate).

4. Illinois Rules of Professional Conduct, Rule 1.3, Comment 1.
5. Nasar, S., *A Beautiful Mind*, Simon & Schuster (1998); *A Beautiful Mind.* Directed by Ron Howard. Universal Pictures (2001).

Wife's Strategy	Husband's Strategy	
	Don't Litigate (or Settle)	Litigate
Don't Litigate (or Settle)	Wife receives $600k Husband receives $400k	Wife receives $500k Husband receives $450k
Litigate	Wife receives $650k Husband receives $300k	Wife receives $550k Husband receives $350k

Obviously, this is an exceedingly over-simplified rendering of reality. Many of these assumptions could never reliably be made in a practical, real-world divorce. There are countless other variables to consider that could never fit into such a simple matrix, but from a theoretical perspective, the thought exercise can be useful.

Under this theoretical set of facts, both parties know what will happen in any of the four scenarios identified above. If either party chooses to litigate, the other party will unquestionably choose to litigate as well to avoid a negative result at trial. Likewise, both parties know that if they both choose to litigate, the division of the estate will be the same as the pretrial recommendation (60% to wife, 40% to husband), with the parties having spent an additional $100,000 in litigation costs. Accordingly, the Nash Equilibrium is the set of strategies wherein both parties choose not to litigate and to settle the case based on the judge's recommendations and their knowledge of where each set of strategies will lead. This set of strategies only makes sense when the parties have an equal understanding of the value of the estate, an equal understanding of the cost of litigation, and can communicate and negotiate a settlement.

A different game example that is regularly discussed in game theory is the "Prisoner's Dilemma." While the Prisoner's Dilemma is not directly analogous to divorce litigation, it does show that an inability of the parties to communicate can result in sub-optimal results for both parties.

The Prisoner's Dilemma is a game theory developed in 1950 by mathematicians Melvin Drescher and Merrill Flood. In the classic version of the problem, two criminals are arrested. They are held separately and have no way of communicating with one another. If neither criminal betrays the other, the prosecutor won't have enough evidence to convict either of them for the major crime but can convict both of them on a lesser charge, and both will serve only one (1) year in prison. If one of them betrays the other, while the other stays silent, the betrayer goes free and the silent one is sentenced to three (3) years in prison. If both criminals betray one another, they will both be sentenced to two (2) years in prison.

In this case, the best overall result would be for both criminals to keep their mouths shut and get one year in prison. But, because they are ignorant of what their co-criminal will choose to do and cannot act cooperatively, the strategy with the best payoff, regardless of which strategy the other party chooses, will always be betrayal:

Bonnie's Strategy	Clyde's Strategy	
	Stay Silent	Betray Bonnie
Stay Silent	Bonnie gets 1 year Clyde gets 1 year	Bonnie gets 3 years Clyde gets 0 years
Betray Clyde	Bonnie gets 0 years Clyde gets 3 years	Bonnie gets 2 years Clyde gets 2 years

As the matrix above shows, if Clyde chooses to stay silent, Bonnie's best payoff is to betray Clyde (0 years in jail vs. 1 year in jail), and if Clyde chooses to betray Bonnie, again, Bonnie's best payoff is still to betray Clyde (2 years in jail vs. 3 years in jail). The Nash Equilibrium in this case occurs where both criminals betray one another and end up in prison for two years, despite the fact that it is not the optimal result for either of them. It would be better for both of them to stay silent and cut their time in jail in half, but because they cannot communicate and cooperate, they are destined to choose the sub-optimal result.

The Prisoner's Dilemma shows the importance of communication and makes a strong case for collaboration between

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divorcing spouses. Together with their attorneys, the parties can often come up with creative, nuanced settlement options that work well for both of them, options that would not be possible if their case were to go to an all-or-nothing trial. At trial, a judge who is often not familiar with the complex and interconnected goals of the parties will follow the letter of the law in reaching a decision, but the final result is often a judgment that is not satisfactory to either party.

Another game theory concept that is partially applicable to matrimonial litigation is the zero-sum game, a situation in which one player's gain is equal to the other player's loss. A fight over who gets what share of the marital estate might be described as a zero-sum game. One spouse getting more of the assets means the other spouse gets less. Unfortunately, parties to an acrimonious divorce often tend toward a cognitive bias known as "zero-sum thinking" and treating every facet of divorce as a zero-sum game.

Divorcing parents, for instance, will sometimes treat the allocation of parenting time as a zero-sum game, with every hour awarded to a spouse as a "win" to that spouse and a "loss" to the other spouse. To a certain extent, this is natural as most parents want the opportunity to spend as much quality time with their children as possible. However, treating parenting time strictly as a finite commodity does not take into consideration the best interests of the children and can lead to disastrous and unworkable schedules.[6]

Game theorists' assumption that all players are rational limits the theory's relevance to divorce proceeding. A rational player is one who can reliably (a) assess possible outcomes and analyze how those outcomes will affect his or her welfare and (b) select actions that will yield the player the most preferred outcomes given the other player's actions.

Many divorce cases involve parties that cannot be described as rational players. This can be due to multiple causes:

- Mental health issues or substance dependency issues that make it difficult for one spouse to make rational choices generally;
- Emotional attachment or acrimony directed toward the other spouse that makes it difficult to make rational choices specifically related to the divorce itself;
- Ignorance of the law and how it will be applied to the case; and/or
- Ignorance regarding the existence or value of assets, income, and debts.

These deficiencies can be overcome with the assistance and guidance of counsel and the discovery tools available to them. The desire to deal with rational actors is why judges and attorneys often breathe a mental sigh of relief when a *pro se* litigant retains competent counsel. The hope is that with two competent attorneys rationally but zealously representing their respective clients, a mutually optimal result can be reached.

In conclusion, the author would be out of his depth if he tried to belabor the reader with the mathematical equations that underpin game theory. For those interested in delving further, books written on game theory concepts geared toward non-mathematicians are available.[7] Suffice it to say, the concepts of subjective utility, fair division, equilibrium, rationality, and zero-sum games (versus cooperative games), clearly apply to the field of civil litigation in general and domestic relations litigation in particular. Hopefully, these ideas can help attorneys think about their cases from a different perspective and help negotiate and litigate those cases in ways that lead to more optimal results for their clients. □

6. Recognizing that parenting issues are not a zero-sum game and that the parties should make every effort to resolve such issues in a collaborative fashion, the IMDMA requires parents to meet with a mediator to assist them in formulating a parenting plan. *See* 750 ILCS 5/602.10(c).

7. *See, e.g.*, Davis, Morton D., *Game Theory: a Nontechnical Introduction*, Dover Publications (1997); Fisher, Len, *Rock Paper Scissors: Game Theory in Everyday Life*, Basic Books (2008).

Rethinking Fairness: The Scope of Assignor Estoppel Doctrine After *Minerva*

By Sheng Tong

In technology businesses, employment agreements typically require employees to assign to their employers the ownership of all intellectual property rights during the course of employment. These rights include patent rights to current and future inventions that stop others, including the employee-assignor, from exploiting the patented invention before the patent expires. After an employee leaves her employer to work for a competitor, she might participate in the launch of a competing product. This could result in patent infringement where the competing product arguably embodied a patent that the former employee had assigned to her former employer under an employment agreement.

In response to a patent infringement suit, the former employee defendant has two primary defenses: non-infringement and patent invalidity. The non-infringement defense centers on whether the competing product embodies any technology within the scope of an assigned patent. The invalidity defense focuses on whether the assigned patent is invalid for failure to meet the patentability criteria under the Patent Act. For example, an invention that lacks novelty should not have been granted a patent. However, assignor estoppel, a common-law doctrine, may prevent the former employee, as the patent assignor, from asserting the patent invalidity defense. The doctrine prevents unfair practices where, after assigning all the patent rights, the assignor claims the invalidity of the assigned patent such that she may exploit the invention without infringement. This article discerns the breadth of assignor estoppel doctrine and its implications after a recent Supreme Court case *Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S. Ct. 2298 (2021).

The assignor estoppel doctrine dates back to late-eighteenth-century England and was recognized by the Supreme

Court in *Westinghouse Elec. & Mfg. Co. v. Formica Insulation Co.*, 266 U.S. 342, 349 (1924). After the affirmation in 1945 in *Scott Paper Co. v. Marcalus Mfg. Co.*,[1] the Court once again dealt with the viability of the assignor estoppel doctrine in *Minerva*. Assignor estoppel survives for the same rationale of fairness as in *Westinghouse*. However, the *Minerva* Court limits the use of this doctrine to situations "only when an inventor says one thing (explicitly or implicitly) in assigning a patent and the opposite in litigating against the patent's owner."[2] Based on this ruling, how broadly or narrowly one can interpret the assignor's representation as to the assigned patent rights would significantly impact the applicability of assignor estoppel.

The *Westinghouse* Court, for the first time, recognized assignor estoppel as a defense to patent infringement, where an assignor cannot contend that the patent claims – the defining features of the invention that set the scope of protection – were invalid for "lack of novelty or utility or [being] anticipated by prior inventions."[3] In drawing an analogy to estoppel in conveyances of land, the Court acknowledged fair dealing as the touchstone for the doctrine of assignor estoppel.[4] Furthermore, assignor estoppel may be applied to an assignment before or after a patent is granted. The Supreme Court distinguished between the two situations.[5] In the former situation, the assignee, instead of the assignor, ordinarily controls prosecution and the scope of the patent could be broader than what had been assigned by the assignor. Where the assignment is for a granted patent, the assignee relies on the assignor's representations of the scope of the patent claims. This distinction might justify consideration of ample evidence "in fixing the limits of the subsequent estoppel" where a party assigns a patent application or an invention.[6]

Notably, the *Westinghouse* Court implicitly articulated relevant factors to show the limits of assignor estoppel including, for example, prior art, which is any evidence showing that an invention, in whole or in part, is publicly known. Therefore, under *Westinghouse,* an assignor could not attack the validity of claims added after the assignment of a patent application if the claims are based on the same patent specification, a written description of the invention that supports the claims in the patent application. However, the assignor could use prior art to narrow the scope of the patent in order to show non-infringement because a patent is invalid if its scope overlaps with one or combinations of prior art.[7] The views on fairness in transactions and the role of prior art were fully recognized by the Supreme Court in *Minerva*.

A similar doctrine as a defense to intellectual property infringement claims is the licensee estoppel doctrine, where a trademark licensee is estopped from asserting a naked licensing defense based on its own conduct within the license.[8] That is, the licensee cannot argue that the licensor abandons its trademark because the licensor fails to exercise adequate control over the licensee's use of the mark, such that the mark ceases to represent the quality of a product or service that consumers would expect. The principle of fairness justifies the existence of such a doctrine. It would be unfair to allow a licensee to reap the benefit of a contract and simultaneously attack the licensor's rights. Although the licensee estoppel doctrine once existed in the patent context, the U.S. Supreme Court abolished it in 1969.[9]

Does assignor estoppel apply when an assignor contends that the assigned patent is anticipated by an expired patent? The answer had been affirmative for decades until the Supreme

1. 326 U.S. 249 (1945).
2. *Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S. Ct. 2298, 2304 (2021).
3. 266 U.S. at 349.
4. *Id.* at 350-51.
5. *Id.* at 351.
6. *Id.* at 353.
7. *Id.* at 351.
8. Restatement (Third) of Unfair Competition § 33 cmt. d (1995) ("(L)icensees have also been estopped from challenging the validity of the licensed mark on the basis of abandonment or lack of distinctiveness.").
9. *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969).

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Court created an exception to the assignor estoppel doctrine in *Scott Paper*.[10] There, a former employee and assignor assigned a patent to his former employer during his employment. After his departure, the assignor started a competing business and was accused of infringing the assigned patent. The assignor-former employee raised an invalidity defense, asserting that the alleged infringing patent was a copy of an expired patent, which is prior art. The assignee contended that assignor estoppel prevented the assignor from resorting to prior art to show patent invalidity.

Without expressly examining the doctrine of assignor estoppel, the Supreme Court held that an assignor was not estopped from showing that the alleged infringing product practiced an assigned patent, whose scope was covered by prior patents.[11] The Court reasoned that where a contract conflicted with the public policy behind the patent system that the public is free to practice the invention of an expired patent, such an arrangement could not be permitted to frustrate public interest. In other words, the assignor was not actually attacking the validity of the assigned patent. Rather, she defended on the ground that, despite being similarly covered by the assigned patent's claims, the accused device she practiced was indeed within the prior art.[12] As a result, any member of the public who utilizes techniques in the public domain should not be punished for breach of a contrary, private agreement.

In 2021, the Supreme Court in *Minerva* faced the doctrine of assignor estoppel as it applied to an assignment of a continuation patent application. A continuation application is a new patent application based on the same specification of a parent patent, as a tool to expand patent coverage for the same invention. The facts in *Minerva* illustrate patent assignment in a typical employment situation. Truckai assigned a patent application to Nocacept, where he was a co-founder. The invention was directed to a medical device performing endometrial ablations. Later, Truckai sold Novacept, whose successor in interest was Hologic. When Truckai founded another company, Minerva Surgical, he developed a somewhat different medical device to perform endometrial ablations (the "Minerva device"). Hologic filed a continuation of the parent patent application with claims that would cover the Minerva device regardless of how the device worked. After the claims were issued, Hologic sued Minerva for patent infringement. In response, Minerva argued that the amended patent was invalid mainly because the newly added claims lacked support in the written description of the original patent application. The question in front of the Supreme Court became whether assignor estoppel should apply.

In a five-to-four decision, the Supreme Court expressly refused to abolish assignor estoppel, characterizing it as a rule "well grounded in centuries-old fairness principles."[13] The Court's doctrinal analysis centered on the need to protect fair dealing in transactions, emphasizing the basis for estoppel: principles of fairness and equitable dealing. A patent assignment is only fair if the assignor made explicit or implicit representations about a patent's validity.

Not all representations before the grant of patent could be consistent with the claims ultimately issued. Consequently, assignor estoppel does not apply when "the assignor has made neither explicit nor implicit representations in conflict with an invalidity defense," because "there is no unfairness in its assertion."[14] The three exceptions to assignor estoppel identified by the Supreme Court provide additional paths for an assignor employee who is in an adverse competitive position to invoke invalidity defense.

10. *Scott Paper Co.*, 326 U.S. at 250.
11. *Id.* at 257.
12. *Id.* at 256 ("The patent laws preclude the petitioner assignee from invoking the doctrine of estoppel, as a means of continuing as against respondent, his assignor, the benefit of an expired monopoly, and they preclude the assignor from estopping himself from enjoying rights which it is the policy of the patent laws to free from all restrictions.").
13. 141 S.Ct. at 2304.
14. *Id.* at 2310.

> **“Assignor estoppel, a common-law doctrine, may prevent [a] former employee from asserting the patent invalidity defense.**

The first exception concerns legal evolution that “renders irrelevant” an assignor’s “warranty of validity.”[15] The other two exceptions apply to claims filed after assignment. A common situation is the assignment of future rights. This is likely to be the situation when an employee, under an employment agreement, assigns to her employer patent rights to future inventions before she could possibly make a warranty of validity of patent claims. Another situation concerns the assignment of a mere patent application where the claims ultimately issued are materially broadened to cover a scope not initially represented by the assignor. The facts in *Minerv*a illustrate this exception. Therefore, the Supreme Court remanded the matter to determine whether the newly-added claim is materially broader than the ones originally assigned.

The two dissenting opinions call into question the continued viability of assignor estoppel. Justice Alito dissented on the basis that the Supreme Court ignored *stare decisis*. Pointing out the lack of patent statutes supporting the doctrine, Justice Alito argued that the majority failed to consider whether *Westinghouse* should have been followed or overturned. Otherwise, the majority’s ruling and reasoning became “unprecedented and troubling.” Justice Barrett’s dissent, which was joined by two other justices, charged that the absence of the assignor estoppel doctrine from the Patent Act of 1952 suggested that Congress intentionally excluded the doctrine. Therefore, Justice Barrett contended that the Court should not have upheld this common law principle of assignor estoppel.

Justice Barrett’s concerns are important to an effective patent system. The exclusion of assignor estoppel from the Patent Act can serve the public interest. After all, patent law should not disrupt the free market when the law and market forces would sufficiently regulate the parties’ behaviors. The threat of prohibitively expensive patent litigation could force an assignor to weigh and consider whether her expected benefit from adopting technology so similar to her assigned invention outweighs the litigation cost. Furthermore, in forcing disclosure of technological advancements, patent law promotes innovation and adds to the body of scientific and technological knowledge because of the increased public access to valuable information. An invention that is already in the public domain no longer has new public value. These concerns were predicted in *Scott Paper* eight decades ago: “[t]he interest in private good faith is not a universal touchstone which can be made the means of sacrificing a public interest secured by an appropriate exercise of the legislative power.”[16] □

15. *Id.* at 2311.

16. 326 U.S. at 257.

Changes to the Real Property Transfer on Death Instrument Act

By Richard F. Bales

Public Act 102-0068 has had a tortured past. Proposed changes to the Transfer on Death Instrument Act were originally outlined in Senate Bill 3150, which was introduced to the 101st Illinois General Assembly on February 6, 2020. Passage of the bill stalled because of the pandemic, so changes were later introduced to the 102nd General Assembly on January 29, 2021, as Senate Bill 0047. The governor signed the bill on July 9, 2021, which becomes effective January 1, 2022. This legislation is now known as Public Act 102-0068 and can be read in full by visiting www.ilga.gov and clicking on "Public Acts."

Public Act 97-555 (HB 1153), effective January 1, 2012, created the Illinois Residential Real Property Transfer on Death Instrument Act. It was first amended by Public Act 098-0821, effective January 1, 2015. Public Act 102-0068 is the second amendment to what is now called the Real Property Transfer on Death Instrument Act ("the Act").

A Transfer on Death Instrument ("TODI") is a probate-avoidance tool. Although the Act states that a TODI is a nontestamentary instrument,[1] a TODI should, as a practical matter, be deemed the equivalent of a will for the disposition of real property – i.e., a "will-equivalent" that does not require prove-up and admission in a probate proceeding.

A TODI, in proper form, properly executed and timely recorded, transfers title to the subject property to the designated beneficiary, but the transfer is effective only upon the death of the owner, who is the party who executed the TODI.[2]

1. 755 ILCS 27/30, as amended.
2. *See* 755 ILCS 27/20, 40, and 65, as amended; *see also* 755 ILCS 27/5, as amended (defining "designated beneficiary" as "a person designated to receive real property under a transfer on death instrument.").

In what is surely the most significant of Public Act 102-0068's many changes, the name of the Act is amended to read: "The Real Property Transfer on Death Instrument Act."[3] That is, the title has been changed to reflect that the Act is no longer limited to only residential real estate.

The definitions section of the Act has been significantly revised.[4] Prior to Public Act 102-0068, a "beneficiary" was a "person that receives residential real estate" under a TODI and included several trusts under the definition of "person." A "beneficiary" is now "a person that receives real property" under a TODI, expanded to include a trust created under a transfer on death instrument.[5]

The definition of "owner" is now revised and expanded, to wit: "'Owner' means an individual who owns an interest in real property. 'Owner' does not include a trustee or an individual acting in a fiduciary, representative, or agency capacity who holds an interest in real property."[6] An owner is now defined as someone who owns "an interest" in real property. This change suggests that an owner of a less than fee simple interest in land can make a TODI. In this regard, see the discussion of Section 20 of the Act, *infra*. This change to the definition of "owner" also makes it clear that a trustee of a personal trust (for example, "John Smith, as trustee of the John Smith Living Trust,") cannot execute a TODI.

There is now a new definition of "real property" in Section 5. "Real Property" is now defined as "an interest in realty located in this state capable of being transferred on the death of the owner."

This expanded definition of real property in Section 5 is carried over into Section 20. One of the most significant changes to the Act is in this section. Section 20 has been amended to redefine the interest in real estate that may be transferred by a TODI:

> An owner may transfer real property by a transfer on death instrument to one or more beneficiaries in any form of ownership valid under state law, concurrent or successive, absolute or conditional, contingent or vested, effective at the owner's death.[7]

Pursuant to Section 21, a TODI beneficiary can be a trustee of any one of several trusts, including a trust that is already in existence at the time the owner executes the TODI and is identified in the TODI;[8] a trust that is created in the owner's will;[9] a trust created in the TODI;[10] or a trust created in the will of a third party, assuming that that third party predeceased the owner.[11]

Note that there is a caveat in Section 21: "Unless the transfer on death instrument provides otherwise, a revocation or termination of the trust before the owner's death causes the transfer to the trust to pass to the owner's estate."[12]

3. 755 ILCS 27/1, as amended.
4. 755 ILCS 27/5, as amended.
5. *Id.*
6. *Id.*
7. 755 ILCS 27/20, as amended.
8. 755 ILCS 27/21, as amended.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

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Section 45 now provides that, generally speaking, if a TODI is not witnessed by at least two credible witnesses, the TODI is void.[13]

Section 65 has been drastically rewritten. This section concerns the effect of the TODI at the owner's death. Note that Section 65 uses the term, "designated beneficiary." Again, a designated beneficiary is a person designated to receive real property under a TODI and a "beneficiary" is simply a person that receives real property under a TODI.[14]

The effects of the new Section 65 are numerous. Unless otherwise indicated, two or more designated beneficiaries taking title to concurrent interests take title in equal and undivided shares with no rights of survivorship.[15] If there is only one designated beneficiary, and the designated beneficiary is an entity that does not exist at the time of the owner's death, then the property passes to the owner's estate.[16] If there is only one designated beneficiary, and that beneficiary is not a descendant of the owner, and if that beneficiary dies before the owner dies, then the property passes to the owner's estate.[17] If there are two or more designated beneficiaries to receive concurrent interests, and those designated beneficiaries are not descendants of the owner, and one or more, but less than all, of these designated beneficiaries die before the owner dies, then the interests of those deceased designated beneficiaries are transferred to the other remaining designated beneficiary or beneficiaries in proportion to the other remaining designated beneficiary's or beneficiaries' respective interest or interests in the real estate.[18] If a designated beneficiary is a descendant of the owner, and he dies prior to the owner, then the property passes to the then-living descendants of the pre-deceased designated beneficiary, *per stirpes*.[19]

"The recording of the renunciation operates as a complete bar to any claim of the surviving spouse under the TODI.

Section 66 is completely new. It concerns a new concept for TODIs: a spouse renouncing a TODI. This section is very similar to the section on will renunciation that is found in the Probate Act.[20] Section 66(a) states that the surviving spouse of the owner can renounce a TODI. If the spouse renounces the TODI, the spouse is entitled to a one-third interest in the real property transferred by the transfer on death instrument if the owner leaves a descendant or a one-half interest in the real property if the owner leaves no descendant.[21]

13. 755 ILCS 27/45(b).
14. *Supra note* 5.
15. 755 ILCS 27/65(a)(2), as amended.
16. 755 ILCS 27/65(a)(3), as amended.
17. *Id.*
18. 755 ILCS 27/65(a)(4), as amended.
19. 755 ILCS 27/65(a)(5), as amended.
20. *See* 755 ILCS 5/2-8.
21. 755 ILCS 27/66(a).

Section 66(a) also states that a spouse "may" waive the right to renounce the TODI by executing a waiver "as part of the transfer on death instrument."[22] But the use of the word "may" suggests that a surviving spouse could also waive the right to renounce the TODI by executing a waiver after the other spouse died.

Section 66(b) states that in order to renounce the TODI, the owner's surviving spouse must record a renunciation within seven months after the owner's death, or within such additional time as a court might grant pursuant to 755 ILCS 5/2-8.[23] The recording of the renunciation operates as a complete bar to any claim of the surviving spouse under the TODI.

Section 85, which deals with the rights of creditors, has been completely revised. Upon the death of the owner, a beneficiary of a TODI acquires the land subject to possible claims against the estate of the deceased owner.[24] These claims may be enforced against the land. That is, Section 85 indicates that a creditor of the decedent may enforce a claim against the land transferred by a TODI.

Section 95 now provides that *any* licensed attorney (not just an *Illinois* licensed attorney) can prepare a TODI.[25] The section also states that the failure of a TODI to be prepared by a licensed attorney does not in and of itself render the TODI void.

Considering the dramatic changes to the Act made by Public Act 102-0068, it will be interesting to see how TODIs are drafted after January 1, 2022. □



22. 755 ILCS 27/66(a).
23. 755 ILCS 27/66(b).
24. 755 ILCS 27/85, as amended.
25. 755 ILCS 27/95, as amended.

Law Update

Editors Hilary Wild and Anne Fung

ILLINOIS LAW

CIVIL RIGHTS

Hobby Lobby Ordered to Allow Transgender Female Employee to Use Female Restroom; Illinois Human Rights Act Provisions Violated Even After Hobby Lobby Provided "Alternative" Unisex Bathroom Access; Employee Awarded Substantial Damages for Emotional Distress

***Hobby Lobby Stores, Inc. v. Sommerville*, 2021 IL App (2d) 190362**

In *Hobby Lobby Stores, Inc. v. Sommerville*, the Second District Appellate Division addressed an issue of first impression in Illinois: whether an employer violates the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* (the Act) by denying a transgender woman the use of the women's bathroom. The Human Rights Commission (the Commission) found that Hobby Lobby violated both Article 2 of the Act (prohibiting discrimination based on, among other things, gender identity, in employment) and Article 5 (prohibiting such discrimination in the provision of facilities in a place of public accommodation). It awarded the respondent, Meggan Sommerville, $220,000 for emotional distress and required Hobby Lobby to grant Sommerville access to the women's bathroom. Hobby Lobby appealed, arguing that its policy of regulating bathroom access based upon sex did not violate the Act and that the damages awarded were too high. The appellate court affirmed the Commission's rulings and remanded the case to the Commission to consider awarding additional damages to Sommerville.

Hobby Lobby hired Sommerville in 1998. In 2007, she began transitioning from male to female. In 2020, she obtained a court order changing her name, and was issued a new Illinois driver's license and Social Security card which showed her new name and identified her as female. In 2010, Sommerville formally informed Hobby Lobby of her transition and her intent to begin using the women's bathroom in the store. Hobby Lobby continued to refuse to allow her to use the women's bathroom. However, Sommerville occasionally used the women's bathroom at work. In 2011, she was given a written warning for entering the women's bathroom at the store. This caused her to break down crying. She filed her complaint with the Commission in 2013.

During the litigation, Hobby Lobby installed a unisex bathroom in the store, which Sommerville could use, but it continued to deny Sommerville access to the women's room. As a result, Sommerville was further humiliated and segregated: *"I felt as though there were the guys, the gals, and then me." Id.* at ¶ 9. As a result of Hobby Lobby's ban on her using the women's bathroom at work, Sommerville suffered physical and emotional stress. For a couple of years, she would "hold it" until her lunch break. She limited her fluid intake. She left the store to use the bathroom at nearby businesses.

Under the Act, it is a civil rights violation for "any employer to *** to segregate, or to act with respect to *** discipline *** or terms, privileges or conditions of employment on the basis of unlawful discrimination." It is also a civil rights violation for any public place of accommodation to "[d]eny or refuse to another the full and equal enjoyment of the facilities based on unlawful discrimination." *Id.* at ¶ 22. "Unlawful discrimination" includes "discrimination against a person because of his or her actual or perceived *** sex *** [or] sexual orientation ***. The Act defines "sex" as "the status of being male or female." The definition of "sexual orientation" encompasses "gender-related identity, whether or not traditionally associated with the person's designated sex at birth." *Id.*

The appellate court concluded that Hobby Lobby's conduct "falls squarely within the definition of unlawful discrimination under the Act, as it treats Sommerville differently from all other women who work or shop at its store, solely on the basis that her gender identity is not 'traditionally associated with' her 'designated sex at birth.'" *Id.* at ¶ 24. Hobby Lobby argued that

the Commission conflated "sex" with "sexual orientation," and it limited its access to the bathrooms based on sex, not gender identity. But the court held that the Act's definition of "sex" as "the status of being male or female" is broad enough to encompass a changing sexual identity. "There is simply no basis in the Act for treating the 'status' of being male or female as eternally fixed." *Id.* at ¶ 26.

Hobby Lobby next argued that its refusal to allow Sommerville to use the women's bathroom was a reasonable application of the Act's "bathroom exemption," which allows the designation of separate bathrooms for men and women. The court found a fundamental problem with this argument – "Sommerville is female, just like the women who are permitted to use the women's bathroom." *Id.* at ¶ 33.

The appellate court also swiftly disposed Hobby Lobby's arguments about the privacy and discomfort of others using the women's restroom, proclaiming, *"We will not prioritize fears or discomfort that have no factual basis in the record. 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'"* *Id.* at ¶ 43, quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

The court further upheld the $220,000 damages award, finding that it was not excessive. The Act provides for the award of actual damages, which includes damages for emotional distress. In a discrimination case, such damages include compensation or mental anguish, humiliation, and embarrassment. Here, Sommerville experienced substantial mental and emotional distress from Hobby Lobby's discriminatory bathroom policy, including dehydration, bursts of crying, headaches, and nightmares.

Finally, the appellate court remanded the case to the Commission to consider awarding Sommerville additional damages and attorneys' fees due for Hobby Lobby's continuing violations during the course of the litigation.

CRIMINAL LAW

Trial Attorney's Failure to Fully Cross Examine Prosecution's Expert Witness Deemed Ineffective Assistance of Counsel
***People v. Petrie*, 2021 IL App (2d) 190213**

After a bench trial in the Circuit Court of DeKalb County, Petrie, an at-home daycare provider, was convicted of multiple counts of aggravated battery to a child. On appeal, she raised two main issues: 1) whether her waiver of a jury trial was invalid after she filed a motion for substitution of judge, but did not proceed on the motion, and 2) whether her counsel was ineffective after it failed to fully cross-examine the state's

About the Editors



Hilary Wild graduated from the University of Colorado School of Law and practiced in New York for several years before moving to Illinois. Since 2014, she has worked for Rolewick & Gutzke, P.C., specializing in employment law, business law, and a variety of types of litigation, including personal injury, wills and trusts and commercial.



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expert witness on his opinion that the child could not have been injured while in the care of his parents when the timing of the injury was a significant issue in the case.

Regarding her first argument, the appellate court disagreed that Petrie's jury waiver was invalid. Her motion for substitution of judge was filed by her first attorney. New attorneys soon became involved but knew there was a pending motion for substitution. The substitution motion was raised by the judge, but new counsel asked to continue the motion. Petrie was present either by video or in-person each time the case was presented to the trial judge. Thereafter, Petrie signed a jury waiver. The judge presided over the case for a number of years before it was assigned to another trial judge. The second trial judge also raised the issue of the motion for substitution and its impact on Petrie's jury waiver. Petrie's counsel did not proceed on bringing the motion for decision and eventually proceeded to trial. On appeal, Petrie's counsel argued that her jury waiver was improper due to the pending motion for substitution of judge. The appellate court held that Petrie "either invited or acquiesced to the trial court's error" by failing to secure a decision on her motion and by failing to take any action to prevent the case from going to trial.

Regarding her second argument, the appellate court found that defense counsel's failure to cross-examine the state's expert witness amounted to ineffective assistance of counsel under *Strickland v. Washington*. At trial, the state called two expert witnesses. One of the expert witnesses opined that the injury could have occurred up to eight hours before the child was in Petrie's care. The other expert witness testified that the injury occurred immediately before the onset of symptoms (while the child was in Petrie's care). Defense counsel presented an expert who testified that the injury could have occurred up to forty-eight hours before the onset of symptoms. The trial court credited the testimony of the state's second expert over the others. Despite studies and published research contrary to the second expert's opinion, defense counsel never asked the expert for professional literature or other support for his opinion. Moreover, the defense counsel did not object to his testimony based on lack of foundation. Despite defense counsel's skilled cross-examination of the state's first expert and the presentation of a contrary expert, the appellate court found that failing to cross-examine the expert on an issue central to the case fell below the "threshold of constitutionally mandated assistance of counsel." The court also found that Petrie was prejudiced by her counsel's ineffectiveness as the state's expert was permitted to testify without ever having to address that his opinion was debated in the medical community. The case was remanded for a new trial.

CONTRACTS

Accelerated Rent Unavailable When Lessor Constructively Evicts

***Ivanhoe Shoppes, LLC v. Bauspies,* 2021 IL App (2d) 200582**

Plaintiff and defendant entered into a five-year written lease for space in which the defendant operated a fitness center. Approximately two years into the lease, the defendant began paying only partial monthly rent. Approximately a year later, the plaintiff executed and filed a distress warrant, including a written inventory of the personal property (gym equipment) on the premises. In the execution of the warrant, and in an effort to preserve the personal property for sale in order to satisfy the rent owed, the plaintiff changed the locks on the premises. Although the defendant was permitted on the premises once or twice after the locks were changed, he could no longer operate the business.

The plaintiff argued that it only locked the premises to keep the defendant from removing and selling the gym equipment. The court opined, however, that while the plaintiff was entitled to seize the personal property under the Eviction Act, it was not entitled to lock the defendant out of the premises. Locking the defendant out resulted in a constructive eviction. Even though under the lease agreement, the plaintiff lessor was entitled to accelerate the rent after the defendant's default, it was only entitled to rent through the time of the constructive eviction, when the defendant was denied the right to enjoyment and use of the property – not through the entirety of the lease.

The appellate court affirmed the Circuit Court of Lake County ruling that the plaintiff was not entitled to accelerated rent under the lease when it engaged in unlawful constructive eviction.

EMINENT DOMAIN

Petition for Attorney Fees Under the Eminent Domain Act Must Be Brought Within 30 Days of the Final Judgment in a Condemnation Action
***Village of Bloomingdale v. Lake/Ridge,* LLC, 2021 IL App (2d) 200232**

The defendant property owner in a condemnation action under the Eminent Domain Act (735 ILCS 30/1-1-1 *et seq.*) filed a petition for attorney fees under section 10-5-70(a) of the Act. The petition was filed more than 30 days after the final judgment in the condemnation action. The circuit court denied the petition as untimely, finding that the Act requires such a petition to be brought within 30 days of the entry of the final judgment in the condemnation action.

The appellate court affirmed, holding that section 10-5-70(a) fee petitions must be brought within the condemnation action, which means within 30 days of the final judgment in the action and while the trial court retains its general jurisdiction. The language of section 10-5-70(a) states that an order on a fee petition must be entered in the action. Because a statutory provision providing for attorney fees must be strictly construed, this quoted language indicates that the request for fees is to be brought in the condemnation action and not in a separate action. The court deemed obsolete *Town of Libertyville v. Bank of Waukegan*, 152 Ill. App. 3d 1066 (1987), which reached a contrary result based upon a previous version of section 10-5-70(a).

DOMESTIC RELATIONS

Trial Court's Denial of Attorney's Fees Under Section 508(c) of the Marriage and Dissolution of Act Reversed When Based on Alleged Violations of the Illinois Rules of Professional Conduct
***In Re Estate of Weber,* 2021 Il App (2d) 200354**

In a dissolution of marriage proceeding, the wife, who was suffering from disability due to severe physical and possible mental illness, had a personal caregiver. As the result of a question regarding the undue influence of the caregiver, the caregiver's bank accounts were subject to a subpoena. The wife's attorney commenced representation of the caregiver for purposes of the subpoena. Judgment for dissolution was granted (reserving all financial issues), and the husband passed away quickly thereafter. Several months later, the wife terminated her attorney's services and the attorney filed a motion for setting final fees and costs. Very soon thereafter, the wife also passed away.

The wife's estate objected to the attorney's fees based on the attorney's violation of the Rules of Professional Conduct (the "Rules") and the breach of his duty of loyalty to the wife when the attorney engaged in representation of her caregiver simultaneous to the wife's representation. In ruling on the fee petition, the trial court found that when the attorney commenced representation of his client's caregiver, it violated Rule 1.7 of the Rules of Professional Conduct and thus, cut off fees after that date. The trial court ordered the disgorgement of $16,000 in fees and disallowed $125,000 in fees. The court further found that the hourly rate and time spent on the case was reasonable other than some explicitly mentioned motions.

On appeal, the appellate court reversed, finding that a violation of the Rules of Professional Conduct does not give rise to a private cause of action, "nor should it create presumption in such a case that a legal duty has been breached." The court reasoned that the Rules serve as a structure for regulating attorney conduct through the ARDC – not as a basis for civil liability. The appellate court specifically noted that this was the type of case that subverts the stated purpose behind the rules.

Moreover, the appellate court noted that the fee petition proceedings were not well-suited for making a proper finding of a conflict of interest. While it is true that Rule 1.7 defines and prohibits lawyers from representing clients with concurrent conflicts of interests, it also includes an exception for clients who give informed consent. The trial court heard no evidence from the estate regarding whether the client was informed or consented to the conflict – possibly because any evidence of such presented by the estate would have waived the Dead Man's Act and opened the door to evidence from the attorney seeking fees.

Finally, the court noted that in a disciplinary proceeding, the ARDC must prove attorney misconduct by clear and convinc-

ing evidence. The attorney does not bear the burden of proving his innocence. Because the trial court found that the attorney's time spent and fees accrued was otherwise reasonable, the appellate court reversed for entry of judgment on the full fee award.

Award of Penalties Against Employer for Violation of the Income Withholding Support Act Reversed When Employer Did Not Knowingly Violate the Act
***Burns v. Delta Airlines,* 2021 IL App (2d) 200313**

In the context of a dissolution of marriage proceeding, the husband's employer was served with an Income Withholding Order (IWO). Although the IWO indicated a specific amount to withhold, the husband did not earn sufficient wages to cover that amount. In such a case, a formula would be applied to determine the amount to withhold dependent on two variables: 1) whether the obligor supports another family and 2) whether the obligor is more than twelve weeks behind in support payments. The IWO indicated that the obligor husband was more than twelve weeks behind in payments, which would result in a withholding of 65% of his disposable income, but did not indicate whether he was supporting another family, which, if he were, would result in a withholding of only 50% of his disposable income. In addition, the Income Withholding Support Act (the "Act") includes a $100 per day penalty for an employer who knowingly violates the IWO.

The employer, through its agent, withheld 50% of the obligor husband's income and timely forwarded it to the State Disbursement Unit. During this time, the obligee and the employer were communicating about the discrepancy. The obligee did not, however, send the official notice as required by the Act to the employer until nine months after the IWO was in effect. Realizing it was mistaken, the employer paid the difference in the amount owed without any accrued interest or penalties.

On cross-motions for summary judgment, the obligee argued that she was entitled to penalties measured against the employer for its knowing violation of the Income Withholding Support Act measured from the time it violated the Act. The trial court determined that the employer's failure to withhold the proper amount as indicated on the IWO, was a knowing violation of the Act – even if the employer withheld a regular amount and timely forwarded it to the State Disbursement Unit (SDU). The trial court awarded the obligee spouse $190,000 in penalties, which began accruing as soon as it violated the IWO.

On appeal, the appellate court noted that this appeared to be an issue of first impression: whether "penalties are appropriate when the employer regularly withholds an amount within the range of percentages indicated in the IWO, even if it is not the correct percentage, and makes timely remittances to the SDU." The court looked to the legislative history of the Act and determined that the primary reason for the penalty was to ensure *timely* payments of support. Moreover, because the penalty is penal in nature, it should be strictly construed in favor of the payor.

The IWO, by allowing for two factors for calculating the correct percentage to withhold (whether the obligor was more than 12 weeks in arrears and whether the obligor was supporting another family) without providing the information regarding these factors, created an ambiguity. The pre-printed form included no space for an indication of whether the obligor was supporting another family. Thus, the employer was in the position of having to prove the negative (i.e., that the obligor was not supporting another family). The appellate court determined that because the employer made *timely* payments – even though they were too low an amount, its violation was not knowing. The court opined, "Read together with the IWO in this case, section 35(a) penalties are best understood as a means of ensuring that at least 50% of an obligor's disposable income is withheld and timely paid as child support."

The appellate court found that the violation of the Act was not knowing until it received the official notice from the obligee – nine months after the effective date of the order. Thus, the penalties and interest accrue for the time period after the notice was received – not after the employer's first violation of the Act. The entry of summary judgment against the employer was vacated and the employer was ordered to pay interest and penalties for the period after it received the notice until it complied with the notice.

ATTORNEY CLIENT PRIVILEGE

Attorney-Client Privilege Does Not Survive a Corporation's Dissolution Under the Facts Presented; A Corporation Must Have a Legal Successor or Management That Can Assert the Privilege
***John Doe Corp. 1 v. Huizenga Managers Fund*, LLC, 2021 IL App (2d) 200513**

In *John Doe Corp. 1 v. Huizenga Managers Fund*, the Second District Appellate Court answered the novel question of whether the attorney-client privilege survives a corporation's dissolution in the negative. The plaintiff entities filed suit under the fictitious names John Doe I and John Doe 2, alleging that they were subject to confidentiality agreements that prohibited them from identifying themselves and certain other parties by their real names. They sued the defendants for violations of nondisparagement and confidentiality provisions contained in two subscription agreements pertaining to the purchase of equity interests in an investment fund.

The Madison County trial court issued an *ex parte* TRO against the defendants and set a hearing on the plaintiffs' request for a permanent injunction. The defendants filed an emergency motion to transfer the venue to Cook County, where they alleged that related actions had been pending for over a decade. The trial court granted the motion to transfer but ordered the case transferred to DuPage County, where both defendants' principal places of business were located.

The defendants then filed a motion to dismiss the plaintiffs' complaint with prejudice in DuPage County. The plaintiffs filed a motion to stay the proceedings in DuPage County until the Cook County proceedings were resolved, arguing that otherwise there could be inconsistent judgments in the different forums. The trial court stated it would not stay the case indefinitely, and the plaintiffs elected to voluntarily dismiss their action over the defendants' objections.

The defendants filed a motion for sanctions in the DuPage case under Illinois Supreme Court Rule 137, arguing that the plaintiffs improperly obtained the TRO in Madison County. The DuPage trial court agreed that sanctions were appropriate for the plaintiffs' failure to give notice to the defendants and for their failure to apprise the Madison County court of "very important and extremely material facts that would have allowed him to make a full and fair determination on the merits." *Id.* at ¶ 20. The trial court entered and continued the defendants' request for sanctions and damages, pending discovery and an evidentiary hearing.

The plaintiffs obtained new counsel, Winston & Strawn. During the course of the DuPage proceedings, the plaintiffs' actual identities were revealed both in court and in discovery responses. The plaintiffs' discovery responses also asserted various objections, including that certain information was protected by the attorney-client privilege. The defendants filed a motion to pierce the attorney-client privilege and related privileges, based upon the crime-fraud exception and the lack of privilege for defunct entities. They argued that the crime-fraud exception applied because the plaintiffs had submitted conflicting sworn statements. The defendants further argued that if the plaintiffs no longer had any legal existence, they could not assert privileges. The defendants filed a supplemental motion to compel production of allegedly privileged documents.

The trial court held a hearing on the privilege issue and ordered the plaintiffs to produce the documents, ruling that the defunct entities could not assert the attorney-client privilege. The plaintiffs filed a motion to reconsider. After a hearing, the trial court again ordered the plaintiffs' counsel to turn over the documents to the defendants. At his clients' direction, the plaintiffs' attorney, Wieber, did not produce the documents and he was held in contempt. The court imposed a sanction of $1,000 per day until the matter was resolved by the appellate court.

On appeal, the plaintiffs argued, among other things, that the trial court erred in ruling the plaintiffs could not assert the attorney-client privilege. The plaintiffs argued that they were still defending themselves against sanctions claim in the case; they did not dissolve until 18 months into the litigation; they asserted the privilege before they were dissolved; and the privileged communications were from the period of time applicable to the trial court's sanctions determination which predated the plaintiffs' dissolution. The defendants argued, among other things, that the plaintiffs failed to present a compelling reason why the privilege should continue to apply.

The appellate court stated, "Whether a dissolved corporation may assert the attorney-client privilege has not yet been addressed in Illinois," and it looked to other state and federal courts for guidance. *Id.* at ¶ 82. It noted, "The privilege extends beyond an individual's life because the client's knowledge that the communication will remain confidential even after death encourages the client to speak freely with counsel and not have to be concerned about reputation, civil liability, or possible harm to friends of family." *Id.* at ¶ 83 (internal citation omitted).

But these concerns cannot be applied to corporations because "corporations do not have reputations to protect after dissolution, they do not have friends and family who could be embarrassed or armed, and there are limitations periods for suing a dissolved company." *Id.* Moreover, limiting the attorney-client privilege to the life of a corporation is consistent with the principle that the privilege is to be construed narrowly because it withholds relevant information from the judicial process. *Id.* The court stated, "In determining whether a corporation is dead, courts should look at practical business realities rather than technical legal status." *Id.* at ¶ 85. In order for the privilege to apply, the corporation must have a legal successor or management that can assert the privilege.

The plaintiffs admitted that they had been dissolved with no officers, directors, or employees; this lawsuit comprising their only remaining function. The appellate court held that the plaintiffs could not assert the attorney-client privilege "because they are dissolved entities and failed to show that they have a manager or other representative with the authority to assert the privilege on their behalf." *Id.* at ¶ 89. However, the appellate court vacated the contempt finding, believing that the attorney's noncompliance with the discovery order was based on a good faith effort to secure an interpretation of an issue or to serve his clients and the court. *Id.* at ¶ 94. The appellate court affirmed the trial court's rulings in part and vacated them in part. It remanded the cause, noting that the plaintiffs were still subject to significant sanctions in the underlying proceeding. □



News & Events



32 ISBA Update
- By J. Matthew Pfeiffer

34 Barbeque Between the Raindrops – DCBA Families Celebrate Fall with a Cantigny Picnic

39 Judicial Profile: DuPage Associate Judge Leah Bendik
- By Tony Abear, Esq.

43 Legal Aid Update
- By Cecilia Najera

47 Legal Resources

ISBA Update

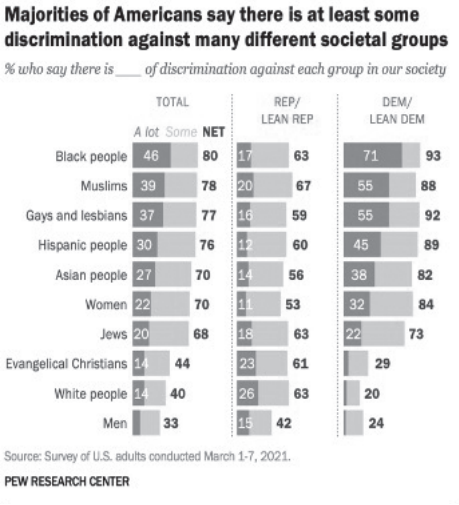


Putting Diversity, Equity, and Inclusion Front and Center

By J. Matthew Pfeiffer, ISBA Liaison

Diversity, equity, and inclusion, commonly referenced singularly as "DEI", has taken center stage in a variety of settings for some time now. Those settings include law firms, other industry employers, courts, and professional organizations (e.g., Illinois State Bar Association), all of which must actively work to create meaningful change and cooperation in spite of the history of injustice that has marginalized underrepresented groups within the legal profession.

It comes as no surprise that DEI has emerged as a topic of great significance at this point in time. According to a Pew Research Center survey of American adults in March 2021 (see inset), large numbers of Americans say there is at least some discrimination against several groups in this country, including 80% who say there is a lot or some discrimination against Black, 76% who say this about Hispanic, and 70% who see discrimination against Asian. Seven out of ten adults say that women face at least some discrimination, including 22% who say women face a lot of discrimination. The same study also concluded that majorities of Americans believe persons of Muslim and Jewish faiths, persons who identify as LGBTQIA+, and women all face at least some discrimination in today's society.



Furthermore, data from the Census Bureau released earlier this year reveal that dozens of counties across several states have no racial or ethnic group which makes up a majority. The estimates suggest that about 113 million people – one-third of all Americans – now live in a plurality county. These census figures highlight the impact of ever-expanding diversity: virtually all population growth in the United States of America is among people of color, groups long viewed as racial or ethnic minorities. As we move closer to the point where there is no longer any true majority for any race, religion, etc., the label "minority" and the meaning behind it are becoming increasingly outdated and would seem to be foreign concepts.

Yet, there continue to be significant shortfalls throughout the legal profession when it comes to embracing DEI and providing the same experiences and opportunities for all persons within the legal community irrespective of their backgrounds.

About the Author

J. Matthew Pfeiffer is the ISBA Board of Governors' elected representative for Area I, which consists solely of the Eighteenth Judicial Circuit. Matt is owner of Pfeiffer Law Offices, P.C. in Wheaton, concentrating its practice in civil litigation, employment matters, business law, estate planning, and commercial real estate. He also serves as current Immediate Past Chair of the Board of Visitors for Northern Illinois University College of Law. Matt is a past president of the DCBA (2018-2019 term).

Recognizing this, President Anna Krolikowska has made it one of her chief initiatives for this bar year to have the ISBA obtain an expert evaluation of the current status of DEI within the organization, develop strategies to accomplish goals related to DEI, and implement those strategies to foster, encourage, and enhance inclusivity and equity among each and every single person involved with the organization. ISBA's ultimate goal regarding its DEI efforts is to ensure that it is an organization that respects and values diversity in and among its leaders, volunteers, members, and staff and that it is committed to active and full participation in its programs, activities, policy development, and decision making, regardless of their backgrounds.



Prof. Kimberly Norwood



Richard D. Harvey, Ph.D.

Earlier this year, President Krolikowska appointed ISBA members (including this author) to serve on an advisory committee to select a DEI consultant. After a thorough vetting process, the ISBA anticipates the engagement of two consultants who will work together on its DEI initiative: Kimberly Norwood, the current Henry H. Oberschelp Professor of Law at Washington University School of Law; and Richard D. Harvey, PhD, an Associate Professor in the Department of Psychology at Saint Louis University. Professor Norwood and Dr. Harvey both bring a wealth of experience, research, and ideas to benefit ISBA as it works toward ensuring that every single person associated with ISBA has a seat at its proverbial table.

During the initial stages of the DEI consultancy, target audiences and areas of emphasis will be limited, then eventually spread to a wider array of participants and areas. The initial target audience is expected to be ISBA's officers, board members, active participants of section councils and committees, and employees, with emphasis on the following areas:

Education: DEI education for the Board of Governors, section council and committee officers, section council and committee members, assembly members, and staff.

Participation: Emphasize the value of diversity on all ISBA groups to leaders through messaging and training; creation of more diverse section councils and committees.

Governance and Policy: Review structures and procedures for equity and inclusion.

Programming: Establish standards for programs to meet diversity requirements; review programs and activities for inclusion and equity.

Social Activities: Establish standards for inclusion responsibilities for bar leaders and section council and committee members.

Evaluation: Charge ISBA leadership with conducting regular assessments as to progress based on measurable benchmarks.

There is a lot to tackle regarding DEI, but the resulting value to be gained from Professor Norwood and Dr. Harvey will be well worth the effort and cost. Stay tuned to this column for updates on ISBA's progress regarding its DEI initiatives. □

Barbeque Between the Raindrops – DCBA Families Celebrate Fall with a Cantigny Picnic



All Aboard the DCBA Express Train - Fall Festival Next Stop

Cocktails and appetizers were traded for ribs, pizza, and churros as three local food trucks and the hospitality staff of Cantigny Park hosted the October 7, 2021, DCBA Fall Family Festival. While early rain threatened (and delivered quite a downpour), the crowd of members and their families was not disheartened. With the American League Division Series (ALDS) playing on the big screen and kids enjoying a train ride through the Cantigny grounds and Red Oak Playground, food was served by Billy Bricks, Fire and Smoke BBQ, and the Grumpy Gaucho. Thank you to these vendors and Cantigny for their warm and friendly service. Also, thanks to **Greg Wildman** and OVC Online Marketing for Lawyers for their continuing support of DCBA social events. Event pictures are available on the DCBA website as well as on the DCBA Facebook page. In addition to resuming the monthly DCBA Unwind and our Grand Holiday Gala, we hope to have a spring family outing at the Kane County Cougars in their Family Fun Zone. Watch the *DCBA Brief* and *DCBA Docket* email newsletter for more details. □



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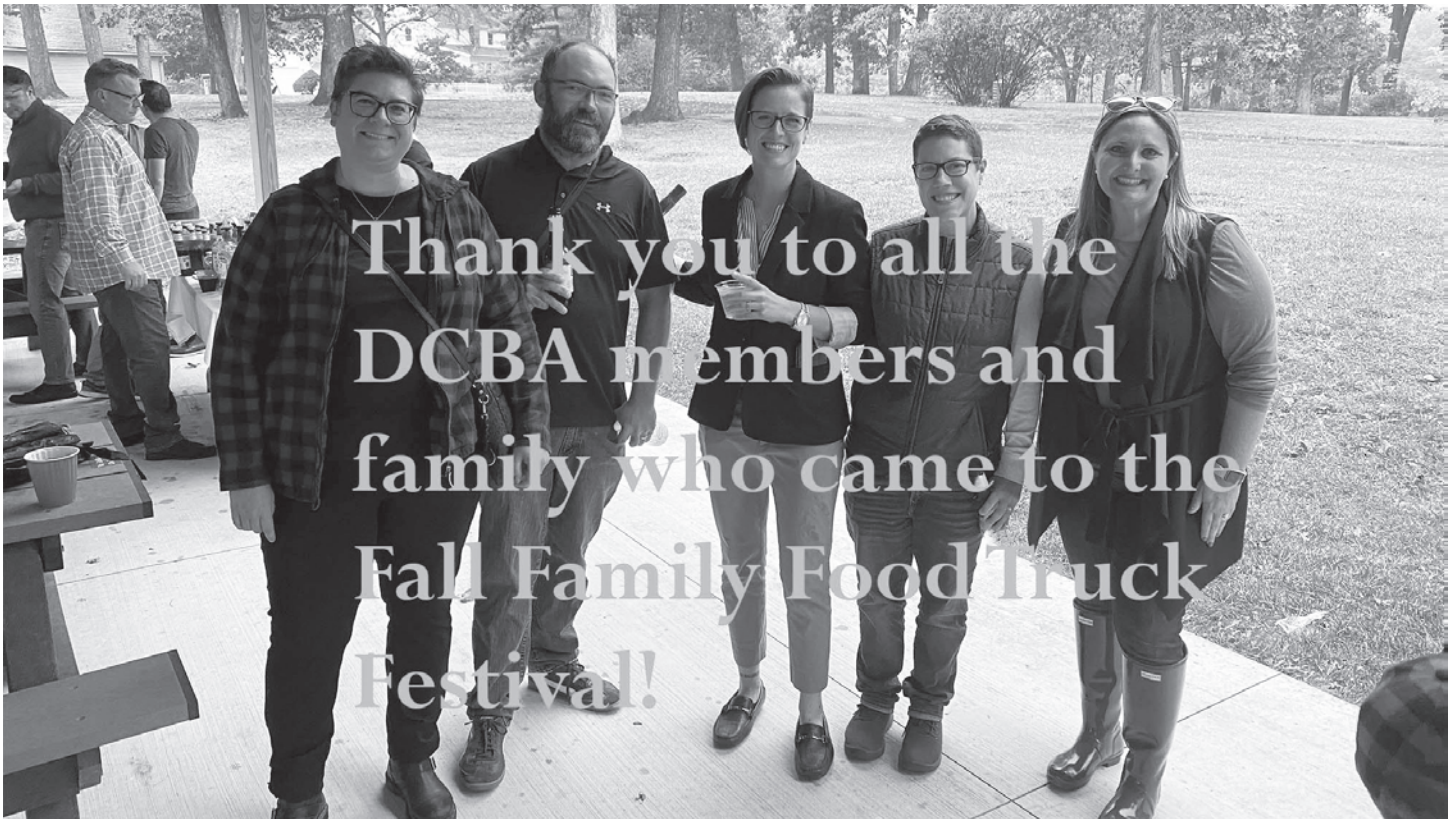
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Oak Brook-based Lillig & Thorsness, Ltd. is proud to announce that it has elected Angela M. Iaria to equity partner and Edward R. Sherman to partner.





Ms. Iaria focuses her practice on litigation, estate planning, estate administration, guardianship proceedings, and heads the firm's family law practice. She is a Guardian ad Litem in DuPage County and is appointed to investigate guardianship proceedings for disabled adults, disabled minor children, and adoptions. Ms. Iaria has extensive litigation experience and has conducted multiple jury trials, bench trials and contested hearings in state and federal court. Ms. Iaria is a former President of the DuPage Association of Women Lawyers, a former Chair of the Estate Planning and Probate Committee for the DuPage County Bar Association, and currently serves as the Assistant Treasurer for the DuPage County Bar Association.

Mr. Sherman leads the firm's appellate law practice, and also focuses on commercial litigation, estate and trust litigation and catastrophic injury defense litigation. He has tried numerous jury trials in state and federal court, and argued before the Illinois Supreme Court, the Illinois Appellate Court and the United States Court of Appeals for the Seventh Circuit. Mr. Sherman is currently the Associate Editor of the DCBA Brief and serves on various committees of the DuPage County Bar Association (Editorial Board and CLE Committee), Illinois Defense Counsel (Amicus Committee) and the Defense Research Institute (Appellate Rules Committee).

Lillig & Thorsness, Ltd. is an Oak Brook based law firm that has served DuPage, and surrounding counties since 1978 in the areas of civil litigation, family law, commercial and residential real estate, business, estate planning and probate, title insurance and other areas of law.

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Judicial Profile: DuPage Associate Judge Leah Bendik

By Tony Abear, Esq.



Judge Leah Bendik

In February 2021, the 18th Judicial Circuit Court of DuPage County announced the appointment of **Leah Bendik** as its newest associate judge. The appointment of Judge Bendik, a 2002 law school graduate, is an attestation to her hard work and consistency.

Judge Bendik is of home-grown local production, having graduated from Wheaton North High School. She then attended Duke University pursuing her major in political science, from which she graduated in 1999. Following in her father's footsteps, she graduated from the University of Illinois College of Law at University of Illinois Urbana-Champaign in 2002.

From 2002 to 2004, Leah thoroughly enjoyed the challenges presented in the appellate court during a two-year judicial clerkship with Illinois Supreme Court Justice Rita Garman. It was during this time that former Governor George Ryan commuted the death sentences of Illinois death row inmates. This action added to the standard judicial clerk caseload, but Leah was not complaining; it posed interesting appellate court issues for the Illinois Supreme Court, and thus it also posed interesting legal work for her. The work with Justice Garman cemented in Leah's mind her desire to pursue the practice of law and to concentrate on appellate practice.

Leah then joined the Illinois Attorney General's Office. Because she excelled in her judicial clerkship, she was privileged to receive an offer to work in the Attorney General's criminal appeals division – and so began her 16-year legal career. For her first 14 years, Leah worked under Illinois Attorney General Lisa Madigan, then worked under Illinois Attorney General Kwame Raoul until her recent appointment this year as a DuPage Associate Court Judge.

When she was at the Illinois Attorney General's Office, she worked at the infamous 17-story, all-glass curved, exterior of the Thompson Center/State of Illinois building. If you've never been to the Thompson Center, you should try to spend 20 minutes there before its anticipated sale and likely controlled destruction and removal. When opining about her experience with the building, Leah recalled that the physical building was certainly unique. Built in 1985, by design, the individual offices had no doors. The ventilation system was awful and, because of the building's voluminous open-air design, the acoustics were similarly horrendous. In the summer, it was uncomfortably hot; in the winter, it was uncomfortably cold. Birds freely flew around the vast interior airspace. Leah recalled that "Working at the Thompson Center was certainly interesting… at one point a pigeon walked into my office."

The pigeon, as it turns out, was feeling rather uninhibited and casually walked into her office. It took a gander around, looked at Leah and at her office accommodations. Finding nothing of much pigeon interest, and after its short visit, it casually walked back out. Upon inquiry as to what she would have done if it had decided to stay, she said that would have had to call the building's "bird-person" to come with "the bird net" to remove her uninvited guest. The fact that the Thompson Center maintained a "bird-person" as

well as a "bird net" as part of its normal building's operating tools is a statement in itself. In case you're wondering, her current chambers in the DuPage County Courthouse come equipped with both a door as well as functioning heating and air conditioning (and no pigeons).

At the Illinois Attorney General's Office, Leah worked on several memorable cases. Her most memorable defendant case was perhaps the Drew Peterson murder case in both the Illinois Supreme Court as well as the federal court case on Peterson's habeas corpus action. In addition to working on the murder conviction case of his 3rd wife, Leah also worked on Drew Peterson's solicitation for murder of the Will County State's Attorney James Glasgow.

While at the AG's office, Leah worked on cases where defendants alleged physical torture by the Chicago Police Department, otherwise known as the John Burge cases. While there were hundreds of cases alleging torture at the hands of Burge, the Attorney General's Office was only assigned a dozen or so cases because those limited cases had been conflicted out from the Cook County State Attorney's Office. Asked how she handled those cases of alleged torture, Leah identified that if there were credible allegations of torture and there was no other evidence against the defendant, then the defendant's conviction was reversed. However, just because someone made an allegation of torture did not automatically mean that the defendant's charges were dropped and the defendant simply released. Each case needed its own investigation. In one instance of a triple homicide, where there was credible evidence of police misconduct and abuse by Burge, but where there was other evidence of the defendant's guilt, the conviction was reversed and the case was prepared by the AG's office for a retrial based upon other evidence of the defendant's guilt, but without using any evidence from the forced confession. In that case, the matter did not go to trial, and instead the defendant pled guilty on the day the trial was set to begin. Leah opined that, because of the lapse of time, the case would have been significantly challenging to retry as several of the witnesses had died in the interim. On those occasions when the Attorney General's Office determined that a new trial was justified, prosecuting those cases proved somewhat challenging because some of the cases were 30 years old.

Another notable case that Leah worked on was the post-conviction federal case by Fedell Caffey. A DuPage court had convicted Caffey and 2 co-conspirators of killing Debra Evans of Addison, also killing two of Evans' children, and then removing from Evans' uterus her then unborn child. Leah was assigned to that federal habeas corpus case and her office participated in depositions of attorneys John Kinsella and Michael Wolfe. In the federal case, Judge Matthew Kennelly, U.S. District Court for the Northern District of Illinois, denied the habeas petition. Leah identified that Kinsella and Wolfe did an excellent job prosecuting a very complex case, which made her job defending the conviction substantially easier.

Concerning her work at the Attorney General's Office, she mentioned that one of her favorite aspects about working there was that, "it was a very collaborative environment." She spent a lot of time discussing cases and potential arguments with her co-workers, and she is certain that her work product improved as a result. "It was a team dynamic in that we all helped each other talk through our cases."

Mentors to Leah include both her father and mother, Dennis Myers and Kathy Myers. Dennis Myers, now retired, was in-house counsel for Verizon Wireless. Even though he traveled often, he instilled in her a strong work ethic and a love of the law. Leah also identified her mother as one of her mentors. She states that her mother showed consistency and a strong work ethic. She helped maintain the household, helped raise Leah and her two brothers, and later returned to work. Her mother provided a model to Leah of an involved parent that balanced work life with family life. Further, Leah identified Justice Rita Garman and Attorney General Lisa Madigan as mentors. She states, "They are two female trailblazers who have set a very good example, for other female attorneys, in particular, by succeeding in their field while also

balancing their family lives in the process."

Leah is married to Chris Bendik, an attorney with the Illinois Office of the State Appellate Defender. In other words, he is a state criminal defense attorney, whereas she had been a state criminal prosecuting attorney. And now they are married. To each other. (Sounds like a made for TV movie, no?) The couple met when Leah was a young attorney and Chris was in law school and working as a probation officer in Cook County. In response to my question regarding possible case conflicts, Leah identified that her husband primarily works on appellate court cases for the 1st district, whereas the Illinois Attorney General's Office rarely takes a 1st district case because Cook County has its own appellate prosecutors. On those rare occasions when a 1st district case came into the office, because of her marriage, she was able to stay away from the case.

Leah's hobbies include spending time with her two children, Zoe and Ryan. This often entails going to their sports events, soccer and basketball, or assisting with her daughter's Girl Scout troop. If given an opportunity, Leah enjoys playing tennis, having past played on Wheaton North High School's tennis team. She reads to her children at night and recently finished reading the Harry Potter series. She confesses that during her free time she enjoys reading detective and crime novel books by author Michael Connelly. She is also a member of the Appellate Lawyer's Association, past member of its Board of Directors, and was a past co-chair of the ALA's Moot Court Committee.

At present, Leah is known as Judge Leah Bendik and is assigned to the DuPage Courthouse courtroom 1003 which is traffic court. This courtroom averages a caseload of 100-200 cases per day. She relies heavily on and appreciates the staff from the DuPage Circuit Clerk's Office and the DuPage County State Attorney's Office so that as a team they are able to keep up with the heavy caseload. Judge Bendik notably identifies that she requests and appreciates the attorneys that come into her courtroom for being both prepared and patient. She does takes attorney cases first and compliments the attorneys for their preparedness before approaching the bench.

Judge Bendik identifies that in her courtroom she has a simple goal. She states that, "My number one goal is to make sure that the defendants understand what is happening, and that they leave feeling they were heard and that the right thing happened." She states that even though her cases at the Attorney General's Office were significant legal cases, usually either murder cases or serious felony cases, the traffic cases and the people now before her are likewise very important and she would like to leave these people who come before her with a positive view of the court system. □

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Legal Aid Update



Serving Domestic Violence Survivors with Protective Orders

By Cecilia Najera

October was Domestic Violence Awareness Month, so it was timely that **Ann Russell** and myself were sworn in as Special Assistant State's Attorneys on October 5, 2021. At the end of May, our program was hit hard with news that one of our Order of Protection clients was murdered. This tragedy, however, brought a renewal of commitment to the Domestic Violence Survivor clients in our office as well as the DuPage County States' Attorney's Office. We are so grateful to be forming a new partnership that will help provide comprehensive legal assistance domestic violence survivors in criminal matters.

Prior to 2018, the Illinois Domestic Violence Act ("IDVA") and the criminal code provisions in 725 ILCS 5/112A pertaining to Orders of Protection were almost identical. In 2018, a law was passed changing the process in which an individual could seek a protective order. A victim can now request a protective order be issued in a criminal matter at any time during the criminal case so long as they are the named victim. A victim no longer has to go to a separate judge to seek an Order of Protection. Additionally, a victim may ask for the same remedies that one may receive in a civil Emergency Order of Protection.

The standard to receive a protective order is not the preponderance of the evidence as it is in a civil Order of Protection case. Instead, the court shall grant the petition for protective order if the court finds prima facie evidence that a crime involving domestic violence, a sexual offense, or a crime involving stalking has been committed. A protective order can be issued if there is a complaint, if the respondent pleads or is found guilty, or is serving a sentence. 725 ILCS5/112A-11.5.

The length of time that an individual can have their protective order is also different than a civil Order of Protection. During the criminal case, a protective order can be issued at any time during the pendency of the criminal case and shall be entered for the length of the proceeding pursuant to 725 ILCS 5/112A-20. Moreover, a criminal protective order may be issued at the conclusion of the criminal case for up to two years beyond the sentence or other disposition. If the criminal case is dismissed, and at the discretion of the court or State's Attorney, the protective order proceedings may continue as an independent action, and the protective order can be issued for up to two years. 725 ILCS 5/112A- 22.3. In a felony matter, the protective order may be extended for up to four years after the conclusion of the case.

State's Attorney **Bob Berlin's** office and DuPage Legal Aid ("DLA") are partnering to serve domestic violence survivors in criminal matters. They will receive legal assistance with obtaining child support through the State's Attorney's IV-D Program, headed by **Jessica Patchik**, and temporary parenting issues and contributions to day care or school expenses through DLA. The underlying protective order proceedings will *(Continued on page 45)*

About the Author

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

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Legal Aid Update

(Continued from page 43)

continue to be heard in front of the criminal law judge where advocates from the State's Attorney's Office will provide support and help direct clients to necessary resources. The partnership allows for the State's Attorney's Office to file Petitions for Support within days of a criminal case being filed. DLA will then follow and provide legal assistance with filing appropriate petitions for temporary parenting issues.

> 725 ILCS 5/112 A-12 (b) states,
>
> A criminal court may decline to decide contested issues of physical care and possession of a minor child, temporary allocation of parental responsibilities or significant decision-making responsibilities, parenting time, or family support, unless a decision on one or more of those contested issues is necessary to avoid the risk of abuse, neglect, removal from the State, or concealment within the State of the child or of separation of the child from the primary caretaker.

and 725 ILCS 5/112 A-12 (c) states,

> The court shall transfer to the appropriate court or division any issue it has declined to decide. Any court may transfer any matter which must be tried by jury to a more appropriate calendar or division.

Given the above provisions, the criminal court is allowing the issues of temporary support and parenting to be determined by the parentage or divorce courts where and when the proper petitions are filed. After submitting to DLA's application process, and if a client is determined to qualify for legal assistance, DLA will continue to represent the client in a parentage or divorce case to assist with entry of a final judgment. DLA is excited to expand the services already provided in civil Order of Protection cases to individuals seeking criminal protective orders.

At DLA, we are looking forward to serving and helping domestic violence survivors by working side by side with State's Attorney Berlin and his staff. We hope to help individuals move forward and navigate legal issues that impact their families so greatly. It is of the utmost importance to support the survivors and their families in their struggle to keep their households stable, safe, and moving towards self-sufficiency. One way our legal system does this is by addressing support and parenting issues. It is essential for our judicial system to address these issues and to set the expectations and guidelines for both parties in order to bring some stability to volatile situations. □

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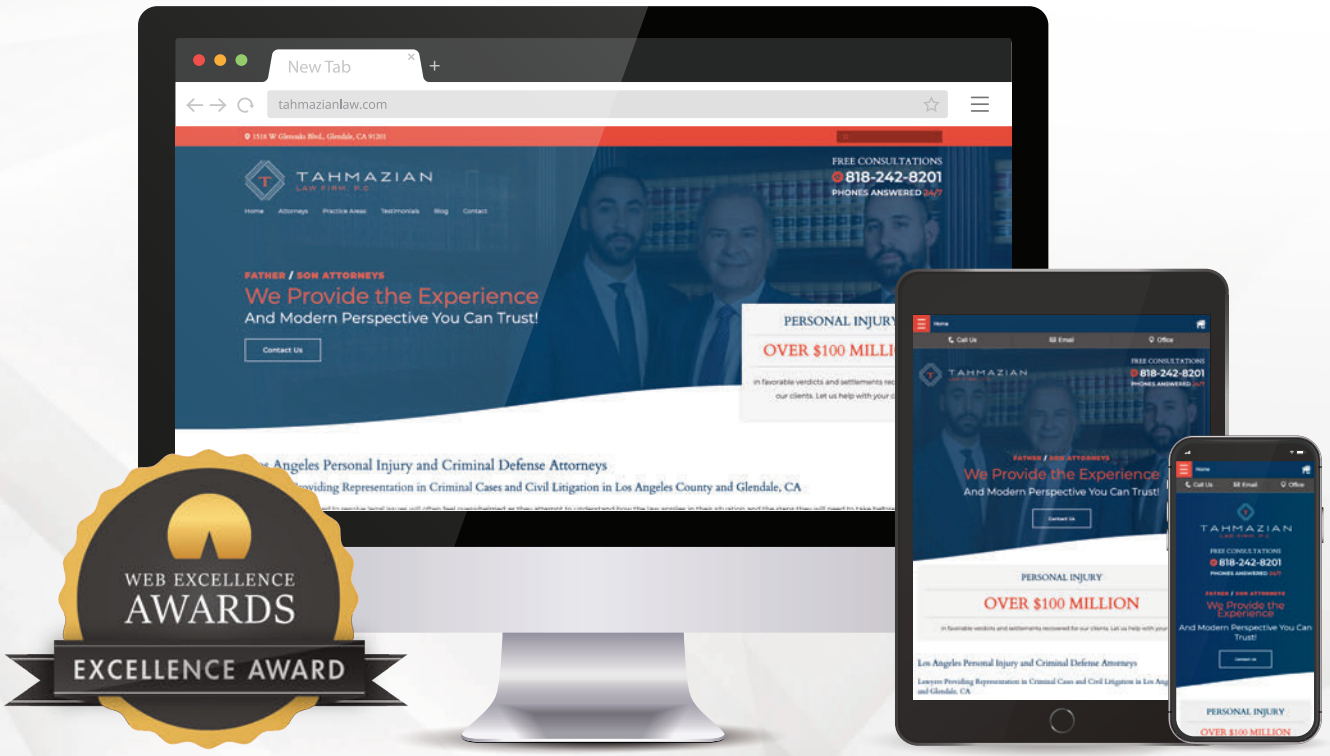
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