DCBA Brief
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Barbed Wire: A Revolution in Property Rights

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DCBA Brief

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Lawyer of the year, Judge Paul Marchese, fourth from right, leads another successful Lawyers Lending a Hand project. Also pictured are Lou Aranda and his daughter, Marie, Robert Rupp, Melissa Piwowar, Judge Brian Diamond and his wife, Lourdes and Markus May.

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Bored During the Pandemic? Write an Article for the DCBA *Brief*!

By Dexter J. Evans

Dexter J. Evans is an equity partner at Woodruff Johnson & Evans where he focuses his practice on personal injury litigation. Dexter is the Editor-in-Chief of the DCBA Brief and an active member of the DuPage County Bar Association. He is a member of the Million Dollar Advocates Forum. He earned his J.D. from Northern Illinois College of Law where he graduated *magna cum laude* in 2005.

I am not sure about everyone else, but I have found myself with plenty of work to do during the pandemic. Initially, I had my concerns when I considered how much of my days spent prior to the shutdown were consumed with travel to and from court or depositions. Fortunately, that has not been the case. I have been busy. I hope that others have had a similar experience with their respective practices.

If you do find yourself with some downtime, consider writing an article for the DCBA *Brief*. In a recent e-blast to the DCBA Membership, I tried my best to beg for articles. We are in desperate need of articles as there is a plethora of uncertainty surrounding what events, if any, we will be able to attend during the fall, winter, or even next spring. Also, quite frankly, the pandemic aside, we have been in desperate need of articles for several years period. It is also nice to see different names than the usual suspects writing articles time and again, although we, of course, appreciate those authors for their hard work and contributions.

Are we looking to just throw anything into the *Brief*? Of course not. As always, we are searching for scholarly written articles on topics that our membership is interested in. I know all of you have it in you to submit one. If the amount of time you have is a concern, fear not. The guidelines ask for the article to be 6-8 pages double-spaced. That is 3-4 pages single-spaced for the mathematical conversion-challenged amongst us.

In speaking with a lot of attorneys, many unfortunately do have a lot of downtime because of a slowdown in their practices due to COVID-19. When life hands you a rotten apple, try and make bitter apple spray. Now you know why my amateur career in comedy failed. All kidding aside, if you do find yourself with some extra time during the week or on a weekend, particularly in the fall and winter when we will be stuck indoors anyhow, why not write an article for the *Brief*?

What are the benefits you ask? There are many. First, as a member of the DCBA, you show that you are an active member that has a legitimate interest in seeing the DCBA continue to progress and be a leader amongst all bar associations. Looking for other attorneys to refer cases to you? What better way than to reveal your knowledge and skill penning an article on an area of law or topic that other attorneys get inquiries about on a regular basis? CLE credit? Oh yes, there is that too. You can claim up to half of your CLE credit for a reporting period based on the amount of time you spent researching and writing your article. Best of all? You make my job much, much easier.

That last one was a joke…well kind of. All kidding aside, the DCBA needs you, other attorneys who lack your knowledge of different areas of the law need you, and the *Brief* needs you. In a unique year where many of us have come together to work together and be stronger together, consider writing just one article if that is all you have time for. Your efforts will be appreciated by all. You will also have my undying gratitude which is priceless.

A little bonus since this is the Halloween issue…my top 5 scary movies to watch on Halloween. 5. The Ring 4. Paranormal Activity 3. The Shining 2. Friday the 13th. Drum roll please…1. Of course, Halloween (you have to watch 1 and 2 together).

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President's Message

Seizing Opportunities During Challenging Times

By Wendy M. Musielak

DCBA President, Wendy M. Musielak is a Partner at Esp Kreuzer Cores LLP in Wheaton, where she concentrates her practice in family law. She graduated with highest honors from DePaul University College of Commerce with her Bachelor's Degree in Finance and Management in 1999 and earned her J.D. from DePaul University's College of Law in 2003. In 2015, Wendy was admitted to practice before the United States Supreme Court. Wendy was recognized as the DCBA Lawyer of the Year in 2013.

When 2020 began, we all were accustomed to meeting people in person and not even *remotely* thinking about how we would need to handle a "remote" world. Then, suddenly, courthouses were limiting our ability to appear in person. Along with the restrictions that existed at the courthouse, we found offices closing or significantly limiting in-person meetings to protect their employees from COVID-19. While in-person contact was suddenly limited, our need and obligation to meet the needs of clients as lawyers and our members of the DCBA remained. But there was one big question – how were we going to meet that need?

At my firm, we bought webcams and added services to allow us to continue to meet with clients remotely from our homes and our office. Days were suddenly filled with video meetings trying to remain connected to our clients while they were facing such uncertainty. What we learned is that we can do this. There are methods to remain connected and keep in touch with people from a distance. We may have been thrust into this Zoom world unexpectedly, but we are now all learning the necessary skills to navigate our new legal world. Video conferencing is here to stay. Meetings can be handled with people in other states without figuring out travel arrangements and worrying about weather-related delays (we do live in Illinois). Court can continue, albeit differently, with us logging in from our offices or homes to advocate for our clients.

For the DCBA, one of the cornerstones of our organization has been offering quality continuing legal education to our members. Almost every day, you could go to the Attorney Resource Center and find one of our Sections offering topnotch MCLE. But, beginning in March, that was no longer an option and we found ourselves looking for answers to how we could continue to service the needs of our members from afar. Continuing Education Manager, **Barb Mendralla**, Executive Director, **Robert Rupp** and all the DCBA staff immediately met the challenge by offering online MCLE through Zoom. Suddenly, members could be at home or at their office and still get the quality MCLE that the DCBA has always been known to offer. We may not have planned it and we may not have wanted to be there right now, but because of the world's circumstances, the DCBA is now better equipped to meet members' needs from afar forever. We will always be able to simulcast an in-person MCLE with members live and members at their offices. Instead of limiting programs to the number of seats that are available (and now less with social distancing rules), we will be able to have more members participate in the MCLE from the comfort of their homes or offices. In fact, the number of attendees at our MCLEs has increased because of the convenience of being online.

All our Section leaders have stepped up and have been creatively working to continue to support the DCBA. Our Family Law Section Chair, **Vicki Kelly** and Vice Chair, **Rebecca Krawczykowski** implemented a weekly newsletter to keep our members informed of changes in the court's procedures and new information. These newsletters are just the tip of the iceberg of what our amazing leaders are doing to support the DCBA and its members.
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Please send any Letters to the Editor to the attention of Dexter Evans, at email@dcbabrief.org

Bored During the Pandemic? Write an Article for the DCBA *Brief*!

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Thank you to **Carl A. Miller**, **Marie Sarantakis** and **Victoria Kelly** and **Leah Setzen** for their article submissions in this issue. Also, thank you to **Jordan Sartell** for his hard work as Articles Editor as well as **Hilary Wild** for her work as Case Law editor. Thank you once again to **Jacki Hamler** for keeping everyone on track and just making life easier on all of us.

Have a safe and Happy Halloween everyone! Peace. ☐

Seizing Opportunities During Challenging Times

(Continued from page 5)

Albert Einstein said, "In the middle of every difficulty lies opportunity." Certainly COVID-19 has caused many difficulties for everyone. But within those difficulties are opportunities for us to grow as individuals and as an organization. Recently, the DCBA Board of Directors met for our Annual Board Retreat. For the first time, the focus was on how we handle this "remote" world. As we worked together, many ideas were developed as a team. As an organization, we are working to create an App for our phones to make information more readily available for all our members. We are looking at safe social events that meet CDC guidelines, but allow us to remain connected as a community both in person and virtually. We are looking at ways to celebrate the holiday season without the traditional holiday party. We are looking for ways that we can continue giving back to the community. This year will not be traditional, but as our discussion about the upcoming year evolved, I saw the commitment of each of our Board Members to work together to continue to support our organization and members. I am honored to be working with such an amazing team and as I said during my installation speech and my first DCBA *Brief* column, "Together We Are Stronger" and together we will seize these opportunities to grow the DCBA over the next year. ☐

Articles

Articles Editor

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 criminal background checks and consumer credit reports. He graduated from the DePaul University College of Law and does *pro bono* work with local legal aid and consumer advocacy groups.

Barbed Wire: A Revolution in Property Rights

By Carl A. Miller

Barbed wire played a central role in the development of the Wild West. The "Devil's Rope" transformed the plains from an expansive open range into a set of defined and enforced tracts of cattle land and farm ground, buttressing property rights and facilitating a boom in economic productivity. The invention of barbed wire also resulted in litigation that set a clear standard in American patent law, creating a system of predictable results that facilitated prospective innovation.

The West without Wire

Writers have often romanticized the nineteenth century American west as a place of freedom on the open range where cattlemen enjoyed the ability to drive their livestock over the vast plains. Such a characterization, however, overlooks the plight of the farmers. Despite their fertile farm soil, many of the Plains states comprised an "open range," where ranchers' stock could roam freely.[1] At that time, the law assigned responsibility to the farmer for the protection of his crops from cattle. Unless the farmer had erected a fence around his property, the law barred him from receiving damages in the event that cows trampled his fields.[2] This legal arrangement made fencing a chief priority for the farmer. Indeed, "annual fencing repair costs [in 1872] were greater than combined annual tax receipts at all levels of government."[3] While the open range may have afforded freedom for the rancher, it decimated the agricultural industry.

The burden of liability spelled disaster for any farmer who could not afford a fence. Prohibitively expensive fencing in the Great Plains diminished farmers' ability to adequately secure their property.[4] The western landscape lacked the dense forestry of the east, making wood – a prime fence-building material – a rare commodity.[5] Geology also ruled out the stone-wall fencing used in parts of the east.[6] Smooth iron fencing proved untenable because the wire was easily penetrable

1. Kevin R. Casey, *The Barbed Wire Invention: An External Factor Affecting American Legal Development*, *Journal of the Patent and Trademark Office Society* 72, no. 5 (May 1990): 434.
2. *See* Richard Hornbeck, *Barbed Wire: Property Rights and Agricultural Development*, *The Quarterly Journal of Economics* 125, no. 2 (2010): 770. Unlike the American arrangement, English Common Law assigned liability to the rancher for damage to crops.
3. *Id.* at 771.
4. *Id.*
5. Wall Text, Ellwood House Museum, DeKalb, IL.
6. Casey, *supra* at 423.
7. Hornbeck, *supra* at 771.

by cattle.[7] In areas without cheap lumber, the marginal cost of excluding cattle from a parcel often exceeded the marginal benefit of the reduction in damage.

Despite legal ownership of their property, farmers lacked the ability to define and enforce their rights. "Farmers had secure title to land, but had to pay high fencing costs to receive protection from damage by others' livestock."[8] The government nominally protected the farmer's property, but was impotent to enforce the right to exclude. Some jurisdictions experimented with "herd laws" – rules that shifted liability to the rancher for damage inflicted by his cattle.[9] Such laws required stockmen to fence in their cattle instead of forcing farmers to fence them out. However, the herd laws enjoyed only limited success due to the entrenched social norms and the difficulty of implementing damages.[10] "In the absence of physical barriers... formal laws appear to have provided farmers little refuge from roaming livestock."[11] Farmers' inability to enjoy their full bundle of property rights rendered valuable agricultural land underproductive, resulting in economic inefficiency.

Barbed Wire's Invention

The story of barbed wire began in 1873 in rural northern Illinois. DeKalb County, situated about 60 miles west of Chicago, was holding its county fair. One exhibitor at the fair had built a wood rail with metallic spikes.[12] The exhibit sparked a frenzy of innovation to solve the fencing problem. The intriguing device set some enterprising local men to thinking: Jacob Haish, a lumberman, Isaac Ellwood, a hardware merchant and mechanical engineer, and Joseph Glidden, a farmer.[13] The three soon devised the barbed wire fence, with each man putting a unique twist on the invention. On November 24, 1874, the U.S. Patent Office awarded Joseph Glidden a patent for an "Improvement in Wire-Fences."[14]

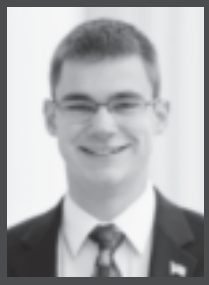
After receiving his patent, Glidden partnered with Ellwood to produce enormous amounts of the product in their DeKalb factory.[15] Glidden's design far outcompeted his rivals. Not only was his product easy to manufacture, but it effectively kept cattle from getting through and resisted damage from temperature fluctuations.[16] Ranchers and farmers displayed an initial skepticism of the product. Few believed it could serve as an effective barrier for cattle. Much of the commercial success of barbed wire is attributable to John W. "Bet-A-Million" Gates, a young salesman hired by Ellwood.[17] Ever the tenacious salesman, Gates determined to silence the critics. He traveled to San Antonio, Texas and fenced in an area with barbed wire at the Military Plaza. Gates put the meanest Longhorn cattle in the corral and invited spectators to provoke the animals.[18] When the fence successfully contained the cattle, barbed wire spread like wildfire and sales skyrocketed. Barbed wire production soared from 10,000 pounds in 1874 to 80,500,000 pounds in 1880.[19] During the last 25 years of the nineteenth century, barbed wire enclosed the American west and ended the era of the open range.

The Economic Impact of Barbed Wire

In 2010, Richard Hornbeck published the seminal work on the economic impact of barbed wire in *The Quarterly Journal of Economics*. Hornbeck conducted an empirical study of the changes in land values, settlement, and crop production resulting from the diffusion of barbed wire. The study examines the period from 1880-1900, when barbed wire had a differential impact on low versus high woodland counties.[20] Hornbeck explains that any relative gains of less-wooded counties due to barbed wire would have disappeared after 1900 because the new technology had entirely replaced wood fencing after that point.[21] The study, which focuses on the eastern plains, categorizes counties based on the amount of forestation: low,

8. *Id.* at 805.
9. *Id.* at 771.
10. *Id.* at 772.
11. *Id.* at 799.
12. Casey, *supra* at 426.
13. *Id.*
14. *Id.* at 429.
15. Ellwood Museum, *supra*.
16. Hornbeck, *supra* at 773.
17. Ellwood Museum, *supra*.
18. *Id.*
19. *Id.*
20. *See* Hornbeck, *supra* at 775-776 ("1880 county outcomes represent the end of the pre-barbed wire period.") The study assumed the explosion of barbed wire usage in 1880 to be exogenous; that is, its success was not caused by anticipated development of low-woodland area in the west. Hornbeck justifies this assumption by noting that the demand for fencing alternatives had been high for a while and that cheap steel had only become available around 1880 with the development of the Bessemer steel process.
21. *Id.* at 775.

About the Author



Carl A. Miller is a student at Hillsdale College pursuing a BA degree in Economics (2021). A proud native of the Land of Lincoln, Mr. Miller has served as a law intern at Tiesenga Reinsma & DeBoer LLP, a commercial firm in Oak Brook, IL.

> **Despite legal ownership of their property, farmers lacked the ability to define and enforce their rights.**

medium, and high woodland.[22] In 1880, before barbed wire had become widespread, the high cost of lumber in lower woodland areas meant that those counties had less fencing as compared with their more densely forested counterparts.[23] Economically, the disproportionately high fencing prices rendered it costlier for farmers to exclude unwanted intruders – in this case cattle – from their agricultural property. The marginal cost of protection via enclosure exceeded the marginal benefits of undamaged crops for farmers in treeless areas.

Hornbeck theorizes that farmers maximize profits by choosing an optimal level of investment and protection.[24] He predicts that "If investment increases when the marginal cost of protection falls, this implies that greater protection directly increases investment[.] If protection directly encourages investment, then investment should increase during this time period and especially in timber-scarce areas."[25] Based on the results of the study, the low woodland counties experienced *relative*[26] gains in improvement intensity of land as compared with higher wooded counties during the period from 1880 to 1900. As compared to counties with 6% woodland, improvement intensity in counties with no woodland increased by a "statistically significant and substantial" 19% during that 20-year span. [27] Importantly, these relative gains were not present before the introduction of barbed wire and disappeared after it became ubiquitous.[28]

In addition to gains in land improvement, Hornbeck's study indicates relative gains in crop productivity in lower woodland counties. "From 1880-1890, average productivity across all six crops increased 23.4% more in a county with 0% woodland than in a county with 6% woodland. [29] In keeping with this development, less-wooded counties began to increase the fraction of their land devoted to crop production.[30] Crop choice serves as another key indicator of barbed wire's impact on farming. Whereas hay is less susceptible to damage from livestock, other crops, such as corn, wheat, oats, barley, and rye are much more vulnerable. The study demonstrates that farmers tended to devote increasing amounts of their land to riskier crops from 1880 to 1890 as barbed wire usage spread.[31] Because it is not affected by weather and other short-term shocks, crop choice is perhaps an even better indicator of barbed wire's impact than the changes in crop production.[32]

Impacts on the value of land present the most compelling evidence for the economic effects of barbed wire. "Changes in land values potentially capitalize the total value of barbed wire to farmers."[33] Indeed, Hornbeck's analysis finds a significant relative increase in land values in low-woodland areas as compared with higher woodland regions from 1880-1890. Using the impact on land values to approximate the total benefit to farmers, Hornbeck estimates that farmers were $103 million better off.[34] This figure equates to about 0.9% of United States GDP in 1880, although it potentially underestimates the total if barbed wire also benefited counties with more than 6% woodland and non-sample areas.[35]

Hornbeck concludes that the introduction and diffusion of barbed wire technology significantly bolstered the economic development of the American west because it reduced farmers'

22. *Id.* at 772.
23. *Id.* at 784.
24. *Id.* at 778.
25. *Id.* at 779.
26. While higher woodland counties also saw some gains in improvement, the less wooded areas boasted a *greater rate* of improvement during the 1880's and 1890's. See appendix B for a graphical representation of the relative increase in the number of improved acres in low woodland areas compared to high woodland regions.
27. Hornbeck, *supra* at 792.
28. *Id.*
29. *Id.* at 800.
30. *Id.*
31. *Id.* at 802.
32. *Id.*
33. *Id.* at 803.
34. *Id.* at 803-804. This is measured in 1880 dollars and has a standard error of $32 million.
35. *Id.* at 804.

costs to enclosing their property. The "institutional failure was resolved not by legal reform but by technological change: the introduction of barbed wire fencing."[36] Because the new wire lowered the marginal cost of exclusion, it enabled farmers in sparsely wooded areas to enjoy their full bundle of property rights. The increased security of property rights caused an explosion in economic growth. The substantial land improvements, rise in crop productivity, growth in livestock-susceptible crop varieties, and increase in land values evince the economic benefits of barbed wire. Hornbeck suggests that this example should serve as a lesson to developing countries: secure property rights may enhance economic development.[37]

Barbed Wire's Mark on Illinois Law

1874 marked a watershed year in the Land of Lincoln. Not only was barbed wire invented, but the State radically shifted the assignment of liability for damages from crop owners to keepers of livestock. Whereas the common law rule required owners of cattle to restrain their stock, Illinois, like most other states, had not theretofore applied such a rule. In delivering the Illinois Supreme Court's 2019 ruling in *Raab v. Frank*,[38] Justice Garman summarizes this legal evolution. The *Raab* opinion references the 1848 case of *Seeley v. Peters*,[39] in which the Court announced that "[h]owever well adapted the rule of common law may be to a densely populated country like England, it is surely ill-adapted to a new country like ours;" "it does not, and never has prevailed in Illinois."

The 1874 Animals Running Act[40] changed Illinois' liability paradigm, implementing a common law-type rule. The act required livestock owners to contain their animals, holding them liable for any damages under a negligence standard. Was it mere coincidence that Illinois adopted this law the same year Glidden invented barbed wire? While the invention was almost certainly not a *cause* of the legislation – nor vice versa, the two developments quite possibly arose due to the same economic forces of the era. Illinois' agriculture had developed significantly in the 25 years since *Seeley*. Friction between cattle owners and crop growers would have increased as more of the prairie became devoted to farming.

The increased frequency of contact between the roaming cattle and vulnerable crops made the invention of barbed wire economically valuable. It may have been a keen perception of this development that incentivized Glidden, Haish, and Ellwood to capitalize on this opportunity to create something of value. Likewise, the development of the law reflected the growing cattle-crop tension. As illustrated in the case of the "herd laws," a simple shift of liability would likely have amounted to an ineffectual formality were it not for the concomitant invention of barbed wire. The technology, which developed in response to the same demographic and agricultural phenomena as the law, bolstered the enforceability of the new legal arrangement.

The Impact of Barbed Wire on Patent Law

The invention of barbed wire had significant impacts on United States patent law. By the time Glidden's patent for an "Improvement in Wire-Fences" was issued in November, 1874, his fellow county fair-goers, Ellwood and Haish, had patented their own variations of barbed wire.[41] Soon, hundreds of patents were awarded for various barbed wire designs.[42] Glidden's design rapidly emerged as the commercial leader, vastly outselling the competitors. His variation proved to be a unique "means for preventing cattle from breaking through wire fences" because it consisted of two wires that easily held the barbs in place.[43] Glidden sold half of his interest in the patent to Ellwood.[44] A couple years after the patent was issued, Washburn and Moen Manufacturing Company bought the rest of Glidden's share and partnered with Isaac Ellwood in the prosperous barbed wire business.[45]

Washburn and Moen soon faced a monumental legal battle as competitors challenged Glidden's patent. The principle suit, filed in 1885, pitted Washburn against the Beat 'Em All Barbed Wire Company.[46] After years of costly litigation, the Supreme Court decided in favor of the Washburn Company – the owner

36. *Id.* at 807.
37. *Id.*
38. *Raab v. Frank*, 2019 IL 124641.
39. *Seeley v. Peters*, 10 Ill. 130 (1848).
40. 510 ILCS 55/1.
41. Casey, *supra* at 429.
42. *Id.* at 428.
43. *Id.* at 429.
44. Hornbeck, *supra* at 773.
45. Casey, *supra* at 430.
46. *Id.* at 446-447.

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of the Glidden patent – in 1892.[47] The ruling concluded "It was Glidden, beyond question, who first published this device; put it upon record; made use of it for a practical purpose; and gave it to the public, by which it was eagerly seized upon, and spread until there is scarcely a cattle-raising district in the world in which it is not extensively employed."[48]

In "The Barbed Wire Invention: An External Factor Affecting American Legal Development," Kevin Casey explains that the Supreme Court ruling in the *Washburn* case helped to establish guiding principles for modern patent law.[49] United States patent law was in disarray following the Civil War; the legal doctrine was "unsettled" when Glidden applied for his patent.[50] The *Washburn* case clarified the definition of a patentable invention. The Supreme Court "laid down a general rule... that if a new combination and arrangement of known elements produce a new and beneficial result never attained before, it is evidence of invention."[51] Furthermore, the Court ruled that the simplicity of an invention does not preclude a patent.[52] These legal standards remain relevant today. The ruling also set a precedent by allowing Glidden's commercial success to be considered as evidence for patentability.[53] By establishing clear legal standards in patent law, the Supreme Court's decision in the barbed wire case helped create a system with predictable results.

The story of barbed wire illustrates the importance of property rights in economic development. The verdict is clear: the economic value of agricultural land vastly increased when barbed wire was adopted. The decreased marginal cost of protection enabled farmers to enjoy their property right to exclude. Freed from the burden of livestock encroachment, farmers greatly increased their production of valuable crop commodities. The resultant rise in land prices encapsulates the increased value of production that was facilitated by the newly-secured property rights.

In the case of barbed wire, the government proved impotent to protect the property rights of farmers. The state's failure created a market demand for a remedy to the problem, incentivizing entrepreneurs like Glidden to innovate. Indeed, the advent of the market solution – barbed wire – rendered obsolete the government's meager attempts at property right protection.[54] This historical development affords a valuable lesson for promoting economic growth. By facilitating an environment that encourages innovation and entrepreneurship, free market institutions create incentives for individuals to further improve market efficiency. Thus, the role of the state should be limited to fostering economic liberty and the protection of property.

By properly protecting intellectual property, the state can increase economic efficiency by promoting innovation. The invention of barbed wire spurred developments in patent law that illustrate the importance of predictable results in the legal system. Without clear standards for patentability, the government issued hundreds of patents for nearly identical devices. This resulted in confusion and costly litigation. By more clearly defining the doctrine of patent law in its 1892 *Washburn* decision, the Supreme Court set important precedents that improved economic efficiency. Precise standards and predictable results foster increased innovation because they reduce the inventor's uncertainty that his intellectual property will be protected. Barbed wire, therefore, revolutionized economic efficiency by enhancing the property rights of inventors and farmers alike. □

47. *Id.* at 429-430.
48. Ellwood Museum, *supra*.
49. Casey, *supra* at 447.
50. *Id.* at 445-446.
51. *Washburn* Case qtd. in Casey, *supra* at 447.
52. Casey, *supra* at 448.
53. *Id.* at 449.
54. Hornbeck, *supra* at 771.

Eight Reasons Why the Pandemic Has Increased the Demand for Divorce Attorneys

By Marie Sarantakis

The global COVID-19 pandemic has caused macro changes to the world economy and, on a smaller scale, impacted the microcosms of individual households that have necessarily adapted their dynamics to accommodate family members' needs in an evolving and uncertain world. People are reevaluating what really matters. Their habits have been turned upside down and prior routines seem like a distant relic of ancient times. The pandemic has ushered in a new, more isolated, virtual, and adaptable era. Across the globe everyone experienced a major shift to their former way of life. People are presented with the opportunity to make changes and redefine what the new normal means to them.

Irrespective of when the immediate concerns of this pandemic subside, one thing is certain: life will not return to the way it was. Many people have come to the conclusion that they can let go of things that they otherwise never thought they could. For others, the loss of old habits has caused them to consider making other major changes in their life, such as the decision to file for divorce.

During mid-March of 2020, the world came to an abrupt halt. People shut themselves indoors, limiting contact to members of their immediate families; travel almost altogether ceased; non-essential businesses closed; and a paralysis of fear abounded everywhere. In such stillness, people experience discomfort, but if pressed, usually find discernment. Many realized that they no longer wished to be tied to their significant other, that they no longer had things in common, or that this person was more of a burden than a comfort in a time of crisis. In spending solid amounts of time together, many families concluded they had grown apart in a trial period that was their informal last bastion of hope.

Nevertheless, the impending crisis meant that many would have to wait. There was too much uncertainty for more immediate change to occur. Besides, it would be a challenge to meet with a lawyer. Would it be virtually? Could any be contacted? Even if something could be scheduled remotely, how could they talk if their spouse was always home? Would courthouses, which had scrambled to keep everyone safe and continued non-emergencies until new means of appearances could be established, even be open? Pragmatically, filing a divorce in the early stages of the crisis was challenging for many reasons. However, as immediate fears began to subside and the world adjusted to a new normal, many spouses became eager to separate from their significant others.

While there was a very abrupt decline in divorce filings at the immediate onset of the pandemic, most family law practitioners are now feeling buried in the volume of work that is flooding through their doors. Here are eight reasons why family law attorneys are currently seeing a dramatic increase in their caseloads as a direct response to the pandemic:

1. Scarcity of Resources: During early spring, Americans rushed to the stores and stocked up on essentials such as water, canned goods, antibacterial products, bread, and toilet paper. Rather than buying a regular quantity of items typically sufficient for their household, many people began hoarding

these things unnecessarily, and in turn depriving many others in need. This widespread fear and panic amongst consumers caused many families to either go without essentials, get creative, or pay ridiculous prices to secure resources. This feeling of not having enough was terrifying. Many spouses blamed the other for not being financially sound, having the wrong priorities, failing to plan, or being reckless with household resources.

As many households had to re-prioritize their needs, this resulted not only in substantive disagreements, but a real power struggle to determine who should be the ultimate decision maker during times of conflict. When families lack enough money, food, supplies, etc., they either pool together whatever they have and sacrifice for the mutual benefit of all or become proprietary and the family unit breaks down in an internal war. Many U.S. households are dual income where both spouses bring in a wage and each can in some capacity ensure that their individual needs and wants are met. During quarantine though, many individuals were laid off or lost their jobs. Suddenly, when one member of the family is no longer able to bring in the same amount of money, everyone has to adapt. Couples become more reliant on one another and spouses who had a proclivity to be greedy or stingy with their individual resources, quickly become exposed. While some spouses may have good reason to disagree on spending priorities, conflict can arise as to what needs to be done in order to protect their family. Resentment for these differences grows as fear increases. Scarcity can lead couples to split as it may expose underlying issues that no longer go unnoticed.

2. Familiarity Breeds Contempt: Many American households are comprised of two spouses who each earn their own income and members of the household are encouraged to pursue their own individual passions and goals. Parents spend their days at work. The kids sign up for extracurriculars and summer camps. Even the pets may go to doggy daycare. Members of the same household are often physically separated becoming the best version of themselves they can. Even when spending quality time as a family while at dinner or on vacation, individual family members are often absorbed in their smartphones and social media pages. Sadly, our busy and often virtual lifestyles mean that we do not spend a lot of uninterrupted quality time with the other members of our household. We have become accustomed to an inundation of external stimuli even in the presence of our loved ones.

At a time when the outside world comes to a standstill, we find ourselves at home, enjoying more time together than ever. The external noise has become silenced as members of a household find themselves communicating more with each other, rather than the outside world. It is something that sadly many of us are not used to. This increased time together, coupled with the frustration of the inability to partake in our individual pursuits and hobbies, is leading to much resentment. Spending sporadic time as a family unit is very different from spending 24 hours a day together indefinitely. Many family members are realizing they do not know each other very well and, even more frightening, are realizing they do not want to.

3. Final Straw: Divorce attorneys will tell you that while there may be seasons that are busier than others, there is a continuous revolving door of clients at any given moment getting their affairs in order to prepare to file a Petition for Dissolution of Marriage. While the length of the preparation and contemplation period varies, the Petitioner initiating the divorce usually finds themselves in a sort of purgatory before fully committing to the process. Ending a marriage should not be undertaken rashly and requires thoughtful consideration prior to execution. Undoubtedly, many people were in this indeterminate position when COVID-19 took over the nation. There were countless people who had come to terms with filing for divorce, but had not yet pulled the trigger. Spouses who were on the verge of

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filing for divorce before the pandemic may decide to wait out the crisis before taking any further action.

This makes sense. People are less inclined to make major life changes when an immediate threat such as COVID-19 exists. First, their minds are preoccupied on survival. The emotions they are dealing with likely will not be processed and dealt with until after that primal fear subsides. In the midst of uncertainty, people are not going to dive further into the unknown. Second, they may be lacking the security and resources. Maybe the couple must now pool their money together to buy necessities. Maybe they cannot afford the added expense of a second household. Moreover, it may not be a viable time to sell/purchase a home or physically move. Even more frightening for parents is the idea that separating from a spouse during a time like this may mean that they risk separation from their children and lose direct control of their safety and well-being. As the immediate threats subside and people begin to adapt to a new way of life, those who were about to file are feeling more comfortable to do so.

4. Lack of Physical Intimacy: Many couples in seemingly healthy relationships struggle to keep romance alive during a marriage, and this is a very common reason for divorce. Clients often confess to their divorce attorneys during an initial consultation how they felt like they were living with a roommate and that they stopped engaging in any relations years ago. In the daily grind it is easy to excuse the lack of intimacy on the kids, work, being tired, or traveling. Now that we are all homebound and living for the most part on our own schedules, with fewer distractions than ever, the excuses not to engage in physical relations are waning. Some spouses are realizing that the problem was not the lack of time or opportunity.

Moreover, as basic as it may sound, it is undeniable that feeling attractive and confident increases sexual desire. The pandemic has meant that many people are living a more sedentary lifestyle, lounging around the house in sweats and unkempt hair, and feeling a little frumpier and worn. A partner who is not feeling as attractive as they used to is less likely to initiate or willingly participate in marital relations. This leads to fewer meaningful physical connections between spouses.

5. Domestic Abuse: The pandemic is causing people to feel a huge range of emotions. At the onset of the crisis, news outlets displayed clips of overcrowded hospitals, death tolls ticked up and to the right, and new limitations as to where people could go were imposed on a daily basis. Just a few minutes of exposure to any nightly news program caused one to feel trapped, confused, scared, anxious, and uncertain. Many people are coping with their internal fear by channeling it into external anger. Anger often gives us a perceived sense of control over our surroundings. When people cannot control the world around them, they often try to control others. This can take on the form of physical and/or emotional abuse. Both take a serious toll on the recipient spouse. More time together can also lead to more conflict for those in already abusive situations. Spouses with existing anger management issues will likely be dealing with heightened impulses causing them to lash out. Unfortunately, the victim spouse has a diminished ability to escape in the current climate. Victims may bite their tongues and remain in a bad situation for the time being, simply because they have nowhere else to turn. As things return to a sense of normalcy, we will likely see partners escaping these toxic and hostile situations to which they have been held hostage.

6. Failure to Meet Expectations: While we live in an era with less defined gender roles, we all have expectations of our spouses, which may or may not come to fruition. Many wives may have dreamed that their husbands would suddenly become strong hunters and gatherers vigorously protecting the home from any potential threats. Many husbands may have longed for the stay at home June Cleaver wife and mother who juggles cooking homemade meals while homeschooling the children. Sometimes these unrealistic expectations can lead to such a degree of disappointment that they cause resentment. Spouses are disheartened that the other person cannot meet their wants and needs at a time when roles have shifted and become redefined. Who gets the kids ready in the morning? Who helps them with remote learning? Who cooks dinner? Who runs the essential errands? Who is bringing home the money? Who

> **While there was a very abrupt decline in divorce filings at the immediate onset of the pandemic, most family law practitioners are now feeling buried in the volume of work that is flooding through their doors.**

decides what needs are met? While some couples can naturally fall into a new normal routine, others may combat each other at every turn.

7. Exposure of Infidelity: Cheating is unfortunately all too common. Whether the affair is physical or emotional, spouses are unfaithful to each other. Modern technology makes it easier than ever for spouses to find potential paramours and for the other spouse to uncover affairs. If spouses are cooped up together at home, there is less time for the cheating spouse to secretly communicate with people outside of the household. During quarantine, if a spouse left the house, it would usually be for a short and discrete task like filling up the gas tank or purchasing groceries. If someone is away longer than normal, without having accomplished the purpose of their outing, it is painstakingly obvious that they may be spending time with a paramour. Otherwise hidden indiscretions become easily exposed. Plus, when everyone is home, smart phones and laptops are often sitting out in the open. Little pings become noticed. Websites are left in a logged in state. And spouses who cannot pull their eyes away from their social media accounts suddenly appear more suspicious.

Even faithful spouses may be feeling depressed, anxious, and craving human contact. Their increased communications with others, whether inappropriate or not, can make the other spouse feel jealous and insecure. The combination of the increased likelihood of uncovering affairs and one spouse's need for the other's attention during the pandemic has resulted in increased perceived or actual infidelities that many marriages cannot withstand.

8. Uncovering Latent Issues: Many couples have learned to co-exist and live very separate and distinct lives from one another. Sudden and close proximity may force a reckoning of issues that have been swept under the rug. For some couples, this can be a good thing. They can openly discuss their needs, wants, and concerns. For others, it will uncover wounds that were better left untouched. Essentially, it all boils down to communication. Can a couple confront the weaknesses in their marriage and come out stronger for it? If they are able to have a rational discussion, taking into account the other's needs and changing their behaviors accordingly, then the answer is yes. However, if they roll their eyes, listen half-heartedly, and remain steadfast in their positions, the struggles will only grow deeper. When the latter occurs, couples may come to the realization that certain issues are irreparable. The pandemic has forced people to deeply examine the quality of their relationships and redefine what they want their futures to look like.

None of us can predict when this health crisis will end, but it is fair to say that many families will sadly not withstand the storm, and divorce practitioners must be ready to help transitioning families with compassion and an understanding of a perhaps forever changed legal system adapting to the needs of a more remote world post-pandemic. □

Modern Maintenance: Conflicting Views on the Applicability of Amended Maintenance Guidelines Create Uncertainty

By Leah D. Setzen and Victoria Kelly

In the last few years, Illinois has enacted a flurry of changes to its Marriage and Dissolution of Marriage Act ("the Act") to bring modernity to the process and substance of divorce in Illinois.[1] Apart from the historic 2017 rewriting of the child support guidelines from a percentage-based system to an income shares model, no other revision to the Act comes close to creating an entirely new area of uncertainty than the 2015 inclusion of guidelines for both the amount and duration of spousal maintenance.[2]

Prior to January 1, 2015, when determining an initial award of maintenance, courts in Illinois were instructed only to consider a number of factors set forth in section 504(a) of the Act in determining the propriety, amount, and duration of maintenance.[3] For review, modification, or termination of maintenance of an initial award, section 510(a-5) of the Act directed a consideration of the section 504(a) factors along with other enumerated factors.[4] On January 1, 2015, specific maintenance guidelines were added to the Act so that all courts in Illinois utilize the same method to calculate the amount and the duration of a maintenance award.[5]

While family law attorneys and divorce litigants alike celebrated the maintenance guidelines as a long-overdue legislative acknowledgment of the need for consistency and transparency in maintenance awards, questions have arisen concerning how or when to apply the "new" law to "old" cases. While recent appellate decisions have begun to chart a road map for family law practitioners in determining answers to these questions, uncertainty remains.

In re Marriage of Cole

The first appellate case to address whether there would be retroactive application of the new maintenance guidelines was *In re Marriage of Cole*.[6] In *Cole*, the parties entered into a judgment for legal separation in 2009, wherein the wife was awarded $2,200 per month in maintenance plus contribution to her health insurance premiums from the husband, a disabled veteran. The husband later filed a petition for dissolution of marriage. At the time of trial, the wife's income had increased in comparison to when the judgment for legal separation was entered. After proofs closed in 2014, the trial court took the case under advisement and entered a judgment for dissolution of marriage on February 24, 2015. Notwithstanding the effectiveness of the new maintenance guidelines at the time of the judgment, the court declined to apply them, instead awarding the wife $2,088 per month in permanent maintenance and ordering the husband to pay half of the wife's health insurance premiums until she became eligible for Medicare.[7]

The husband appealed the decision, arguing that the new maintenance guidelines should have been applied, which would

1. 750 ILCS 5/101 *et. seq.*
2. 750 ILCS 5/505; 750 ILCS 5/504(b-1).
3. 750 ILCS 5/504(a).
4. 750 ILCS 5/510(a-5).
5. Pub. Act 98-961, § 5 (eff. Jan. 1, 2015).
6. 2016 IL App (5th) 150224.
7. *Id.* at ¶ 4.

have resulted in a monthly payment to the wife of $1,328.49 and that the trial court had no authority to order him to pay for the wife's health insurance.[8] The appellate court found that the trial court properly determined maintenance based upon the facts of the case because the trial court was not obligated to apply 2015 maintenance guidelines to what was effectively a 2014 decision.[9]

At issue for the appellate court in *Cole* was whether the new maintenance guidelines are substantive or procedural in nature because procedural aspects of a new law may be applied retroactively while substantive provisions may not.[10] It determined that the guidelines are substantive in nature because they "alter the method for determining a maintenance award and address the rights underlying a dissolution proceeding" and ultimately redefine an individual's right to maintenance. Thus, they could not be applied retroactively because applying the new formula to a maintenance award based upon proofs entered before the effective date would attach new legal consequences to events completed before the effective date.[11]

In re Marriage of Carstens

The next appellate analysis of the application of the new maintenance guidelines to pre-2015 awards came in 2018 from the Second District Appellate Court, in *In re Marriage of Carstens*.[12] In this case, the parties were married in 1986, and on December 6, 2004, the trial court entered a judgment for dissolution of marriage. At the time of dissolution, the wife was a homemaker and the husband was employed as the chairman and CEO of Libertyville Bank & Trust. The wife was initially awarded maintenance in the amount of $5,000 per month for 60 consecutive months. On December 10, 2009, the wife filed a petition to increase her maintenance and child support. After trial in 2011, the court awarded the wife indefinite maintenance in the amount of $5,000 per month. In April of 2016, the husband filed a petition to terminate or reduce maintenance, in which he alleged that his employment had been terminated and that, while he did get a new job, his compensation

8. *Id.* at ¶ 6.
9. *Id.* at ¶ 9.
10. *See Caveney v. Bower,* 207 Ill.2d 82, 92 (2003).
11. *In re Marriage of Cole,* 2016 IL App (5th) 150224, ¶ 9.
12. 2018 IL App (2d) 170183.

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“The circuits are divided on whether to apply the guidelines to a review or modification of maintenance, and indeed whether there is even a substantive legal distinction between the two proceedings.

had decreased by more than half. The trial court found that there had been a substantial change in circumstances and granted the husband's request to modify the wife's maintenance, reducing it to $4,196 per month.[13]

The trial court relied upon *Cole* to conclude that the maintenance guidelines were inapplicable. It nevertheless considered the guidelines as a template in arriving at the modified maintenance amount.[14] However, with regard to the length of the modified maintenance award, the trial court concluded that the section 504(b-1) guidelines concerning the duration of maintenance were inapplicable because the law of the case based on the 2011 maintenance modification provided the wife with indefinite maintenance, and pursuant to *Cole*, the guidelines are to be applied only prospectively as they represent a substantive change in law.[15]

The appellate court found that the trial court's reliance on *Cole* was misplaced.[16] The *Carstens* court framed the issue before it as whether the new guidelines applied to a request for modification of maintenance raised after the guidelines' enactment. It considered section 801(c) of the Act, enacted in 2016, which provides that, "This Act applies to all proceedings commenced after its effective date for the modification of a judgment or order entered prior to the effective date of this Act" and its decision in *In re Marriage of Benink*, in which it had held that section 801(c) of the Act applied to modification proceedings filed after January 1, 2016.[17] As the husband's petition to modify or terminate maintenance had been filed in February of 2016, his petition fell squarely within the parameters of section 801(c) of the Act, and the appellate court remanded the case for the trial court to consider the duration of the modified maintenance award pursuant to section 504(b-1) of the Act.[18]

In re Marriage of Harms

Just over a month after the *Carstens* decision was issued, the Fifth District Appellate Court addressed whether the amended maintenance guidelines applied to a modification of a previous maintenance award in *In re Marriage of Harms*.[19] The husband filed a petition for dissolution of marriage in 2005. At that time, the parties had been married for 19 years and 9 months. In 2007, a judgment for dissolution of marriage was entered and the husband was required to pay the wife nonmodifiable maintenance until she turned 65, whereupon either party could request a review of the original maintenance award. Both parties filed petitions to modify maintenance after the wife's 65th birthday. In 2016, applying the amended guidelines concerning the amount of maintenance, but not addressing the other provisions concerning its duration, the trial court increased the monthly amount of maintenance paid by the husband to the wife and noted that the original trial judge had previously entered a "permanent maintenance order," which it did not modify.[20]

On appeal, rather than arguing that section 504(b-1) of the Act did not apply to the parties' cross-petitions to modify the initial

13. *Id.* at ¶ 17.
14. 2018 IL App (2d) 170183, ¶ 17.
15. *Id.* at ¶ 32; *In re Marriage of Cole,* 2016 IL App (5th) 150024, ¶ 7-8.
16. 2018 IL App (2d) 170183, ¶ 33 (citing Pub. Act 98-961, section 5 (eff. Jan. 1, 2015) (amending 750 ILCS 5/504)).
17. 750 ILCS 5/801(c); 2018 IL App (2d) 170175, ¶ 27, 113 N.E.3d 576.
18. 750 ILCS 5/504(b-1), 504(b-1), 801(c) (2016).
19. 2018 IL App (5th) 160472, 103 N.E.3d 979 (5th Dist. 2018).
20. 2018 IL App (5th) 160472, ¶¶ 18, 22.

maintenance award, the husband asserted that the trial court had erred by failing to apply the duration guidelines and other preliminary factors before applying guidelines concerning the amount of maintenance.[21] The appellate court rejected those arguments, instead determining that the amended maintenance guidelines were inapplicable.[22] It analyzed section 504 of the Act, which governs initial awards of maintenance, and section 510 of the Act, which governs petitions to modify maintenance or child support.[23] The court noted that while section 510 of the Act had been amended four times since the guidelines for maintenance went into effect, none of the amendments added language directing courts to apply the guidelines in proceedings to *modify* maintenance, limiting their application instead to *initial* awards.[24]

In contrast to *Carstens*, the Fifth District Appellate Court did not refer to section 801(c) of the Act, either in support of or in contrast to the other provisions of the Act it analyzed.[25] Instead, it reasoned that applying the guidelines set forth in section 504(b-1) to modify the duration of a previously set maintenance award "will often lead to results that are absurd or unjust."[26] Applying the maintenance duration guidelines would lead to an unjust result in this case, as the wife had previously been awarded permanent maintenance. However, while holding that the trial court's belief that it was bound to apply the maintenance calculation guidelines was incorrect, the appellate court did not reverse the lower court's decision, noting that an award of maintenance consistent with the guidelines will typically fall within the proper exercise of a court's discretion.[27]

In re Marriage of Kasprzyk

The Fourth District Appellate Court next addressed the guidelines in the context of a review of maintenance in *In re Marriage of Kasprzyk*.[28] The parties were married in 1989 and divorced in late 2014, wherein a judgment for dissolution of marriage was entered awarding the wife two years of reviewable maintenance. Prior to the expiration of the two years, the wife filed a petition to extend maintenance. The trial court ultimately granted the wife's petition, noting that had the parties' marriage dissolved six weeks later, the wife would have been entitled to permanent maintenance or maintenance for a period of the length of the parties' marriage because the maintenance guidelines would have been in full force and effect. Applying the current version of the maintenance guidelines, the court awarded the wife permanent maintenance.[29]

On appeal, the husband relied upon *Cole* to argue that the trial court should have applied the 2012 version of the Act because the parties were divorced prior to the amendments to section 504(b-1).[30] The wife argued that *Cole* was distinguishable because it involved an *initial* maintenance award based upon evidence received prior to the effective date of the new statute.[31] The wife asserted that the trial court should have followed *Carstens* because section 801(c) of the Act required the application of the new guidelines to her petition.[32] In rebuttal, the husband distinguished *Carstens* as concerning a *modification* proceeding, wherein one must establish a substantial change in circumstances, whereas the instant appeal involved a petition to *review* maintenance, where no such proof is required.[33]

The Fourth District Appellate Court rejected any distinction between a review of maintenance and modification, holding that section 801(c) is not so limited.[34] It held that section 510(a-5) applies to all post-divorce maintenance proceedings, including termination, modification, and review,[35] and that section 510(a-5) instructs courts to consider the factors set forth in section 504(a) in all such proceedings. The court reasoned that parsing the term "modification" in section 801(c) as to exclude, for example, termination proceedings, would lead to an "absurd result."[36] The appellate court also held that making maintenance permanent would not be considered an abuse of discretion.[37]

In re Marriage of Kuper

Less than three weeks later, the Third District Appellate Court weighed in on the issue of application of the section 504(b-1) maintenance guidelines to a modification or termination of a previous award of maintenance in *In re Marriage of Kuper*.[38]

21. *Id.* at 25, 37.
22. *Id.* at 28.
23. *Id.* (citing 750 ILCS 5/504, 510).
24. 2018 IL App (5th) 160472, ¶ 31.
25. 750 ILCS 5/801(c).
26. 2018 IL App (5th) 160472, ¶ 32.
27. *Id.* at ¶ 36.
28. 2019 IL App (4th) 170838; 128 N.E.3d 1105 (4th Dist. 2019).
29. *Id.* at ¶ 16, 18.
30. *Cole,* 2016 IL App (5th) 150224; *Kasprzyk,* 2019 IL App (4th) 170838, ¶ 29.
31. *Kasprzyk,* 2019 IL App (4th) 170838, ¶ 31.
32. *Carstens,* 2018 IL App (2d) 170183, ¶ 29; *Kasprzyk,* 2019 IL App (4th) 170838, ¶ 33.
33. *Kasprzyk,* 2019 IL App (4th) 170838, ¶ 35.
34. *Id.* at ¶ 36.
35. 750 ILCS 5/510(a-5) (West 2016); *Kasprzyk,* 2019 IL App (4th) 170838, ¶ 35.
36. *Kasprzyk,* 2019 IL App (4th) 170838, ¶ 37.
37. *Id.* at ¶ 41.
38. *In re Marriage of Kuper,* 2019 IL App (3d) 180094.

In *Kuper*, the husband filed a petition to modify or terminate maintenance, alleging that he had retired. The wife filed a petition to extend maintenance. The wife's net monthly income was $2,899 per month, which consisted of her earnings, maintenance received, and a portion of the husband's Caterpillar pension.[39] The husband had remarried and was supporting his new wife and her three adult children, who were in college.[40] At the time of his retirement, he was earning $56,000 per year, he had inherited almost a million dollars, and his assets were approximately $1.9 million.[41] Applying the amended maintenance guidelines, the trial court found the husband's monthly income to be $14,114 and awarded permanent maintenance to the wife of $3,767 per month.[42]

On appeal, the husband argued that the trial court erred by applying the new guidelines to a post-judgment review of maintenance.[43] The appellate court agreed, looking to *Harms* in contrast to the Fourth District Appellate Court's reliance on *Carstens* in *Kasprzyk*. The *Kuper* court reasoned that section 510 of the Act does not provide for the application of section 504(b-1) to post-dissolution maintenance modification on review because it did not expressly so indicate.[44] The appellate court held that the trial court had erred in using the amended maintenance guidelines because section 510(a-5) only references section 504(a), not 504(b), and remanded the case for a determination of maintenance in an amount based on the factors set forth in section 504(a) instead of section 504(b-1)(1).[45]

In Re Marriage of Brunke

In *In re Marriage of Brunke*, the Second District Appellate Court performed a nuanced examination of the above cases.[46] In *Brunke*, the parties were married in 1986, had no children, and were divorced in 2012. The parties entered into a settlement agreement in which the wife would receive $3,000 maintenance per month for five years, at which point maintenance would be reviewable.[47] After five years, the wife filed two petitions: one to review or extend maintenance and another to modify or increase maintenance.[48] The husband thereafter filed a motion to abate maintenance on the basis that the wife had not made a good faith effort to become self-supporting and that she was not drawing on Social Security benefits despite being able to do so.[49] The trial court denied the wife's petition to increase maintenance, granted her petition to extend maintenance, and denied the husband's petition to terminate or abate maintenance.[50] The trial court ordered the husband to continue to pay the wife $3,000 per month in maintenance until he retires.[51] The husband appealed and the wife cross-appealed.

In the wife's cross-appeal, she argued that the court abused its discretion by failing to apply the maintenance guidelines which would have resulted in a monthly maintenance award to her of $8,507 indefinitely or for a period equal to the length of the marriage.[52] The appellate court commenced its analysis by looking to section 801(c) of the Act, which applies the maintenance guidelines to "proceedings that 'sought the modification of a judgment order entered prior to' that date."[53] The court synthesized the issues before it to (1) "whether the guidelines apply to review proceedings and (2) whether [the wife's] petition for increased maintenance, which alleged a change in circumstances, triggered a modification proceeding requiring the application of the guidelines" pursuant to *Carstens*.[54]

Regarding this first issue, the *Brunke* court emphasized that the present matter arose on a review of maintenance, which does not require proof of a change in circumstances, as opposed to a modification of maintenance, which does.[55] With this distinction in mind, the appellate court looked to *Carstens* and reasoned that the word "modification" does not include review proceedings because, in section 510(a-5) of the Act, the legislature distinguished between the two types of proceedings.[56] The court noted that this distinction is significant as the two proceedings are not interchangeable; a review reconsiders a prior court order, whereas a modification proceeds from a substantial change in circumstances.[57] Because the legislature only spoke of "modification" proceedings when it made the maintenance guidelines applicable through amended section 801(c), legislative intent impliedly excludes review proceedings from

39. *Id.* at ¶ 5.
40. *Id.* at ¶ 6.
41. *Id.* at ¶ 6-7.
42. *Id.* at ¶ 8.
43. *Id.* at ¶ 10.
44. *Id.* at ¶¶ 27-28.
45. *Id.* at ¶ 28.
46. 2019 IL App (2d) 190201.
47. *Id.* at ¶ 3.
48. *Id.* at ¶ 4.
49. *Id.* at ¶ 5.
50. *Id.* at ¶ 21.
51. *Id.*
52. *Id.* at ¶ 46.
53. 750 ILCS 5/801(c).
54. *Brunke*, 2019 IL App (2d) 190201, ¶ 49 (citing *Carstens*, 2018 IL App (2d) 170183).
55. *Id.* at ¶ 46.
56. *Brunke*, 2019 IL App (2d) 190201, ¶ 53 (citing 750 ILCS 5/510(a-5)).
57. *Id.* at ¶ 55.

the ambit of the maintenance guidelines.[58] The court went on, disagreeing with the Fourth District Appellate Court's holding in *Kasprzyk* that the court itself provides the authority to revisit an order whereas in modification proceedings, the legislature provides the authority.[59] The Second District held that, "it is the legislature, not the court, that provides the authority for both review and modification proceedings and sets the parameters of the relief that may be awarded."[60] Therefore, the court found that the trial court had not erred by declining to apply the guidelines in its review of the wife's maintenance award.

Regarding the second issue, the wife's cross-appeal of the denial of her petition to increase maintenance, having already held that the new maintenance guidelines did not apply in this case because it arose as a review of maintenance, the appellate court also rejected the argument that the wife could have invoked the modification standard by alleging a substantial change in circumstances because the judgment called for a review of the maintenance award.[61]

Conclusion

To date, the appellate case law on the application of the maintenance guidelines to modifications and reviews of maintenance awards has created uncertainty. The circuits are divided on whether to apply the guidelines to a review or modification of maintenance and, indeed, whether there is even a substantive legal distinction between the two proceedings. Practitioners and litigants must now look to the Illinois Supreme Court to resolve these disagreements. ☐

58. *Id.* at ¶ 56 (citing 750 ILCS 801(c)).
59. *Brunke*, 2019 IL App (2d) 190201, ¶ 57; *Kasprzyk*, 2019 IL App (4th) 170838, ¶ 36.
60. *Brunke*, 2019 IL App (2d) 190201, ¶ 58.
61. *Id.* at ¶ 60.

Illinois Law Update

Editor Hilary Wild

Malicious Prosecution Claims Dismissed Absent Allegations of Damages Beyond Anxiety, Loss of Time, Attorneys Fees, and Necessity of Defending One's Reputation
Grundhoefer v. Sorin, 2018 IL App (1st) 171068

In *Grundhoefer*, the plaintiff sued the defendants for malicious prosecution and defamation *per se*. Grunhoefer, a licensed physician, was married to the Sorins' son, David, who died as a result of falling while climbing on their residence. The Sorins filed a wrongful death claim against Grundhoefer alleging that she had caused David's death by prescribing Ambien to David when she knew that sleepwalking is a side effect of the drug and that David had a propensity for sleepwalking. Grundhoefer claimed that she was never served with the wrongful death complaint but learned of its existence from a Chicago Sun-Times article. As a result of the article, the television show Dr. Phil contacted her to appear on a show about Ambien. The Sorins voluntarily dismissed their wrongful death complaint.

Grundhoefer thereafter filed her complaint against the Sorins and the attorneys who represented them in the underlying wrongful death claim, alleging malicious prosecution and defamation per se. The Cook County trial court dismissed the defamation *per se* claim and granted summary judgment in the Sorins' favor on the malicious prosecution counts. Grundhoefer appealed the award of summary judgment. The Appellate Court affirmed, finding that summary judgment was proper because Grundhoefer failed to prove the damages element of her claim.

To establish a claim for malicious prosecution, a party must allege facts showing (1) the commencement or continuation of an original civil or criminal proceeding, (2) termination of the proceeding in her favor, (3) absence of probable cause for the proceeding, (4) presence of malice, and (5) damages resulting to her. The fifth element, damages, was not satisfied where Grundhoefer merely alleged that she lost "professional reputation and patients," that she had to file a claim with her malpractice insurance carrier, and that she was not offered fellowships at Northwestern or in Chicago. Grundhoefer could not prove an injury "beyond the anxiety, loss of time, attorney fees, and necessity for defending one's reputation, which are an unfortunate incident of many (if not most) lawsuits." Which exempts plaintiffs from having to prove "special injury," in malicious prosecutions arising from medical malpractice proceedings, did not change this result. The appellate court stated, "Nothing in the plain words of section 2-109 indicates that the General Assembly intended to presume damages, or to eliminate the need to prove or plead the element of damages in a malicious prosecution claim."

Little Leaguers Have Standing to Pursue Reinstatement of Championship Title as Remedy, But Parents' Claims against League and ESPN Defendants Dismissed
Benton v. Little League Baseball, Inc., 2020 IL App (1st) 190549

In *Benton*, the plaintiff parents and guardians, individually and on behalf of their thirteen minor children, sued Little League Baseball, Inc. ("Little League"), Jackie Robinson West Little League Inc. ("Jackie Robinson West"), ESPN, Inc., ESPN reporter Stephen Smith ("Smith"), and other defendants, alleging breach of implied contract, promissory estoppel, defamation, intentional and negligent infliction of emotional distress, false light, and civil conspiracy.

In August 2014, Jackie Robinson West, an all African-American baseball team from the South Side of Chicago, won the U.S. Little League World series title. After the event aired on ESPN, the players became media sensations and even went to the White House to meet Barack Obama. Six months after they won the title, they lost it because of residency rule violations. Some of the team members lived outside the designated boundaries and the team treasurer had attempted to correct any eligibility problems by "expanding" the boundary map so that ineligible children now lived within the map's new boundaries.

The plaintiffs alleged that Little League and Jackie Robinson West and individuals who worked for those entities knew of the eligibility problems, but covered up these facts to gain profit and notoriety on the backs of the parents and their children, to their emotional and economic detriment. The plaintiffs alleged that those defendants knew or should have known that the players were not qualified and yet, up the entire chain of command, they failed to enforce the Little League rules and regulations to the detriment of both the parents and the children.

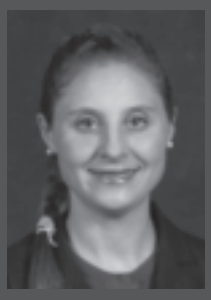
The plaintiffs alleged that ESPN and Smith, in covering the matter, falsely accused the parents of participating in the cheating scandal or cover-up, thereby defaming them. The defendants filed motions to dismiss the plaintiffs' claims. The trial court dismissed the defamation counts, the intentional infliction of emotional distress counts as to the parents, the negligent infliction of emotional distress counts, the false light counts, and the civil conspiracy counts. The court denied dismissal of the intentional infliction of emotional distress counts as to the children, the breach of implied contract count, and the promissory estoppel count. However, the court held that reinstatement of the championship title was not an available remedy under these counts. The plaintiffs appealed the dismissed counts.

First, the plaintiffs argued that the trial court erroneously deprived them of the remedy of reinstating the 2014 championship title. Little League argued that the plaintiffs lacked standing to pursue such relief because they failed to demonstrate a legally recognized interest at stake. Standing is defined as some injury in fact to a legally recognized interest. The claimed injury, whether actual or threatened, must be distinct and palpable, traceable to the defendant's actions, and substantially likely to be prevented or redressed by granting the requested relief. The appellate court concluded that the plaintiffs did have standing to pursue reinstatement of the championship title as a possible remedy. The plaintiffs set forth "a legally recognized interest against foul play by Little League with regard to its own rules and regulations, given the parents' and players' investment of time and money in the organization." The players suffered a distinct injury in fact by stripping them of their hard-won title, and the breach was distinct, palpable, and fairly traceable to the Little League's alleged failure to follow its own rules.

The plaintiffs next contended that the trial court erred in dismissing their defamation claims against ESPN and its reporter Smith. To state a cause of action for defamation, a plaintiff must present facts showing that the defendant made a false statement about the plaintiff, the defendant made an unprivileged publication of that statement to a third party, and the publication caused damages. A defamatory statement is one that harms a person's reputation because it lowers the person in the eyes of others or deters them from associating with that person. In dismissing these counts, the trial court found that Smith's statements were nonactionable opinion and rhetorical hyperbole protected by the First Amendment. The plaintiffs asserted that ESPN and Smith committed defamation when Smith erroneously charged them with submitting "falsified documentation" to Little League and knowingly engaging in deceit so their kids could "play ineligibly." The parents specifically pointed to Smith's comment, "A bunch of adults and parents who knew better – parents who knew better decided to do this. Pox on all their houses. They should all be ashamed of themselves." According to the parents, this also suggested they were responsible for the lost title. The appellate court found that, although Smith's commentary seemed "loose and careless," the trial court properly dismissed the plaintiffs' defamation claims because Smith did not name any of the parents. Moreover, the plaintiffs' general allegations of damages were insufficient to support their defamation claims.

The appellate court next turned to the parents' intentional infliction of emotional distress claims. To establish intentional infliction of emotional distress, the plaintiff must show: (1) the conduct involved was truly extreme and outrageous; (2) the

About the Editor



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.

actor intended that his conduct will inflict severe emotional distress or know that there is a high probability that his conduct will cause severe emotional distress; and (3) the conduct caused severe emotional distress in the victim. There is no bright-line rule about what satisfies extreme and outrageous conduct, but relevant factors include (1) whether the defendant holds a position of authority over the plaintiff, abuses that authority, or maintains power to affect the plaintiff's interests; (2) whether the defendant reasonably believed his objective was legitimate; and (3) whether the defendant was aware the plaintiff could be particularly susceptible to emotional distress. In this case, the allegations did not show the actions of Little League or Jackie Robinson West were extreme or outrageous. The defendants did not maintain a position of power in relation to the parents. A reasonable expectation in the sports world is that cheating accusations will arise and be publicly aired. Moreover, the parents had no identifiable susceptibility to emotional distress. Accordingly, the trial court properly dismissed the parents' intentional infliction of emotion distress claims.

The trial court also properly dismissed the parents' negligent infliction of emotional distress claims. The plaintiffs alleged that due to the Little League and Jackie Robinson West defendants' negligent conduct in handling and revoking the league championship title, plaintiffs suffered from emotional distress and physical manifestations requiring psychological treatment. The emotional distress included depression, anxiety, fear of being in public, feelings of extreme degradation and hopelessness, loss of concentration, and suicidal ideation. Physical manifestations included headaches, nausea, hypertension, muscle spasms, stomach pain, chest pain, insomnia, and fatigue. The trial court dismissed all counts relating to negligent infliction of emotional distress, finding that "a physical injury to someone" at the very least was required but entirely lacking in the present case and that plaintiffs could not rest their claim on "emotional injuries" alone. The appellate court agreed, holding that physical contact of some sort is absolutely necessary to sustain a direct victim negligent infliction of emotional distress action.

The appellate court next affirmed the dismissal of the false light invasion of privacy claims. Three elements are required to satisfy such a cause of action: (1) the plaintiffs were placed in a false light before the public as a result of the defendants' actions, (2) the false light in which the plaintiffs were placed would be highly offensive to a reasonable person, and (3) the defendants acted with actual malice, that is, with knowledge that the statements were false or with reckless disregard for whether the statements were true or false. The plaintiffs could not sustain their false light claims against Little League because Little League made no statement directed at any parent. They also could not sustain their false light claims against ESPN defendants whose reports constituted protected opinion. In addition, the plaintiffs failed to allege any special damages, which are required for false light claims requiring extrinsic evidence.

Finally, the appellate court affirmed the dismissal of the civil conspiracy claims. Civil conspiracy is an intentional tort wherein two or more people participate in a common scheme to commit either an unlawful act or a lawful act in an unlawful manner. To state a cause of action for civil conspiracy, a plaintiff must allege an agreement and a tortious act committed in furtherance of that agreement, as well as an injury caused by the defendant. The appellate court held that the trial court properly dismissed these counts because the plaintiffs failed to show that there was an actual agreement among the defendants or that there was any "unlawful act." Concealment of a matter for the sake of notoriety or generally acting recklessly towards someone's well-being could not be characterized as unlawful.

The case was remanded back to the trial court for adjudication of the remaining counts of the complaint.

Loss Recovery Act Claims Allowed to Proceed against Online Wagering Business Defendants in Illinois after Dismissal of Florida Action

Lawson v. Iaderosa, 2020 IL App (3d) 180609

In *Lawson*, John Webb and his mother, Sandra Lawson, sued the defendants under the Loss Recovery Act, 720 ILCS 5/28-8, alleging that Webb lost $646,000 to the defendants' online wagering business. A year earlier, Webb had filed a complaint in Florida against the same defendants, alleging that the

defendants did not maintain Webb's funds in an escrow account and never made any bets or wagers. Webb voluntarily dismissed his Florida case.

A few days after dismissing the Florida case, the plaintiffs filed suit in Will County, Illinois, seeking to recover Webb's gambling losses under the Loss Recovery Act. The Loss Recovery Act permits a gambler who lost more than $50 in an illegal game to recover their losses from the winner.

The Will County trial court dismissed Lawson's claims, concluding that Lawson lacked standing because Webb's Florida action involved the same parties and the same transactions. The appellate court reversed and remanded, finding that Webb did not pursue his remedy to recover gambling losses in the Florida action. Rather, he had demanded the return of his deposits to the gambling websites on the basis that the defendants were engaged in a Ponzi-type scheme and did not actually place bets Webb requested. Because he did not pursue his remedy to recover gambling losses, Lawson's claims under the Loss Recovery Act were not barred by the Florida action. □

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News & Events

100th Anniversary of the 19th Amendment to the U. S. Constitution

By David Schaffer

Imagine the following for a moment: An old-school women's prison in the early 1900's. Classic worm-ridden food, filthy water, and filthy bedding. Someone's great grandmother ends up in that prison. Imagine for a moment that it is your great grandmother, who also happens to be a respected, upstanding citizen in her community. Faced with brutal prison treatment and conditions, she and her compatriots request to be treated as political prisoners. Some go on hunger strikes, only to be strapped to chairs while feeding tubes are forced down their throats. For daring to request better treatment, the Superintendent insists on "teaching them a lesson:" to wit, being dragged by the guards into dark filthy cells; arms shackled against the wall and forced to stand all night; two guards twisting one woman's arms above her head, then suddenly lifting her up and banging her down over the arm of an iron bench, so she loses consciousness, and is then denied medical attention. Another political prisoner observing this, suffers a heart attack, and is also denied immediate medical care.

Their crime? Standing silent in front of the White House in Washington, D.C. These are the "Silent Sentinels." Their cause? Passage, and then ratification, of the 19th Amendment – a woman's equal right to vote – to the U.S. Constitution, the latter of which occurred 100 years ago August 18th. "It's pretty amazing what they were willing to go through, and what they had to endure." By the way, the D.C. Circuit Court held that these amazing women had been illegally arrested, convicted and imprisoned[1].

Preceding the 19th Amendment, the 14th Amendment, which was ratified in 1868, gave males over 21 years old the right to vote, and the 15th Amendment, which was ratified in 1870, made clear that former male slaves had the right to vote. No suffrage for women yet, though[2].

The 19th Amendment was passed by the House of Representatives on May 21, 1919, followed by the Senate on June 4, 1919. Tennessee was the last of the necessary 36 ratifying states to secure adoption. It almost didn't happen until Harry Burn, who cast the tie-breaking vote in the State House, got a persuasive call from none other than his mother, Phoebe Burn, urging him to ratify the Amendment. The Nineteenth Amendment's adoption was certified on August 26, 1920: the culmination of a decades-long movement for women's suffrage at both the state and national levels.

Like other historical power shifts, those holding power did not go quietly into the night. In celebrating the passage of the 19th Amendment, always remember those who sacrificed so much, often times enduring inhumane and humiliating treatment and conditions. If a suffragette was arrested, she often lost all rights of custody to her children, so that this country can truly say that every citizen of this country has the right to participate in the political process, regardless of their race, color, previous condition of servitude, *or sex*[3]. □

1. Historychannel.com
2. Historychannel.com
3. Wikipedia

October Bar Notes

Tools for Tumbly Times

By Robert Rupp

As a lifelong fan of Winnie the Pooh, I find his phrase "rumbly tumbly" to be an apt description of the days in which we find ourselves. President **Wendy Musielak**'s column at the front of this issue did a great job of laying out the direction we are headed with the development of new products, programs and services to help settle down that feeling of uneasiness and set the DCBA on a strong course to serve members' needs. If you only glanced at that column, go back and read it closely as it contains a lot about which to be happy and excited.

The discussions at the August Board Retreat that she references were, in addition to future facing, also a good inventory of where we are with current programs and how those programs are already equipped to deliver value and assist DCBA members.

Our online member directory is available to make up, in small measure, for the absence of passing friends and colleagues in the hallways of the courthouse when looking for a name, phone number or referral source. We have made our directory easier to find with a button in the top navigation of the website and a shortcut at www.dcba.org/directory. Membership is required to access the directory search page, so make sure you are logged in. On the directory, you can search by name, firm or section membership. Those who have subscribed for specialty listings can also be found under the Law Concentration Listings section. Note that if you would like to be added to the Law Concentrations Directory, you can do so at any time by calling the Bar Center or purchasing concentration listings in the webstore (www.dcba.org/shop). A priority for the year ahead is to make the Online Member Directory more mobile friendly, so use the tool now knowing significant improvement is on the way.

CLE is our most valuable member benefit and now through Zoom, it is more convenient than ever. Check in at www.dcba.org/calendar to see all that is coming up and find links to register for this complimentary member benefit. If you want to receive advance notice of individual programs delivered directly to your e-mail box, add unlimited Section memberships to your profile at www.dcba.org/myprofile. And remember that the recordings of DCBA MCLE programs are available on IICLE and, like the live programs, are complimentary to DCBA members. Just visit www.dcba.org/iicle.

Missed the latest issue of the *DCBA Docket*? Go to www.dcba.org/news and you will find the current week's issue at the top of the list. The Docket highlights DCBA programs, volunteer opportunities, courthouse news and announcements and (hopefully very soon!) details on social events.

Speaking of courthouse operations, we have been working hard, since the first court closure in March, with the Office of the Chief Judge to keep DCBA members up to date on new rules and administrative orders. The court has been a great partner in providing question and answer sessions as well as video training sessions on new court technology supporting remote hearings. You can find all of this at www.dcba.org/covidupdate.

The DCBA website has the unfortunate reputation, grounded in truth, of being extremely hard to navigate. As you can

(Continued on page 42)

About the Author

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

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DCBA, IICLE and You

The DCBA sections have been busy providing valuable MCLE programs for members. These are being recorded for viewing more than ever this year and are available online through the DCBA portal to IICLE. Most are free of charge to DCBA members when you use your DCBA login to access the portal. Following is a list of some of the latest programs available. The DCBA *Brief* will be publishing more in the issues to come. The full list of available MCLE programs can be found in the IICLE catalog.

Members can find the link to The Illinois Institute for Continuing Legal Education (IICLE®) on the DCBA website under "Legal Community" –> OnDemand CLE –> Online CLE Catalog. You must be logged into your DCBA Membership Profile in order to view courses for free or at a reduced, member price.

If you have any questions, please contact Continuing Education Manager, **Barb Mendralla** at bmendralla@dcba.org. □

Title/Topic	Speakers	Date	Area(s) of Law	Credits
Mediation FAQs This course explains the ins and outs of mediation to attorneys and answers the frequently asked questions they may have concerning the mediation process. Topics include the role of the mediator, preparing a client for mediation and the value of pre-mediation contact. The presenters will also discuss the advantages and disadvantages of mediation. Tips for remote mediations and how to use virtual conferencing options for a session are shared.	Hon. Brian R. McKillip, (Ret.), Hon. Ronald D. Sutter (Ret.), ADR Systems	5/20/20	Civil Law, Alternative Dispute Resolution	1.0 General
GALs and Gathering Information from Third Parties As part of their investigations, a guardian *ad litem* relies on third parties. Learn about investigations, when and how to perform discovery, filing motions, the impact of HIPAA, Illinois Mental Health and Disabilities Code, Federal Confidentiality Act and more.	Hon. Linda E. Davenport, 18th Judicial Circuit Court and Attorney Emily Rapp, MagnusonRapp Law	5/26/20	Family Law, Child Advocacy	0.75 General

Disabilities Code, Federal Confidentiality Act and more.				
Special Needs Planning Estate planning for families of children with special needs is a very complicated specialty. Benjamin Rubin will discuss some of the complexities, including the difference between a 3rd party and 1st party special needs trust, common mistakes in special needs trusts and the nursing home impoverishment exception to the five-year look-back.	Benjamin Rubin, Rubin Law, A Professional Corporation	5/27/20	Estate Planning	1.0 General
Coronavirus Legislation – PPP and Taxes Review the Paycheck Protection Program's loan forgiveness application, the CARES Act and other related legislation. Get up to speed on late-breaking rules with tax strategies to consider and refund opportunities to apply for and strategies on how to deal with the PPP Program.	Scott Singer, DHJJ	6/4/20	Business Law	1.0 General
Preparation of the Financial Affidavit in Dissolution Matters The preparation of a Financial Affidavit utilized in Domestic Relations matters including parentage cases and prejudgment and post judgment dissolution of marriage matters. Included will be a discussion of the requirements for completion of the affidavit and pitfalls in its preparation.	William J. Scott, Jr. - Momkus, LLC	6/9/20	Family Law	0.75 General
Understanding Your Malpractice Policy Focus on a study of professional liability insurance and how this important insurance is structured, including a review of claims-made insurance and how it is different from common types of insurance.	Kyle Nieman, President and CEO of Protexure Insurance Agency, Inc.	6/17/20	Ethics & Professional Responsibility, Law Practice Management & Technology	0.75 PR - Other
Rules and Regulations Governing Referrals and Business Development Focus on the specific rules of professional conduct that govern referrals and business development, including competence, diligence, confidentiality, advertising, and solicitation.	Melissa Smart, Illinois Attorney Resource and Disciplinary Commission	6/24/20	Ethics & Professional Responsibility, Law Practice Management & Technology	1.0 PR - Other

Legal Aid Update

Celebrating *Pro Bono* Week

By Cecilia Najera

The DCBA has cultivated an attitude amongst its membership that responsively acts in the spirit of giving. Where there is a need, the membership will address it. DuPage Legal Aid is a program that hopes to be the legal link to a brighter future for our clients.

Over one third of our clients are domestic violence victims. Sometimes it can be hard for the abused to escape an abusive relationship because abusers may use litigation to intimidate the victim. This was the case for a DLA client who is a young mother and had fled the marital residence with two small children in tow. Her ex is 18 years her senior and stayed in the home they shared for 6 weeks after she left. After leaving, she received a Plenary Order of Protection after Staff Attorney, **Ann Russell**, litigated the matter. Shortly thereafter, the client received notice of a small claims case filed against her by her ex accusing her of damaging the home. The Petition was filed months after she had left the home they shared and only after she received the Plenary Order of Protection. **Patrick L. Edgerton** provided legal assistance to the client in the small claims case and filed a Counter Claim alleging the small claims case was filed to further harass the client. He gave this vulnerable individual a voice within the legal process and acted as her shield against her abuser. Without Patrick, there would be no way our client would be able to retain legal counsel to help her through her legal crisis.

Our program would be nothing without the help of the more than 400 attorneys who volunteer to take cases through DLA. This October, we celebrate another *Pro Bono* Week, our p*ro bono* volunteers, and the difference volunteer attorneys make in our clients' lives. We are so grateful for all you do! Thank you to those volunteer attorneys that accepted cases during the 2019-2020 fiscal year:

Illini Legal Services
Jacqueline Aldrich
Pamela Anderson
Laura Baldwin
Britni Bartik
Joseph M. Beck
Joshua Bedwell
Nicola Bodnar Latus
Robert D. Boyd
Michael J. Calabrese
Brenda Carroll
Axel Cerny
Anthony J. Conniff
Kasey Coughlin
Todd M. Cowden
Dion U. Davi
John Demling
Charles W. Dobra
Patrick L. Edgerton
Denise Erlich
Brian S. Estes
Alex Fawell
John L. Fay
George S. Frederick
Megan Gieseler
Danya A. Grunyk
Juli Gumina
Megan Harris
Dennis A. Harrison

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.

Tracie A. Jablonsky
Danielle M. Jaeschke
Raleigh D. Kalbfleisch
Henry Kass
Victoria Kelly
Thomas G. Kenny
Walter T. Kosch
Lynne C. Kristufek
Adrian Laurean
Zachary H. Lawrence
Richard L. Lucas
Lee A. Marinaccio
Christopher J. Maurer
Deborah McCoy
Mary E. McSwain
Robin R. Miller
Daniel Moriarty
Wendy M. Musielak
Clarissa R. E. Myers
Jesus Negron
Nicolas Nelson
Thomas M. Newman
Brian Nigohosian
Margaret M. O'Connell
Charles Ogan
Julie M. Pabst
John J. Pcolinski
Chantelle Porter
Michael E. Powers
Emily Rapp
Elizabeth Reed
Richard Roberts
Richard Russo
Hilary Sefton
Darius J. Sethna
Leah Setzen
Jason Shore
Elizabeth A. Simons
Robin Slattery
Justin Smit
Lindsay Stella
David Stevens
William Stogsdill
Blake Stone
Eric Telander
Larry L. Thompson
Angel M.Traub
Anthony Vechiola
Win Wehrlil
Heather White
Jessica Wollwage-Rymut
Robert J. Zotti

The donated time and talent of all volunteer *Pro Bono* Attorneys is very much appreciated by our staff, Board of Directors, and clients. If you would like to volunteer by taking a *pro bono* case assignment; acting as a GAL in a probate, parentage, or divorce case; or want to help conduct clinics, please contact me at 630-653-6212. ☐

Welcome

Welcome to the new DCBA members.

New Attorney Members:
Kira N. Albrecht, Mirabella, Kincaid, Mirabella & Frederick Law, LLC; **Kathleen A. Barrett**, Epstein Becker Green; **Erika Foltys**, Blacha Law Office, LLC; **Michelle A. Gale**, Waste Management; **Matthew J. McQuaid**; **Robert Matthew Schroeder**, Huck Bouma PC; **Joseph P. Selbka**, Pluymert, MacDonald, Hargrove & Lee, Ltd.; **Jennifer Sykora**, Law Offices of Mark S. Bishop, LLC; **Dariusz T. Wator**, Wator & Associates, P.C.; **Kathryn A. Doerries**, IWCC; **Haley N. Harlan**, Office of the State's Attorney; **Honorable Craig R. Belford**, DuPage Judicial Center; **Carlie M. Leoni**, Tiesenga Reinsma & DeBoer LLP; **Maurice Rice, II**; **Victoria Rose Tobin**.

Student Members:
David Grasso; Megan Grenville; Taylor Hypes; Katherine London Bischof; Shannon Schwarzwalder; Kelly Hussey; Michelle Leisten.

Lawyers Lending a Hand, Lawyer of the Year and the Honorable Paul Marchese

By Honorable Brian Diamond

Judge Paul Marchese delivering canned goods and other non-perishables to the Milton Township Food Pantry, collected at an impromptu parking lot project.

As the outgoing president, ***Stacey McCullough*** *has selected Judge* ***Paul Marchese*** *as this year's Lawyer of the Year. Paul will be receiving this honor, which is conveyed in recognition of his distinguished leadership and meritorious services rendered in addition to his long-standing leadership of LLH. As of this writing, the award will be presented at an upcoming LLH event. We wish to thank Judge Brian Diamond for the following tribute to Paul and his twenty years of LLH leadership that created this long-lasting program of attorney volunteerism.*

Twenty years have passed since the volunteer service group Lawyers Lending a Hand (LLH) became a fixture in the DuPage legal community. The idea percolated from an experience of Judge Paul Marchese. "I was jogging on the Prairie Path and passed a disabled person. It made me think that lawyers don't seem to have time for volunteer opportunities with the less fortunate. If we could give them a regular, scheduled opportunity, then they could put it on their calendar and make the time."

From there, it was a matter of enlisting the help of then-Executive Director of the DCBA, **Eddie Wollenberg**. Together they took the idea to Bar President, and current judge, **Rick Felice**, who enthusiastically endorsed it. The first project involved painting a classroom for disabled adults at Ray Graham Association. Since that day, Eddie and Paul have shepherded the volunteers through a total of 250 service projects for 45 different nonprofits serving the DuPage County community. *(Continued on page 41)*

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ISBA Update

New Report and Recommendations from Chicago Bar Association/Chicago Bar Foundation on Reforms To Rules in Regards to "Access to Justice"

By Kent A. Gaertner

On July 22nd, 2020, the CBA/CBF Task Force on the Sustainable Practice of Law and Innovation completed its 111 page report on possible changes to the Rules of Professional Conduct to increase access to justice for those who are low income, but not indigent enough to qualify for legal aid. The report contains numerous recommendations which I will present in brief here. The ISBA Board of Governors met shortly after the report was issued to discuss generally. The Board also requested input from the ISBA Section Councils and Committees regarding the report. This will allow the ISBA to take a position on the report. It is anticipated that once the report is submitted to the Illinois Supreme Court, the Court will also set a period for comment. Note that this report is separate from and much farther reaching than a report issued by ARDC, to which the ISBA has already responded.

Among the recommendations made in the CBA/CBF report are the following:

1. The report proposes the creation of an intermediary entity/navigator model designed to assist consumers in finding legal service providers including lawyers, but also other entities such as free assistance programs, approved technology providers, etc.

2. The report calls for modification of the rules to provide for registered technology advisors who can provide access to legal technology and services. It proposes a board to register these providers and create guidelines under which they could operate.

3. The report proposes streamlining limited scope representation rules, enhancing education of lawyers, judges, law students and court personnel in that area. It proposes increased data collection on limited scope representation. It also wishes to explore introducing limited scope representation into the Federal Courts.

4. The report proposes developing newly amended rules to provide for alternate fee arrangements and the ability to have these fee arrangements approved by the courts in a fee petition application.

5. The report proposes a licensed paralegal model to allow certification of licensed paralegals to undertake services similar in scope to Rule 711 students, including court appearances for minor motions. This would be under the supervision of an attorney.

6. The report proposes that a task force explore extensive modification to Rule 5.4 which currently prohibits a non-lawyer entity from active ownership of a law firm.

7. The report proposes that lawyer advertising rules be relaxed to provide for direct solicitation of consumers except in cases where consumers request to opt out.

8. The report proposes that the Rules be amended to provide for a more definitive explanation as to what exactly is the practice of law and what is not.

About the Author

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

9. The report proposes a broad, plain language review of the Rules of Professional Conduct to make them easier to understand.

Two of the task force's members are past ISBA President **John Theis** and the Hon. **Robert Anderson** (DuPage County Ret.). They have responded to the CBA/CBF task force with a letter addressing specific concerns regarding several of these recommendations. These include:

1. These recommendations must at all times be designed to maintain high quality legal representation to the consumer and ethical accountability for all parties involved.

2. The task force needs to keep in mind that such drastic rule changes affect all law firms from solo to mega firms. What is not broken does not need to be fixed.

3. Several states have tried to open the practice of law to non-attorney entities (such as the LLLT program in Washington state) only to find that the program did not work, with such programs being discontinued.

4. Outside entities bring more concern for their bottom line than for the client.

5. It is a dubious predicate that lawyers can get more clients and referrals if they have non-legal entities assisting them with advertising or with capital in exchange for a significant portion of the fee.

6. The ABA has already rejected changes to Rules to allow non-lawyer entities the ability to hold an ownership interest in law firms as this poses a threat to lawyer independence.

7. The licensed paralegal model poses significant liability and supervisory concerns for the attorney involved, especially if the paralegal is allowed to appear in court on behalf of the client.

8. Strictly defining the practice of law does not allow for the practice to expand to fulfill certain needs that may be unanticipated at the present time. Once there is a set definition, non-lawyer entities will encroach upon all areas not specifically included in the definition. It is best to let the courts determine what is unauthorized practice of law based upon current case law and precedent.

9. The approval of registered legal technology providers is vague as to what their function will be and the scope of products and services they will provide.

The ISBA will continue to actively respond to these proposals as well as the previously submitted ARDC proposals from several months ago. The ISBA supports reasonable proposals to increase access to justice. However, the ISBA will also continue to support high quality legal services at reasonable rates with full ethical protections for our clients at all times. Stay tuned. More to come on this important subject. ☐

LRS Stats

6/1/2020 to 6/30/2020

The Lawyer Referral & Mediation Service received a total of **739 referrals** for the month of June.

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

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

Administrative Law	1
Animal Law	0
Appeals	5
Bankruptcy/Credit Law	8
Business	18
Collection	28
Consumer Protection	3
Contract Law	0
Criminal Law	126
Elder Care	17
Employment Law	59
Estate, Trusts and Wills	66
Family Law	186
Federal Courts	2
Government Benefits	2
Immigration Law	1
Insurance Law	6
Intellectual Property Law	1
Mediation	0
Modest Means	0
Personal Injury	67
Real Estate Law	135
School Law	1
Tax Law	0
Workers Compensation	7

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Lawyers Lending a Hand, Lawyer of the Year and the Honorable Paul Marchese

(Continued from page 36)

Volunteers at a 2005 LLH project assisting the DuPage Animal Control Center.

The group meets once per month and is open to lawyers, their families, friends and legal staffs. "I enjoy seeing all the lawyers and judges I used to work for," Eddie says, by way of explaining her long association with LLH.

Early on, Paul decided that a little competition might motivate the lawyers and added a coat drive. Every year, over 2000 items of winter apparel make their way from lawyers' closets to the needy in DuPage. Some nonprofits depend heavily on these donations to prepare their clients for winter. The Bar seems to enjoy it as well. "Participating in the winter coat drive has given me the obvious enjoyment of helping others while again seeing former coworkers," according to retired Judge **Pete Dockery**. Other "regulars" among the legal community are equally enthusiastic about LLH. "It has been so rewarding to be a part of something that instills goodwill in the community and to make a difference for people over so many years," according to lawyer **Audrey Anderson**.

Lawyering is, after all, a customer service industry. The opportunity to show empathy for the less fortunate seems to draw volunteers to LLH as an occasion for lawyers to see the problems of the world from a different perspective. The isolation of life in a nursing home, the overwhelming workload of an organization trying to care for the disabled, and the sheer volume of food needed to feed the hungry in DuPage, are experiences not common to most busy lawyers. Those who join LLH events often share them with family, friends and non-lawyer staff. It is as common to see law students as retired lawyers. Events build friendships and networking opportunities.

All of this is not to minimize the work that is accomplished, the needs that are met and the efforts given to the many nonprofits. Linda Gray, Recreation Therapist at the DuPage Care Center, speaks fondly of the annual pizza party hosted by LLH. "Pizza is such a special treat for the residents, but they get the added bonus of socializing and meeting new people. It has become such a popular event that we had to create a wait list. The residents look forward to this event all year!"

Mark Lagan of Ray Graham echoes the sentiment. "We are very fortunate to have volunteer partner organizations like LLH that support Ray Graham Association. The work they do is remarkable and saves us thousands of dollars and hundreds of staff hours, making a significant difference to the people we serve."

No matter how large or small the project, it is not nothing. It is not telling someone else, or the government to solve the problem. LLH becomes part of the solution. The world's problems can seem overwhelming in scale. The ability to serve others, with money, sure, but also with our effort or just our presence is a gift. Lawyers Lending a Hand hopes to continue this gift of the DuPage legal community for many years to come.

Be sure to watch for news about upcoming projects in your email, the Thursday Docket e-newsletters and the dcba.org website. Even during this pandemic, we are finding ways to help others safely. □

Director's Award

It being an unusual year, we were unable to properly recognize the winners of the 2020 Directors Awards and the achievements that garnered their receipt of these prestigious awards. Without further ado… **Judge Bryan Chapman** for his work as the Chair of PILI's 18th Judicial Circuit *Pro Bono* Committee. **Michael Bergmann** for his work as an ED for PILI, *Pro Bono* Week, and the Expungement Clinic. **Joseph Emmerth** for his work as Vice-Chair of LPM for Friday Files legal tech e-newsletter. **Lisa Giese** for her work as Chair of the Child Advocacy Section and for GAL training. **Markus May** for his work as Chair of the Business Law Section and for stepping in as an early replacement for several significant programs. Last, but not least, **Aaron Ruswick** for his excellence in his first year as DCBA Treasurer. Thank you to all and please join us in virtual belated applause! ☐

October Bar Notes

(Continued from page 31)

see though, there are very valuable tools available to DCBA members through this platform. In the year ahead, we will be working on several fronts to improve the online experience you have with the association. Until those changes are in place, I hope this guide helps to "settle the tumbly" and leads you to helpful resources. ☐

Classifieds

Naperville

Multiple office spaces for rent in downtown Naperville. We are centrally located between the Metra station and downtown Naperville. Currently renting multiple units: 2 Unfurnished offices starting at $500 per month; and 2 fully furnished, ready to use offices beginning at $750 per month. Utilities are included, conference room and support services available. **Please contact me to inquire at (630) 926-8377**.

Wheaton-Danada Area

Two Offices (14' 2" x 10' 6" - $650.00) and (12' x 10' 8" - $550.00) in prestigious Danada area of Wheaton; available to rent together or separately, furnished or unfurnished; Office suite has 4 offices, 2 of which are occupied by other lawyers; conference room, kitchen, reception area; **Available immediately. (630) 260-9647**.

Oak Brook

Law office for rent – Furnished window office, 15' x 15' with furnished secretarial station, use of conference room, file cabinet space and small kitchen area. Ample parking; internet and phone wired; close to I-88, I-355 and I-294. Available for immediate occupancy. **Please contact Sharon at: svahlin@ccspclaw.com**.

Two fully furnished and bright offices. One (18' x 13'6") and the other (14'7" x 12'6"). Office suite includes conference room (15'9"), eat in kitchen (with fridge, microwave and dishwasher), reception area, internet, fax and multifunction copier. Excellent Oak Brook location in elevator building. Available immediately. Starting at $750/month. **Call Harry at 630-792-1000**.

Lombard

Office space in Lombard attorney suite available. $700 per month includes 16' X 9' private office and separate assistant space if needed. Reception area and conference room in suite. Great location across from Yorktown Mall. **Call Tom at 630-493-9500**.

Where to Be
with DCBA

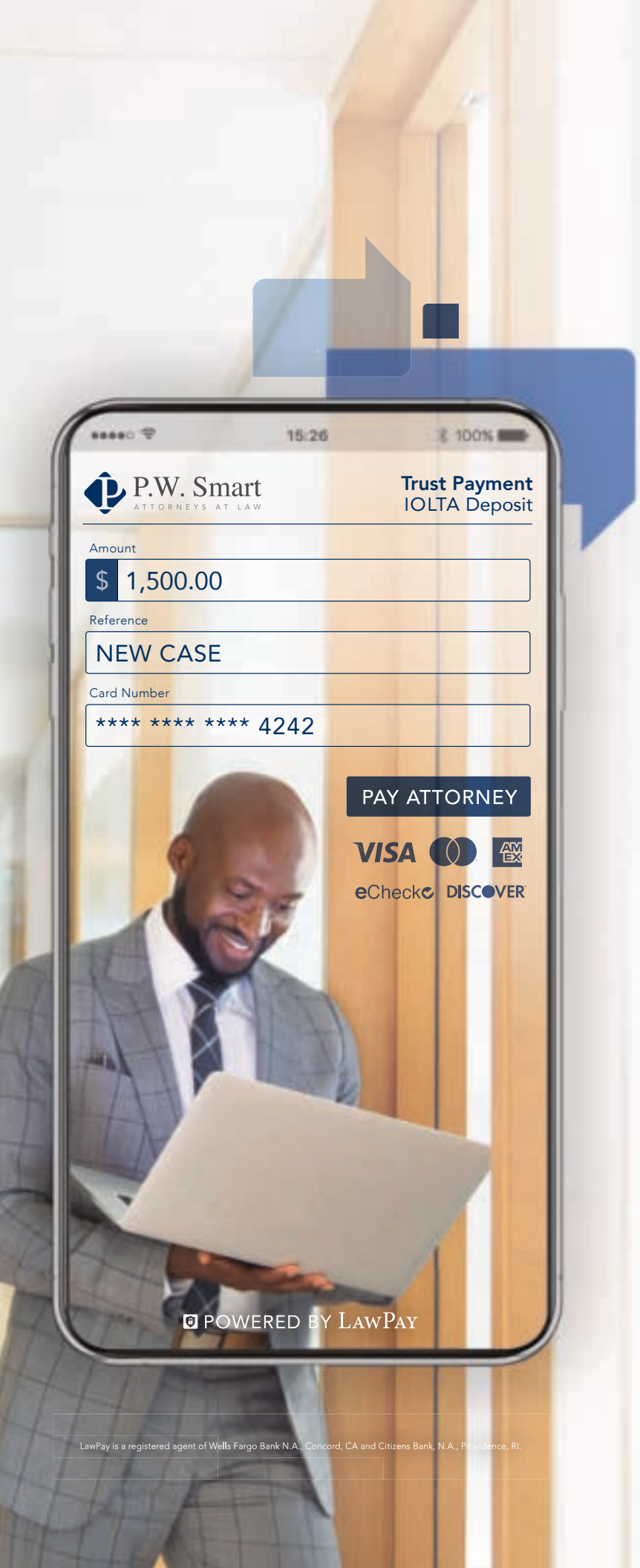
Wheaton Young Attorneys Club

COVID-19 didn't stop us, we're back and we're better! The Wheaton Young Attorney's Club, comprised of attorneys who have been practicing in their current area of law for 6 years or less, meets once every month for lunch. WYAC is a community whose members seek their peers' guidance on tough legal issues, discuss DuPage happenings, and are given notice of exclusive job opportunities from firms in the area seeking associates.

WYAC's special events are open to all members of the DuPage legal community. The next special event is the installation of the club's new leadership which will take place on September 10, 2020 **at 5:30 p.m. at the Ivy Restaurant located at 120 N. Hale St. Wheaton, IL**.

Jessica Defino of McSwain Nagle & Giese, P.C. will be installed as WYAC President. All are welcome to attend. To join or get more information about the club, contact Jessica Defino at jessica@mngfamilylaw.com ☐

DCBA News Updates
Please watch for current, updated information about DCBA events and Circuit and County information through the weekly (Thursday) e-newsletter, the Docket, regular blast emails from DCBA and by reviewing the DCBA website pages at dcba.org. If you are not currently receiving the Docket or other DCBA email notices, please log in and update your profile group selections and/or call the DCBA office to update your information at 630.653.7779 or email bar@dcba.org. ☐



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- Served 6 years in the DuPage County State's Attorneys Office and 8 years as a Senior Assistant Attorney General. For the past 16 years has been in private practice.
- Rated as **Highly Recommended** to serve as a Circuit Court Judge by the DuPage County Bar Association.
- Received the highest rating to serve as a Circuit Court Judge by the Illinois State Bar Association.
- DuPage County Association of Women Lawyers' Inspirational Woman.
- 4 times ProBono Service Award recipient from DuPage Legal Aid.
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