DCBA Brief

The Journal of the DuPage County Bar Association

Volume 33, Issue 1 | September 2020

DCBA President

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DCBA Brief
The Journal of the DuPage County Bar Association
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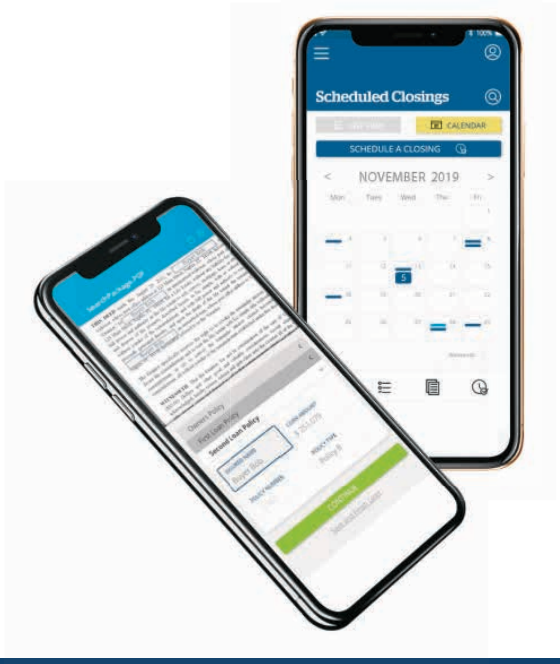

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From the Editor

Is This Our Last Dance? Not a Chance

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.

If you know me really well, then you know I will take any chance to make a Chicago Bulls or Rocky movie reference. The topic does not matter, nor does the situation. I thought it appropriate for my first column because I truly believe this is not our last dance. We have faced unbelievable challenges over the past six months. As a world, as a country, as a state, as a county and as a bar association.

We are facing a global pandemic which I of course welcomed for my year as Editor-in-Chief of the Brief. All kidding aside, with this pandemic, we have seen a horrible death toll and the pain and suffering of loved ones who have said goodbye to friends and family without being able to be by their side. As I write this, it appears tens of thousands of more people will tragically pass away by the time this issue is published. People who are fortunate enough to survive the virus often deal with significant post-virus symptoms and it is unknown whether they will go away or be part of them the rest of their lives.

We have also seen the greatness and compassion that most of us possess. We have seen the selfless frontline workers who risk their lives and health because they are truly essential and believe in what they do. The nurses, CNAs, doctors, factory workers, grocery workers, food industry workers, etc. have been the epitome of heroes during the pandemic. My wife, a nurse, spent several weeks on the COVID-19 ICU floor at her hospital. I have never seen her more exhausted and upset than when I would see her come home each and every day during that time. I imagine that this is true for a lot of people that have been exposed to the tragedy of seeing someone die without their friends and family by their side. The psychological toll on people who have sacrificed their health and safety when they had no choice but to confront this virus head-on will probably live on for several years to come.

A massive civil rights movement has swept across the nation. It is bringing long overdue attention to problems and injustices that have been ignored for too long. I've often asked my mom what it was like growing up in the sixties during one of the greatest (if not the greatest) civil rights movements we have ever had. Today, I look at this as our civil rights movement. We are in this together and we need to do whatever we can to show compassion and love to people because, at the end of the day, we are all the same people. We all have our goodness, our idiosyncrasies, our not so great qualities. But we are the same. "We the People" means all of us even if it did not mean that back in 1778.

I am proud of this bar association and the courthouse/judges for the tremendous amount of work that they have put into implementing ways in which we can get access to court. I haven't seen anyone else do it better. There was no playbook for how to run a courthouse or bar association during a pandemic, but oh did the DCBA do an amazing job on the fly. The zoom meetings conducted by judges and the bar association were extremely helpful. I have done several zoom depositions with ease. I participated in my first zoom status hearing in DuPage and it went fantastic. Thank you to all who have devoted so much time and effort to return us back to some sense of normalcy, even if that normal is quite a bit different than what we were used to. *(Continued on page 6)*

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THAT WE RECOGNIZE OUR VERY OWN

Maureen Sullivan Taylor

DEDICATED LEADER, COMMUNITY COLLABORATOR AND COMPASSIONATE ADVOCATE

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President's Message

A Fitting Installation!

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.

On June 19, 2020, I had the honor and privilege of being sworn in as the DuPage County Bar Association President. It was not the event I originally planned. Instead of the big gala in a fancy dress, a small group of us gathered outside of the DuPage County Courthouse to begin my term as President of the DCBA. While still a little disappointed that this was not taking place as I had hoped and planned, when the moment came, as I walked through the area outside the courthouse, where I had started my career, nothing could have been more fitting for me. Here I was outside the building where I served as a Staff Attorney from 2004-2006, about to become the President of the DuPage County Bar Association that has meant so much to me. While my family and many of my friends could not be there in person, **Robert Rupp** made sure there was a live feed to allow my mom and brother to watch. But this live feed also allowed my colleagues, friends, and family, even those who are outside of Illinois, to be a part of the moment, and I cannot be more grateful that people near and far were a part of this day. I have not had the opportunity to personally thank everyone who was a part of that day, but please know that your active participation made the day very special for me.

Recently, I have been reflecting on my path to becoming the 2020-2021 DCBA President. Almost sixteen years ago, **Sue Makovec** encouraged me to start going to DCBA events. Each time an event would occur, Sue made sure to invite me; that began the road to where I am today. Less than 2 years later, after Judge **Elizabeth Sexton** overheard **Andy Cores** talking about needing a new attorney and encouraging me to apply, I was off to start my career in private practice (despite a 7:00 am interview). During my first court appearance at my new firm, I was so nervous. Opposing counsel was **Terry Mullen**, who could see my nerves as we appeared before Judge **George Sotos**. As I wrote out the order, Terry walked up to me and said jokingly "You're doing it all wrong." From that day forward, I had a friend in Terry. He was always smiling and kind and made me feel welcome. I knew this was the community where I belonged. Then, in 2011, **Sharon Mulyk** asked me to be her Chair of the Membership Committee and I was hooked. I eventually became Chair of the Family Committee and then a Director. In 2017, I decided I wanted to take on a bigger role and ran for Third Vice President.

When I won the election in 2017, I could never have imagined the world we would be living in right now. Throughout life we all face challenges -- because life is hard. Often, those challenges are personal and individual or at least limited to a more intimate group who are directly affected. When we lose a loved one, it is those closest to that person who so acutely feel the pain. While others sympathize, each person's feelings are unique.

Over the past few months, we have all faced new challenges since our world was introduced to COVID-19. We went from socializing and living life as we always knew it to a suddenly very different world. Our nights out with family and friends were taken away. We were told to "Shelter-In-Place." Working from home became a norm. Walking through the courthouse hallways ceased.

(Continued on page 36)

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DCBA Brief welcomes members' feedback.
Please send any Letters to the Editor to the attention of Dexter Evans, at email@dcbabrief.org

Is This Our Last Dance? Not a Chance *(Continued from page 3)*

When we came back to the office full-time in May, I told my paralegal that I anticipated that we would run out of work to do within two weeks. She told me I was wrong and, as usual, she was right. I have been extremely busy each and every day. The legal system has not stopped. Sure, we probably will not be able to do a jury trial anytime soon, but the work and the effort forges on. I handle personal injury cases and I have found that every defense attorney has been incredibly easy to deal with during these challenging times. Whether it has been working on an agreed order or setting up a zoom deposition, I have not encountered a single problem.

I recently watched a documentary entitled "1968". What an unbelievable and tragic year. Martin Luther King was assassinated. Robert Kennedy was assassinated two months later. The Vietnam War was in full effect. A massive and long overdue civil rights movement was sweeping the country. Protests, riots, turmoil. I thought, "I wonder if people then thought they were looking at the end of our country as we knew it?" Obviously, we did not end. The war eventually ended. The country returned to a sense of calmness. We came out of 1968 stronger on the other side. Were we perfect? No. Are we now? Definitely not. But the greatest testament to the ability to grow and prosper as a country (and as a person) is the ability to adapt and persevere when confronted with new challenges, however difficult they may be. We will come out of this stronger on the other side. We will adapt to whatever new normal we find ourselves left with. We will be stronger and better.

Thank you to **Joseph Vosicky**, **Rachel Legorreta** and **Marie Sarantakis** for their article submissions in this issue. Also, thank you to **Rachel Legorreta** for her hard work as Articles Editor as well as **Brian Dougherty** for his work as Case Law editor. Last but certainly not least, thank you to **Jacki Hamler** for making the lives of everyone (especially me) so much easier with all of the hard work she puts into making the Brief the best law publication out there. However, next time, maybe mention I would be Editor-in-Chief during a pandemic before you reel me into the job…

Be safe and be well everyone! Peace. ☐

Articles

Articles Editor

Rachel Legorreta

Rachel Legorreta is an associate with the law firm of John J. Malm & Associates, P.C., where she focuses her practice on personal injury litigation. She graduated *magna cum laude* from Northern Illinois University College of Law and is a current member of the *DCBA Brief* Editorial Board.

Willful and Wanton Conduct Under the Tort Immunity Act

By Rachel Legorreta

Introduction

The Tort Immunity Act has historically barred plaintiffs from bringing claims against governmental entities for mere negligence. Rather than pleading and proving negligence as a plaintiff would typically do against a non-governmental defendant; under the Tort Immunity Act, a plaintiff has to plead, and later prove, a higher standard - that the governmental entity's conduct was willful and wanton. Given the higher standard that needs to be met against a governmental entity, it is important to know what constitutes willful and wanton conduct to successfully plead and prove a claim that falls under the Tort Immunity Act. The Tort Immunity Act is a large, comprehensive piece of legislation, and as such, this article will only focus on a small portion of the Tort Immunity Act, specifically a couple of factors demonstrating willful and wanton conduct under Section 10/3-106.

The Tort Immunity Act

The purpose of the Tort Immunity Act (officially, the Local Governmental and Governmental Employees Tort Immunity Act), is to protect local public entities and public employees from liability from the operation of government.[1] It, therefore, grants only immunities and defenses to local public entities and public employees.[2] The Tort Immunity Act defines a local public entity as: a county, township, municipality, municipal corporation, school district, school board, educational service region, regional board of school trustees, trustees of schools of townships, treasurers of schools of townships, community college district, community college board, forest preserve district, park district, fire protection district, sanitary district, museum district, emergency telephone system board, and all other local governmental bodies.[3] It defines a public employee as an employee of a local public entity.[4] Under the Tort Immunity Act, neither a local public entity nor a public employee is liable for an injury under many circumstances, including where

1. 745 ILCS 10/1-101.1(a)(West 2020).
2. *Id.*
3. 745 ILCS 10/1-206 (West 2020).
4. 745 ILCS 10/1-207 (West 2020).

the liability is based on the existence of a condition of any public property intended or permitted to be used for recreational purpose, including but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, unless such local public entity or public employee is guilty of willful and wanton conduct.[5]

What is Willful and Wanton Conduct?

The Tort Immunity Act defines willful and wanton conduct as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property."[6] Whether actions of a local public entity or public employee constitute willful and wanton conduct often depend on the facts and circumstances of a given case. Courts have held that willful and wanton conduct can drastically range, depending on the misconduct. Under the facts of one case, willful and wanton misconduct may be only degrees more than ordinary negligence, while under the facts of another case, willful and wanton misconduct may be only degrees less than intentional wrongdoing.[7] However, the courts have been clear that willful and wanton conduct is something more than mere negligence. In determining willful and wanton conduct, courts look at the mental state of the individual committing the misconduct. Willful and wanton misconduct "includes a range of mental states from actual or deliberate intent to cause harm, to utter indifference for the safety or property of others, to conscious disregard for the safety of others or their property."[8]

Given the nature of the ranging determination of willful and wanton conduct by the courts, the question of whether conduct by a local public entity or public employee is willful and wanton is generally a question of fact for a jury.[9]

Violation of a Policy

One of the factors courts look at in determining whether a local public entity or public employee has engaged in willful and wanton conduct is whether the public entity or public employee violated a policy. Courts have consistently held that a violation of a standard operating procedure or policy constitutes a claim for willful and wanton conduct.[10] Often, when evaluating willful and wanton conduct, courts focus on whether there was: (1) a deviation from standard operating procedures or a policy violation, (2) an unjustifiably lengthy response time, or (3) an unjustifiably inadequate response to a known danger.[11]

In *Stewart v. Oswego Community Unit School District No. 308*, a student at Oswego Community High School collapsed and died as a result of suffering an asthma attack during class.[12] The school had a policy that if a student suffered a serious health episode, the teacher was required to call the school nurse, and if a student suffered a life and death episode, the teacher was required to immediately call 911 or direct another person to call 911.[13] Instead of immediately calling 911 as required by the policy, the teacher waited 7 to 20 minutes to ask the school's health services coordinator to call 911, and in doing so, failed to provide the coordinator the location of the emergency and enough detail of the student's condition.[14] After a trial, the jury returned a verdict in favor of the plaintiff in the amount of $2.5 million.[15] The school district then moved for judgment *n.o.v.*, and alternatively, a new trial, which were both denied by the trial court.[16] The school district appealed.[17]

Upon review, the appellate court upheld the trial court's decision. In finding that the defendants had engaged in willful and wanton conduct, the court noted that the jury could have reasonably concluded that one of the defendants deviated from clear policy set forth by the school.[18] In its evaluation of whether the defendants engaged in willful and wanton conduct, the court noted it was clear that the teacher violated a clear policy set forth in the school policy handbook.[19] The policy set forth

5. 745 ILCS 10/3-106 (West 2020).
6. 745 ILCS 10/1-210 (West 2020).
7. *Kurczak v. Cornwell*, 359 Ill. App. 3d 1051, 1060 (2d Dist. 2005). (Internal quotation marks omitted).
8. *Murray v. Chicago Youth Center,* 224 Ill. 2d 213, 236 (2007).
9. *Murray v. Chicago Youth Center,* 224 Ill. 2d 213, 245 (2007).
10. *Am. Nat. Bank & Tr. Co. v. City of Chicago*, 192 Ill. 2d 274, 286 (2000)(holding complaint stated a claim of willful and wanton conduct when paramedics violated a policy manual requiring paramedics to turn the knob on the door).
11. *Stewart v. Oswego Community Unit School District No. 308,* 2016 IL App (2d) 151117, ¶ 84
12. *Id.* ¶ 1.
13. *Id.* ¶ 13.
14. *Id.* ¶ 88.
15. *Id.* ¶ 63.
16. *Id.* ¶ 64.
17. *Id.*
18. *Id.* ¶ 89.
19. *Id.* ¶ 88.

About the Author

Rachel Legorreta is an associate with the law firm of John J. Malm & Associates, P.C., where she focuses her practice on personal injury litigation. She graduated *magna cum laude* from Northern Illinois University College of Law and is a current member of the *DCBA Brief* Editorial Board.

> **"… the courts have been clear that willful and wanton conduct is something more than mere negligence. … courts look at the mental state of the individual committing the misconduct.**

in the handbook required the teacher to call or have someone call 911 immediately in life and death circumstances.[20] Rather than call 911 or have someone else call 911 immediately, the teacher waited 7 to 20 minutes to have someone call 911.[21] Additionally, the teacher failed to provide the exact location of the room where the emergency was occurring, and did not provide enough detail concerning the student's condition.[22]

Knowledge of an Impending Danger

Another factor courts look at in determining whether a local public entity or public employee has engaged in willful and wanton conduct is whether the defendant(s) had knowledge of an impending danger. "The party committing the willful and wanton act or failure to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of the surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury."[23] When evaluating whether a defendant engaged in willful and wanton conduct, courts consider whether the defendant has taken any action to mitigate the impending danger.[24] Courts have repeatedly held that the individual actor does not need to subjectively appreciate the high probability of serious physical harm from his conduct.[25] Rather, it is sufficient that a reasonable person appreciate the probability of serious harm.[26]

Illinois courts have generally found willful and wanton conduct cases involving a public entity or public employee ignoring dangers of a hazardous activity, failing to remediate an obvious danger, or inaction after knowledge of impeding danger.[27] Contrarily, courts have found an absence of willful and wanton conduct in cases involving more mundane activities or where there is no obvious or impending danger.

In *Torres v. The Peoria Park District*, the plaintiffs, Michael Torres and Jaimie Gibson, were injured after using their own camping hammock attached to two vertical parallel poles secured in the ground at the Camp Wokanda camping site, which was owned, operated, and controlled by the Peoria Park District.[28] While using the camping hammock, one of the poles broke and fell onto the plaintiffs, causing the plaintiffs to drop to the ground and suffer serious injuries.[29] Unknown to the plaintiffs at the time, the Peoria Park District had a policy disallowing erecting hammocks from any structure within the Park District properties, including the Camp Wokanda campsite.[30]

The plaintiffs filed a second amended complaint, alleging the park district had engaged in willful and wanton conduct that caused their injuries.[31] In their second amended complaint, the plaintiffs alleged that on and before 1975, Camp Wokanda was owned and used by the United States Boy Scouts.[32] During the time period the Boy Scouts owned Camp Wokanda, they built several vertical manmade wooden poles.[33] When they built the poles, the Boy Scouts knew that the poles could not support the weight of hammocks with people in them, and had a safety policy against using the poles to support any appreciable weight.[34] When the park district purchased Camp Wokanda from the Boy Scouts, it instituted a similar policy of not allowing people to hang hammocks from the poles.[35] The plaintiffs alleged that in February 2017, the plaintiffs met with an agent or employee of the park district, who "explained that the poles were there for plaintiffs' exclusive use and could be used for 'any camping or recreational purpose they so desired.'"[36]

20. *Id.*
21. *Id.*
22. *Id.*
23. *Vilardo v. Barrington Community School District,* 406 Ill. App. 3d 713, 724 (2d Dist. 2010). (Internal quotation marks omitted).
24. *Bielema ex rel. Bielema v. River Bend Community School District No. 2,* 2013 IL App (3d) 120808, ¶ 18.
25. *Landers v. School District No. 203,* 66 Ill. App. 3d 78, 82 (5th Dist. 1978).
26. *Id.*
27. See *e.g., Hadley v. Witt Unit School District*, 123 Ill. App. 3d 19, 22 (5th Dist. 1984).
28. *Torres v. The Peoria Park District*, 2020 IL App (3d) 190248, ¶¶ 4, 5.
29. *Id.* ¶ 5.
30. *Id.* ¶ 6.
31. *Id.* ¶ 4.
32. *Id.* ¶ 7.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* ¶ 4.

After plaintiffs filed their second amended complaint, the park district filed a motion to dismiss on the basis that it was immune from liability under the Tort Immunity Act.[37] The park district argued that the plaintiffs' second amended complaint alleged mere negligence, and not willful and wanton conduct.[38] After a hearing, the trial court granted the park district's motion to dismiss and the plaintiffs appealed the trial court's ruling.[39]

On appeal, the court found that the plaintiffs sufficiently alleged that the park district's actions constituted willful and wanton conduct by alleging a course of action by the park district that showed an utter indifference to or conscious disregard for the safety of the plaintiffs.[40] In holding that the plaintiffs had sufficiently alleged willful and wanton conduct, the court pointed to several allegations within the second amended complaint. First the court noted that the park district knew that the wooden poles were at least 42 years old at the time of the incident, given that the park district purchased Camp Wokanda in 1975.[41] The court also considered the plaintiffs' allegations that the Boy Scouts knew that the poles could not support any appreciable weight when they were built, and the park district instituted a policy prohibiting erecting hammocks from the poles after they purchased the property.[42] The court pointed out that establishing such a policy leads to a reasonable inference that the park district implemented the policy for the safety of its patrons, implying that the park district knew of an impending danger in using the poles to erect hammocks.[43]

Conclusion

As demonstrated in the above cases, courts typically look to several factors to determine whether certain misconduct was willful and wanton. Ultimately, the facts and circumstances of a given case determine whether a public entity or public employee engaged in willful and wanton conduct under the Tort Immunity Act. Due to intricacies of the Tort Immunity Act, it is important that plaintiffs understand what constitutes willful and wanton conduct, and ultimately, understand how to successfully plead and prove willful and wanton conduct. ☐

37. *Id.* ¶ 11.
38. *Id.*
39. *Id.* ¶ 12.
40. *Id.* ¶ 28.
41. *Id.* ¶ 26.
42. *Id.*
43. *Id.*

A Paragon of Arbitration Justice

By Joseph Vosicky

A colleague who represented United Parcel Service (UPS) called me seeking legal counsel for a Louisiana customer who had been sued by an Illinois resident, claiming that he never received a package shipped by UPS from New Orleans to DeKalb. The underlying facts suggest something similar to the "Antiques Roadshow" on Public Broadcasting Service television. In the case, three issues arose: (1) whether the cap on damages in arbitration cases designated "LM" or "AR" might trump a contractual arbitration clause; (2) whether the commercial code protects buyers from the risk of loss when a product is lost or destroyed in transit; and (3) whether a shipper is allowed attorneys' fees in damages for a lost item.

The following case shows that a plaintiff might avoid contractual arbitration and fit within its stated exceptions where the defendant's expectation of damages is specifically limited by a careful wording of the *ad damnum*.

Background Facts – Sale of Antique Sign Shipped on Approval

A local antiques collector, Gordon, in his spare time scavenges places like the Sycamore Steam Show. He found a 1920s double-sided Paragon Motor Oil Company porcelain sign, 32 inches in diameter, set in its original cast iron ring. These advertisements used to hang outside gasoline stations, like the old Texaco dinosaur. In good, original condition, those signs fetch about $40,000 today. Gordon bought the sign and found another collector, Worley, in New Orleans who was interested in buying it. Worley said he would consider the purchase at $40,000, only if the sign was in its original state. Gordon shipped the sign via Federal Express to Worley. The intent of the parties was for Worley to inspect the item prior to purchase. If the sign was to his satisfaction, Worley would purchase the sign from Gordon for the requested amount, but if Worley decided not to purchase the sign, he would restore possession of the sign to Gordon. It was later learned through discovery that Gordon declared the value with Federal Express at $10,000.

When the sign arrived in New Orleans, Worley opened the box, with his secretary present, and instantly detected that it had been restored. He called Gordon and advised him that in its current state, the sign was worth maybe $8,000 and that he would return it immediately via UPS. Worley was a regular customer of UPS and Gordon did not require a Federal Express delivery. When UPS picked up the sign in New Orleans, Worley declared the value at the offered price of $40,000, triggering "high value" treatment and paid a surcharge for special handling. Two or three days later, UPS confirmed delivery to Gordon's porch in DeKalb. However, two weeks later, the seller, Gordon, called Worley, asking about the sign and informed Worley that it had not been returned.

In New Orleans, Worley called UPS to report a missing package and made the appropriate claim. UPS conducted their own internal investigation and advised Gordon to file a local police report for theft in DeKalb. The DeKalb police interviewed Gordon as part of their own investigation. Ultimately, UPS denied the claim and Gordon filed suit for Detinue and Bailment in DeKalb County.[1]

1. Ronald Gordon v. Michael Worley v. United Parcel Service, No. 15 LM 109 (Cir. Ct. DeKalb County).

Lawsuit Filed in the "LM" Division of Court

As part of his Answer and Affirmative Defenses, Worley filed a third-party complaint against UPS for the mis-delivery of the alleged $40,000 antique porcelain sign. When Worley shipped the sign with UPS, he entered into UPS' standard shipping agreement, which required an arbitration process if a dispute arose between the two parties to the contract, thus waiving their respective rights to accessing a court of law. In response to Worley's third-party complaint, UPS filed a motion to dismiss or stay the litigation, invoking its arbitration clause contained in the boilerplate minutiae that anyone who ships via a common carrier probably never reads but signs anyway as an inconvenience, in order to get the shipment on its way. The specific language of the shipping agreement stated:

> Claimant and UPS agree that, *except for disputes that qualify for state courts of limited jurisdiction (such as small claims, justice of the peace, magistrate court, and similar courts with monetary limits on their jurisdictions over civil disputes)*, any controversy or claim, whether at law or equity, arising out of or related to the provision of services by UPS, regardless of the date of accrual of such dispute, shall be resolved in its entirety by individual (not class-wide nor collective) binding arbitration.[2] (Emphasis added).

This exception to the binding arbitration agreement was prepared and inserted into the contract by UPS. In addition, Worley and UPS acknowledged and agreed to various Terms:

> -CLAIMANT AND UPS AGREE THAT WE ARE WAIVING THE RIGHT TO HAVE A COURT, *OTHER THAN A STATE COURT OF LIMITED JURISDICTION AS DEFINED ABOVE*, RESOLVE ANY DISPUTE ALLEGED AGAINST CLAIMANT, UPS OR RELATED THIRD PARTIES...

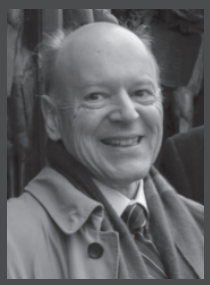
UPS argued that the exception was not applicable in the Circuit Court of DeKalb County, since the court did not have limitations on the types of cases it presided over. UPS contended that the lawsuit was governed by federal common law patterned on the Carmack Amendment to the Interstate Commerce Act.[3] It claimed that federal law preempted all of Worley's state law claims, regardless of whether they were based on negligence, breach of contract, or any other theory of law. It further claimed that the UPS tariff and federal law mandated enforcement of the binding arbitration clause.

Additionally, UPS argued that the arbitration agreement was binding and enforceable under the Federal Arbitration Act ("FAA")[4] because the FAA covers transactions involving commerce, specifically interstate commerce. The FAA reflects a "liberal federal policy favoring arbitration agreements," and provides for orders compelling arbitration when one party fails to comply with an arbitration agreement.[5] UPS also invoked the Illinois Uniform Arbitration Act, which provides that a written agreement to submit any existing controversy to arbitration is valid, enforceable, and irrevocable in Illinois.[6]

The *Ad Damnum in "LM" or "AR" Cases Must be Specific*

Even though UPS attempted to assert it was entitled to binding arbitration, Gordon filed his verified complaint in the "LM" (*Law Magistrate*) Division, clearly praying for damages in excess of $10,000, but less than $50,000. *Dovalina v. Conley* dealt extensively with application of the monetary or judgment limits identified in Supreme Court Rule 222(b): "Any judgment on such claim which exceeds $50,000 shall be reduced posttrial to an amount not in excess of $50,000."[7] Illinois courts interpret a Supreme Court Rule in the same manner as a statute; the Rules have the force of law.[8] The overarching concern is the defendant's expectation of damages and to protect the defendant from surprise.

About the Author



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2. Claims and Legal Actions: Individual Binding Arbitration of Claims, UPS Tariff §50 at 37.
3. 49 U.S.C. §14706 (2018).
4. 9 U.S.C. §1, *et seq* (2018).
5. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); 9 U.S.C. §3 (2018).
6. 710 ILCS 5/1 (West 2020).
7. *Dovalina v. Conley*, 2013 IL App (1st) 103127, ¶ 24.
8. *Id.*

The thrust of UPS' motion to invoke the arbitration clause contained within the terms of the UPS tariff did provide an exception to mandatory binding arbitration:

> ...for disputes that qualify for state courts of limited jurisdiction (such as small claims, justice of the peace, *magistrate court*, and similar courts with monetary limits on their jurisdictions over civil disputes)... (Emphasis added).

Grady v. Marchini dealt with the impact of filing suit designated "LM" and the applicability of Supreme Court Rule 222(b). The court in *Grady* reduced the judgment from $97,700 to $50,000 under Supreme Court Rule 222(b). The mandatory term "shall" appears at least three times in the Rule. Thus, Worley argued that the exception was invoked due to the monetary limits under Supreme Court Rule 222(b), which the Court would have to follow regardless of the judgment returned by the trier of fact.

UPS' citation of FAA's guidelines was not without qualification. *Volkswagen of America* noted that:

> Although reflecting a 'liberal federal policy favoring arbitration agreements,' the FAA's purpose is not to provide special status for such agreements. Rather, it makes arbitration agreements as enforceable as other contracts, but not more so. The Supreme Court has made clear that 'arbitration under the Act is a matter of consent, not coercion and that the parties are generally free to structure their arbitration agreements as they see fit' and 'may limit by contrast the issues which they will arbitrate.'[9]

UPS' Supreme Court authority noted that the Agreement to Arbitrate Claims was limited to exclude from arbitration disputes that qualify for state courts of limited jurisdiction (such as… courts with monetary limits on their jurisdiction over civil disputes). Courts should not apply precedential rulings in a mechanical manner, but in a "pragmatic, flexible manner with a view to the realities of the case at hand."[10]

UPS Motion to Transfer to Binding Arbitration Denied

The *ad damnum* in Gordon's verified complaint was clearly within the LM limits and the cap fit neatly within the language of UPS' contractual terms. The trial court, in a detailed order, found that UPS' use of the examples to attempt to define a state court of limited jurisdiction created an ambiguity, since the exception included courts with monetary limits on their jurisdiction.[11] Although the judge found both UPS' and Worley's arguments reasonable, the court stated that: "since ambiguous provisions of a contract are generally to be construed against the drafter (in this case UPS), the court is bound to deny the motions of UPS."[12]

Risk of Loss Remains with Seller Where Sale is On Approval

Next, the parties dealt with the underlying case. Gordon's suit sought to recover either the sign itself or its alleged value of approximately $40,000. The transaction was a "sale of goods," which was within the ambit of the Illinois Uniform Commercial Code (UCC).[13] Special Incidents of Sale on Approval and Sale or Return in the UCC provide that: "(1) under a sale on approval, unless otherwise agreed (a) . . . the risk of loss and title do not pass to the buyer until acceptance; and . . . (c) after due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions."[14] In other words, in a sale of goods where the seller sends the product to the buyer "on approval" and the buyer reasonably rejects the offer, the risk of loss never leaves the seller.

Louisiana and Possible Conflict of Laws

Gordon's lawyer pointed out that the would-be buyer, Worley, was in Louisiana, which followed the civil law system and was the only state in the nation that never adopted the UCC. Gordon suggested that this was a Louisiana contract and the UCC did not apply. However, Louisiana had a code provision similar to the UCC. Louisiana had a provision for "Sales on View or Trial" that fit squarely with this case: "Until the buyer is satisfied with the trial, which is a kind of suspensive condition of the sale, the sale is incomplete."[15] "A sale made with a suspensive condition does not transfer the property to the buyer, until the fulfillment of the condition. If the thing is destroyed before the condition occurs, the loss is sustained by the seller."[16]

9. *Volkswagen of America v. SÜD's of Peoria*, 474 F.3d 966, 970 (7th Cir. 2007).
10. *Moses H. Cone Mem'l. v. Mercury Constr. Corp.,* 460 U.S. 1, 21 (1983).
11. *Ronald Gordon v. Michael Worley v. United Parcel Servic*e, No. 15 LM 109 (Cir. Ct. DeKalb County, February 22, 2016).
12. *Id.* at 5.
13. 810 ILCS 5/1-101 *et seq.* (West 2020).
14. 810 ILCS 5/2-327 (1)(a)(c) (West 2020).
15. *Chartres Corporation v. Honeycutt,* 342 So.2d 1251, 1253 (La. Ct. App. 1977); *citing* LSA-R.C.C. Article 2460; 24 La.Civ.L. Treatise, Sales §4:5.
16. *Id.*, citing LSA-R.C.C. Article 2471.

> **"… in a sale of goods where the seller sends the product to the buyer "on approval" and the buyer reasonably rejects the offer, the risk of loss never leaves the seller.**

There was also another possible hurdle involving the conflict of laws. Was this an Illinois or Louisiana contract? Which state had the most significant contact? However, "[a] choice-of-law determination is required only when a difference in the law will make a difference in the outcome..."[17] and "only when the moving party has established an actual conflict between state laws."[18] Since the result would be the same in either state, there was no conflict, and this became a non-issue. Therefore, on Worley's motion, the court dismissed the underlying case.

Carmack Amendment Precludes Attorney's Fees

A third issue in the case dealt with UPS' failure to properly handle a "high value" item, where the shipper, Worley, identified the value in excess of $10,000 in writing and paid a surcharge for special handling. Since the sign was classified as "high value", it should have remained on the truck if the recipient was not home to receive it. But, in this case, UPS reported delivery to the Gordon's residence porch. Worley amended his third-party complaint to recover his damages in attorneys' fees and costs for having to defend the case. Throughout the deposition of the UPS driver, it was clear there was a possible "snafu" somewhere. Either the package was not properly identified in New Orleans and the UPS delivery driver did not know that the package required special handling, or he took it on faith and past experience that it was acceptable to leave it on the porch.

In the end, the deciding factor was that all such deliveries fall under the Federal Carmack Amendment, which denies recovery for claims for attorneys' fees in these cases. Additionally, there was no contractual agreement which allowed for attorneys' fees in damages for a lost item. Given the Federal Carmack Amendment, the court denied Worley's claim for attorney's fees.

Conclusion

In conclusion, the dollar limitations for recovery on an "LM" or "AR" case may preclude a corporation or an individual from invoking contractual language that would otherwise force Binding Third-Party Arbitration and allow the continuation of litigation in court. The significant consideration is the defendant's expectation of damages. Where a plaintiff, like Gordon, drafts his complaint under oath, praying for damages in excess of $10,000, but less than $50,000, there is no question that the plaintiff seeks to avail himself/herself to the advantages of streamlined discovery and expedited resolution under Supreme Court Rule 222 and the court would be bound to reduce a jury's award to $50,000, even if the verdict was higher.

Further, on an offer for "sale on approval" or "sale on view" where the offered product is rejected in a timely fashion, the risk of loss never leaves the seller, who is without remedy if the item is lost or destroyed in shipment. And, finally, the Federal Carmack Amendment protects the shipping industry from responsibility and attorneys' fees, even where there is provable negligence in the handling of an item.

The Real Lesson – Necessity of Litigation Review at Outset of Case

Upon reflection, there is another important lesson to be learned from this case. Prior to UPS' probable, perfunctory motion to dismiss, a more in-depth case analysis might have revealed the defensibility of the underlying claim. We, as lawyers, need to step back as we begin the litigation process and take a broad, expansive view of each case as to its likely resolution. □

17. *Bridgeview Health Care v. State Farm Fire*, 2014 IL 116389, ¶ 14.
18. *Id.* ¶ 24.

Seven Considerations for Divorce Attorneys When the Opposing Party Exhibits Signs of Narcissistic Personality Disorder

By Marie Sarantakis

What is a narcissist? In common parlance, it is someone who is self-centered and has an inflated ego. Often a client going through a divorce will describe their ex as being narcissistic. Understandably, everyone separating from their spouse is going to be less altruistic towards their former significant other and more focused on their own well-being. As a result, when a client indicates their partner is narcissistic, the characterization is often readily dismissed as being par for the course. However, when an attorney hears a client utter the word "narcissist", they should pause, as this may be a red flag of a deeper underlying issue which could significantly impact the tenor of the divorce proceedings. Does their spouse potentially have a more severe form of narcissism, commonly known as Narcissistic Personality Disorder ("NPD")? [1]

NPD is characterized by grandiose ideas of one's self, the need for copious amounts of admiration, and the absence of empathy.[2] It affects intimacy and an ability to connect with others in any meaningful way. For narcissists, "[r]elationships [are] largely superficial and exist to serve self-esteem regulation; mutually constrained by little genuine interest in others' experiences and predominance of a need for personal gain." [3] When it comes to their significant others, they go through an abusive repeating cycle of infatuation, then devaluation, followed by a discard.[4] Depending on the patience of the significant other, this cycle can repeat many times until the ultimate discard, where the spouse has either had enough of the abuse or the narcissist has simply become bored knowing they can get away with just about anything. Despite the common perception that narcissists love themselves, someone with NPD is quite self-loathing.[5] They numb their pain through superficial validation and by controlling others.[6] It is, therefore, no surprise that narcissists struggle maintaining healthy personal relationships and find themselves as parties in dissolution proceedings.

According to Mayo Clinic, those with NPD exhibit the following symptoms: inflate their self-importance, exaggerate their accomplishments, have a sense of entitlement, need constant admiration, expect preferential treatment, preoccupy themselves with fantasies of power, success, and perfection, believe that they are superior and can only associate with equally superior people, monopolize conversations, expect unquestioning compliance with their demands, have an inability to recognize how others feel, are envious of others or believe others are envious of them, behave arrogantly, and insist on having the best of everything (e.g.,; house, office, car, etc.).[7] They react very poorly when criticized. If they feel as though someone is questioning them or their abilities, they can become enraged, humiliated, experience difficultly in regulating their emotions, depressed due to their insecurities, belittle others, and experience serious interpersonal problems with those close to them.[8]

1. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. American Psychiatric Publishing) (2013).
2. Elsa Ronningstam & Igor Weinberg, Narcissistic Personality Disorder: Progress in Recognition and Treatment, The Journal of Lifelong Learning in Psychiatry, XI(2), 167-177 (2013).
3. Elsa Ronningstam, Narcissistic Personality Disorder - In Young People, Borderline Personality Disorder Patient and Family Educational Initiative Webinar (March 15, 2018).
4. Andrea Schneider, *Idealize, Devalue, Discard: The Dizzying Cycle of Narcissism*, Good Therapy Blog (Mar. 25, 2015), https://www.goodtherapy.org/blog/idealize-devalue-discard-the-dizzying-cycle-of-narcissism-0325154.
5. Darlene Lancer, *All You Need to Know About Narcissists and Their Partners*, Psychology Today Blog (June 17, 2019), https://www.psychologytoday.com/us/blog/toxic-relationships/201906/all-you-need-know-about-narcissists-and-their-partners.
6. *Id.*
7. Mayo Clinic, https://www.mayoclinic.org/diseases-conditions/narcissistissistic-personality-disorder/symptoms-causes/syc-20366662.
8. *Id.*

NPD is a cluster B personality disorder that can only be diagnosed by a clinical professional. Very few people with this disorder are ever formally diagnosed.[9] The narcissist does not believe they have any shortcomings. They think everyone else does. Therefore, very few ever seek professional assistance. While there may not be a plethora of formal diagnoses, NPD is quite prevalent. It is estimated that 1% of the population has NPD.[10]

As an attorney, you do not need to be equipped with the skills to formally diagnose NPD or to treat it, but you do need to know how it can impact victims and how it may play into a divorce proceeding in order to change your approach to any litigation. The formal diagnosis is somewhat irrelevant for our purposes. If it acts like a narcissist, treat it like a narcissist.

Here are some ways that a NPD spouse may impact a divorce case:

The Narcissist Can Appear to be Very Charming and Welcomes the Opportunity to be Heard.

Often, we think of those having a personality disorder as being low functioning members of society, but those with NPD usually achieve great professional success. They are attracted to others of a high social status, who in turn, think highly of them.[11] Their magnetic personalities allow them to work their way into powerful networks, in which they are led to believe that their charm and clout renders them invincible.

The narcissist is not going to make settlement easy. Many force the issue of going to hearing/trial because they love the thrill and attention of being on the witness stand. Their sociopathic tendencies make them excellent performers and they are keenly aware what other people want to hear. As master manipulators, they know all the right things to say and study their audience. While narcissists lack empathy, they are "excessively attuned to reactions of others, but only if perceived as relevant to self."[12] They can be phenomenal actors adapting their behavior and testimony in the manner a judge would find most pleasing.

Narcissists need a stage, so give it to them. Allow them the opportunity to communicate to you, rather than to the Court. Hold settlement conferences. Issue discovery and allow them to tell their story. It will allow you to assess just how good of a storyteller they really are, and you can use anything they say against them later in the case. The narcissist has no qualms

9. Ronald Pies, How To Eliminate Narcissism Overnight, Innovations in Clinical Neuroscience, 8(2), 23–27 (2011).
10. Nancy Skozen, Narcissists Are Everywhere — But They May Not Be the People You Think They Are. The Washington Post (Oct. 7, 2016), https://www.washingtonpost.com/national/health-science/narcissists-are-everywhere--but-they-may-not-be-the-people-you-think-they-are/2016/10/07/175d79ee-867d-11e6-a3ef-f35afb41797f_story.html.
11. W. Keith Campbell, Joshua Miller, & Thomas Widiger, Narcissistic Personality Disorder and the DSM–V, Journal of Abnormal Psychology, Vol. 119, No. 4, 640 – 649 (2010).
12. Sherry Benton, *How to Identify a Narcissistic Personality Disorder,* Psychology Today Blog (Jan. 17, 2019), https://www.psychologytoday.com/us/blog/reaching-across-the-divide/201901/how-identify-narcissistic-personality-disorder.

About the Author

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“Narcissists have spent so much time belittling and beating down their spouse, that the spouse often struggles with their self-worth and speaking up for themselves.

about lying. In fact, they typically do it so much that they cannot keep their stories straight. The more they say in discovery, the more you must impeach them with their inconsistencies later.

Most people find the narcissist to be very sweet, fun, rational, and alluring. Sometimes they can seem downright cheerful. Usually only those closest to them know that this is superficial, and that they have a dark other side wrought with anger, haughtiness, and contempt. This diametrical contradiction in personas can make litigation very frustrating for the spouse. They so desperately want to expose the other person for what they really are.

While it may be tempting to set the record straight, your client needs to be fully aware of the risks of going to trial. While the spouse has seen them at their darkest times, the court may only have a glimpse into their superficial persona. They are generally attractive, successful, and likeable people. However, when they feel threatened, rejected, or challenged, they will react harshly, exposing some of their less flattering attributes. If you must go to trial, make sure you have deposed the narcissist. Have their prior responses memorized and be ready to impeach them if they go off script. Be prepared though, they are very good at ad-libbing a creative explanation. If you are able to catch them in a contradiction, you will likely be able to expose their rage. Settlement is always preferred, but if you absolutely cannot settle, then be prepared.

Your Clients Will Need Additional Emotional Support

Narcissistic abuse takes a great emotional toll on the victim. It is going to be imperative your client receives professional assistance beyond that of their legal team. Ideally, they should receive counseling to heal from the trauma they endured under the narcissist's control. They should also have a support network of family and friends readily available who they can reach out to whenever they are feeling low. Narcissists have spent so much time belittling and beating down their spouse, that the spouse often struggles with their self-worth and speaking up for themselves. You may have to spend more time encouraging your client than you otherwise would. Almost everyone going through a divorce suffers with guilt and anxiety, but this is even more the case for a victim of NPD.

Narcissists will continue to make the spouse feel as though the divorce is all their fault. Plus, they will likely turn others against them, whether it be children, family, or friends. Because narcissists typically prepare for divorce years in advance of the actual event, they likely have alienated the victim from much of their support network long before the case was filed. The victims have become dependent on and accustomed to putting the narcissist's needs above their own. Your client may need to be reminded that they deserve their fair share of the marital estate and that it is okay to start putting their own interests before that of their spouse. Your client is feeling very raw, scared, and vulnerable. They need assurance that you are in their corner, fighting their battle, and not swayed by the narcissist's charming arguments.

Appeals to Empathy, Common Decency, and Fairness Will Not Work

The narcissist could care less about doing the right thing. They simply want to win. What is fair never enters their mind. By the time they are in divorce court with their spouse, they have identified their spouse as the enemy that deserves to suffer. A hallmark trait of a narcissist is that they have a complete inability to empathize with other people. They cannot put themselves in anyone else's shoes and cannot reconcile that people can have both positive and negative traits. To them, people are good or evil. There is no in between. There is no sentimentality for the years they have shared together with a significant other and act as if they are divorcing a stranger.

Do not expect the narcissist to budge or do the right thing. They will only ever appear to do the right thing, because

they cannot dare look bad to others. Appeal to their vanity. Put them on the spot to compromise. They will not want to look cruel to others as they spend so much energy persuading those around them that they are good people. Use this to your advantage in settlement conferences with the parties and the attorneys present.

Choose Your Battles Wisely

Remind your client that not everything the narcissist alleges requires a response. The narcissist will antagonistically pick at scabs. If they know that something is particularly bothersome to your client, they will focus their energy on that very issue; even if it has absolutely no legal significance. Your client will therefore be tempted to respond to a seemingly trivial issue and appear unhinged. This is intentional and by design. Do not put your client in a position where they take the bait.

Narcissists will also use their seemingly nuanced and pointless issues to detract from their own shortcomings. If they shift the attention to other issues, their wrongdoings may go unnoticed. Also, listen very closely to what types of allegations the narcissist makes. They love to deflect and are usually guilty of the very things that they accuse their spouse of doing.

Set Appropriate Client Expectations

Expect a marathon and not a sprint. When a divorce involves a narcissist, it will inevitably be more challenging. It is important that you set appropriate client expectations so that they know the process will likely take longer and be more expensive than it otherwise would. Because the victim of the abuse is usually so distraught by the time that they are in your office, they will be depending on you to help them navigate unchartered waters.

Your client needs to know that there is a serious possibility that this will be a drawn-out battle where their spouse may disobey court orders, file frivolous pleadings, and turn their children into pawns. The narcissist is not going to hand over records voluntarily, at least not the ones that they do not want the spouse to see. It is likely that subpoenas will need to be issued and depositions will need to be taken. The more uncooperative the narcissist behaves, the more effort and resources it will take for your client to obtain the information. Narcissists are usually the ones who control the finances in a relationship and they intentionally try to break their spouse by drawing out the litigation so that it exceeds their means and are forced to settle.

Keep Communication Between the Attorneys

Typically, we give clients the opposite advice. Try to keep the dialogue open with your spouse. Communicate and engage the attorneys only when necessary to keep costs down and to facilitate settlement. Often in an NPD case, it is the polar opposite. It is critical to maintain boundaries. It can cause the victim too much emotional distress and just allow the narcissist the opportunity to continue to inflict further psychological abuse. Two of narcissists' favorite tricks include: (1) gaslighting and (2) the silent treatment. Gaslighting is a technique used to make the victim question their own reality and believe that they are the problem. The phrase comes from a 1944 Ingrid Bergman and Charles Boyer film when a husband manipulates his wife into believing she has lost her mind in order to completely rely on his judgment. Gaslighting involves denying things were said, projecting their own flaws onto the victim, turning others against the victim, and then blending it all in with random acts of kindness so they seem innocent and compassionate. The victim in turn experiences cognitive dissonance, not being able to reconcile the two realities. If their spouse seems to care for them, how could they be trying to hurt them? If the gaslighting does not appear to be working, the narcissist will resort to the silent treatment. This is a classic technique if the victim does not respond in the way that the narcissist had

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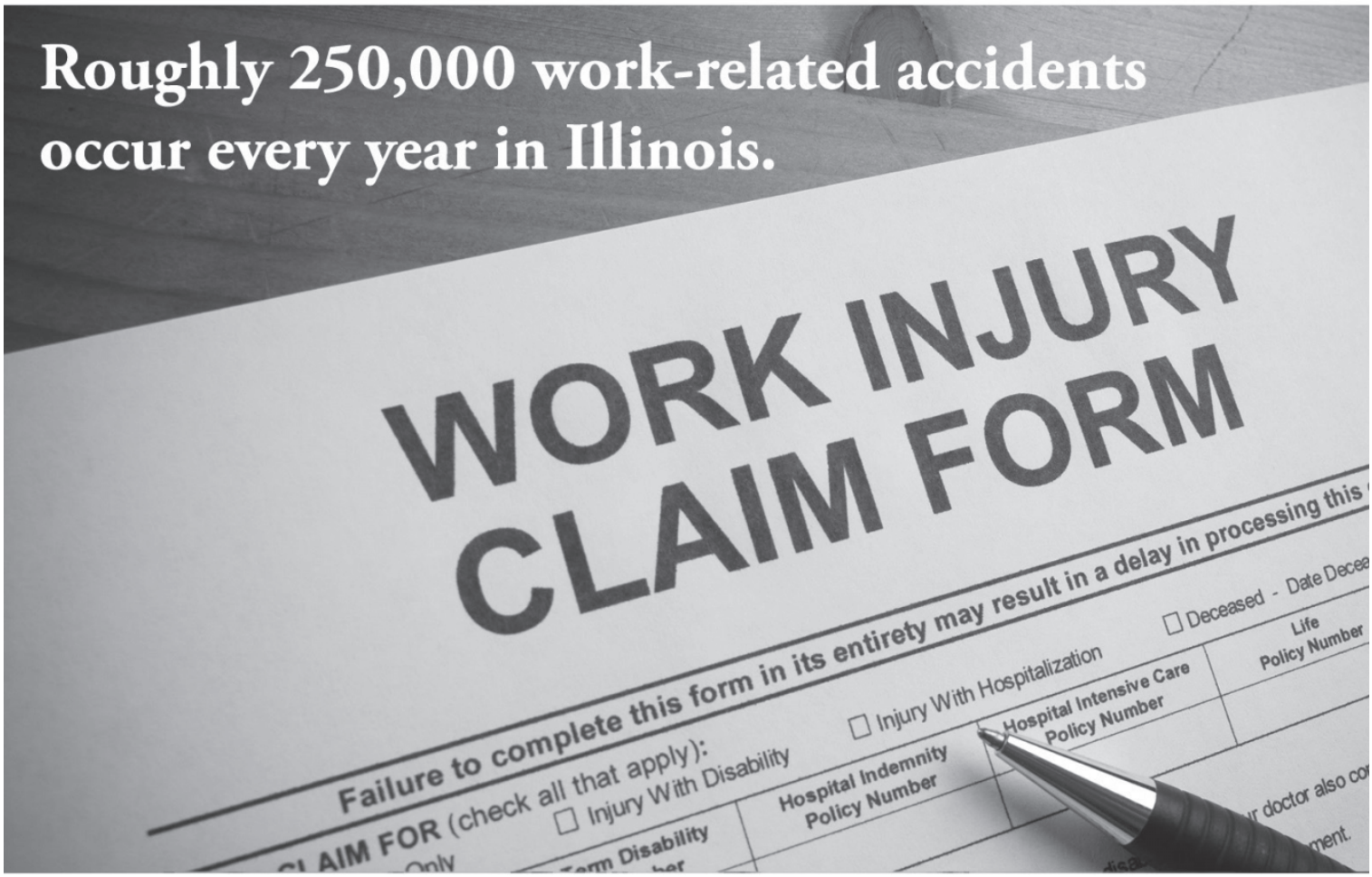

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hoped. The silent treatment is used as a form of psychological warfare until the victim caves to the narcissist's demands or their self-esteem is utterly shattered.

Both common tricks can be avoided by having the attorneys monitor all communications. It is unlikely that the narcissist will succeed, or even attempt, to gaslight in the presence of third parties. Plus, the silent treatment will make them look cruel and unreasonable. In front of others, narcissists love to hear the sound of their own voice and appear accommodating.

Another reason that your client should avoid engaging in substantive settlement discussions with their spouse is because narcissists have no qualms about lying. Their words are empty. They can easily lie or take back their representations on a whim, so there is very little to be gained in conversing with them. They will likely just take advantage of the opportunity to cause more pain and distress. The narcissist may even pretend to vacillate between loving them and despising your client, all intentionally designed to make them feel guilty, hopeful, and regain control. Protect your client's well-being by limiting contact with the narcissist.

Do Not Accept the Narcissist's Representations at Face Value

Narcissists live double lives. As the narcissist's words mean very little, it is imperative that the spouse has independent records to confirm what is really going on. They should be gathering as many financial documents as they can, and then seeking external and independent confirmation of anything the narcissist represents. Narcissists frequently hide things from their partners and sometimes do so for the mere sport of it. It would not be surprising to find out there is a love triangle, gambling, or drinking issue at play behind the scenes. Because they are so preoccupied with control, they likely have been taking away their spouse's access to accounts and information. The spouse may have no idea what their financial situation even looks like, relying on the narcissist's assurances that things are fine.

Family law attorneys must wear many hats. Not only do they help their clients with the legal process and substantive issues that come up in a divorce matter, but they often provide their clients with much needed emotional support throughout the course of representation. All family law attorneys should have a certain level of competency when it comes to dealing with mental impairments and psychological disorders, as they will undoubtedly encounter these issues first-hand with their clients, their spouses, and many times, their children.

Divorce attorneys will have more frequent interactions with narcissists than those in other professions because narcissists often have troubled relationships. They discard partners after long-term marriages without any reason at all. NPD is becoming increasingly recognized in the community at large and you will undoubtedly have clients coming through your door asking if you are familiar with this disorder and its nuances. By having a working knowledge of NPD, you will undoubtedly become a better attorney and be able to protect your clients from further financial and emotional abuse during the course of litigation. □

Illinois Law Update

Editor Brian M. Dougherty

Title VII Prohibition on Sex Discrimination Covers Sexual Orientation and Transgender

Bostock v. Clayton County, No. 17-1918 (June 15, 2020)

In a landmark decision, the United States Supreme Court resolved a circuit split and held that homosexual and transgender employees are protected from discrimination based on sex. Based on the unambiguous statutory text, the Court held that Title VII is violated when an employer fires an employee based in part on sex. In other words, if the employee's sex would have yielded a different result, Title VII is violated. The Court provided numerous examples of how this could play out in the real world and the inescapable conclusion was that sex would play some part in the decision, which is all that Title VII requires. In the Court's view, it is impossible to discriminate against a person being a homosexual or transgender without discriminating on the basis of that individual's gender. The Court drew from the legal underpinnings of three other Supreme Court cases: the refusal to hire young women with children but not young men with children was discrimination based on sex even if the employer's motives may have been altruistic; requiring women to make larger pension contributions than men was discrimination regardless if the employer was motivated by women having longer life expectancies as a group; and a male plaintiff suffered harassment by other males, and the harassment would not have taken place if the plaintiff was a female.

***Force Majeure* Clause in Restaurant Lease Excused Debtor from Paying Full Rent As a Result of Illinois' Executive Order Restricting On-Premises Food Consumption**

In re Hitz Restaurant Group, 20 B 05012 (Bankr. N.D. Ill. June 3, 2020)

In *Hitz,* Creditor-landlord sought to enforce a commercial lease after debtor-tenant filed for bankruptcy. The debtor-tenant argued that post-petition rent was excused under the lease's *force majeure* clause. The tenant cited Illinois Governor J.B. Pritzker's March 16, 2020 Executive Order (EO) and section 1 which pertained to restaurants, specifically on-premises food consumption. The EO did not take effect until after March 1, 2020, and the tenant argued that March rent was excused under the *force majeure* clause. The bankruptcy court found that part of the rent due for March 2020 was excused. The court found that the *force majeure* clause was triggered because the EO was both "governmental action" and the issuance of an "order" under the clause. The EO hindered Debtor's ability to perform because it prohibited debtor from offering on-premises food consumption. The court also found that the EO was the proximate cause of the debtor's inability to pay rent since it prevented the debtor from operating normally.

The court rejected the creditor's argument that failure to perform because of a lack of money was not a grounds for relief under the clause. The court rejected that since the debtor never made that argument; rather, debtor argued that the EO, which shut down all on-premises food operation, was the proximate cause of its inability to generate revenue and pay rent. The court's remedy was that since 75% of the debtor's operations were hindered by the EO, debtor had to pay 25% of the rent owed for April, May, and June 2020.

Hospital Consent Forms Dispositive of Whether Hospital Held Out Physician as Its Employee

Prutton v. Baumgart, 2020 IL App (2d) 190346

Before giving birth at a hospital, plaintiff signed two consent forms indicating that her physicians were not hospital employees, but rather independent contractors. The hospital's advertising, however, could have been construed to tell a different story: that the doctors were joining the hospital's medical staff. Plaintiff sued under an apparent agency theory and the trial court granted summary judgment. The appellate court affirmed.

The appellate court noted that the hospital's advertising, when viewed in isolation, could create a question of fact as to wheth-

er the doctor and hospital enjoyed an employee-employer relationship. But the appellate court found more convincing the evidence that hours before the final stages of going into labor, plaintiff signed two simple, clear, and concise consent forms that indicated that the physicians were not hospital employees.

Attorney's Fees Under Illinois Civil Rights Act Were Not Limited to Fees Actually Incurred

Kirk v. Arnold, 2020 IL App (1st) 190782

In *Kirk*, Plaintiffs filed suit against the State Registrar of Vital Records (State) in order to have their gender designations changed on their birth certificates, which the State denied. Plaintiffs filed suit under the Illinois Civil Rights Act (Act) claiming constitutional violations. After litigation ensued, the State changed its policy and issued new birth certificates. Plaintiffs, represented *pro bono* by a legal foundation and private law firm, submitted a petition for attorney's fees under the Act. The Act mandates that reasonable attorney's fees be awarded to the prevailing party. The trial court denied the fee award finding that no fees were incurred by plaintiffs who received free legal representation. Plaintiffs appealed and the appellate court reversed.

The court found that the plain language of the Act's fee-shifting clause used the word "shall" so that an award of fees was mandatory. The court also noted that the Act used the term "prevailing party" which was specifically defined under the Act and notably did not refer to fees being actually incurred by a litigant as a basis for recovery. Thus, the court found that plaintiffs were the "prevailing" parties under the Act. Next, the court looked at the reasonableness element of a fee award and found that, absent some qualifying statutory language, reasonable attorney's fees are not limited to those actually incurred by prevailing parties. The court cited another Illinois statute as an example of where fees may be limited to those incurred by a party, but the Act was not one such statute. The court's decision was also consistent with decisions under federal law where prevailing party fees were awarded to litigants represented *pro bono* in federal civil rights litigation.

Published Statement Attributing Bigoted Views to Library Trustee, Who Was Also An Attorney, Were Not Defamatory *Per Se*

Jaros v. Village of Downers Grove, 2020 IL App (2d) 180654

In *Jaros*, Plaintiff, a library trustee, expressed views at a public meeting that expressed hostility toward efforts at equity, diversity, and inclusion at the Village library. Plaintiff's statements were published by one of the defendants at the meeting and plaintiff was subsequently removed from his trustee position. Plaintiff filed suit alleging, *inter alia*, defamation *per se*. Plaintiff, an attorney, alleged that the statements prejudiced him in his profession. Defendants filed motions to dismiss arguing, in part, that the statements published by one of the defendants were not defamatory *per se*, and the trial court agreed, dismissing the complaint (which alleged other causes of action against other defendants) in its entirety. The appellate court affirmed dismissal of the defamation *per se* count.

The court rejected plaintiff's argument that the statements attributed to him, which he construed as expressing bigoted or racist views, were defamatory *per se*. The court found that the statements attributed to plaintiff did not constitute a violation of professional ethics of attorneys. The Illinois Rule of Professional Conduct were not violated by plaintiff because his remarks did not occur in the course of representing a client.

Additionally, a statement that painted plaintiff as a bad character is not defamatory *per se*. An attack on one's personal integrity becomes an actionable attack on professional integrity only when the statement is directly related to job skills or function, which in plaintiff's case, did not occur because the statements he expressed arose at a public meeting of the library board to discuss official business. □

About the Editor

Brian M. Dougherty is a partner in the litigation group at Goldstine, Skrodzki, Russian, Nemec and Hoff, Ltd. His practice area includes representing employees and employers in employment disputes arising under state and federal law, commercial landlord-tenant matters and business torts. Brian is a member of the DCBA Editorial Board.

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News & Events

New DCBA Leadership: Immediate Past President, Stacey McCullough, 2nd Vice President, Angel Traub, President-Elect, Kiley Whitty, President, Wendy Musielak, 3rd Vice President, Rick Veenstra

September Bar Notes

Consistent Inconsistency

By Robert Rupp

Welcome back everyone! So much is just where it needs to be, you would think we were back to normal. Our 2020-21 Membership Renewal was a resounding success with our membership retention actually rising from last year and nearly 200 members showing their support through Sustaining Membership, also a distinct improvement from the past three years. Our Sections have held their planning meetings and it is looking like we will once again be hosting 15-20 MCLE programs per month over the next ten months. The golf outing delivered a great day for everyone with our sponsors providing their always generous support to this event. Our new officers led a successful Board Retreat that has us poised for exciting days ahead. It's so good to be back!

But we are certainly back to a new normal. And that normal is anything but consistent. Rules and procedures at court that evolved over the summer continue to evolve. The once rollicking ARC remains a quiet and somewhat solemn space with Thursday Donuts and lunchtime pizza fading into memory. Our monthly DCBA Unwind, a 15-year tradition thanks to our hosts and friends at OVC Online Marketing for Lawyers, last took place in February. Our CLE has reached over 1,000 members over the past few months, but those members were never in the same room together. As change flies left and right, your association is trying to roll with the changes to keep our promise.

One thing that hasn't changed is our mission. "The Association serves the attorneys, judiciary, and citizens of DuPage County, Illinois in providing legal education, business development and networking opportunities, designed to enhance and benefit its membership and community, while upholding the highest degree of civility and professionalism." Over the past six months, the leadership and the staff have been constantly embracing change and innovation to ensure that this mission is met. Going forward, you can count on continued delivery of education and networking opportunities on improved technology. As we continue to find ways to allow our members to gather safely in person and in greater numbers, consistent with rules and public health directives, know that your Section's CLE will be broadcast live via Zoom so you will be able to enjoy these valuable member benefits. This applies to our networking and social activities as well. We are cautiously adding small, in-person events as we explore how technology can be used to bring members together to capture the DuPage camaraderie that is so important to us all.

With regard to association activities and developments, the most important thing for you to do is to stay connected to the DCBA. If you do not see our Thursday e-newsletter, *DCBA Docket*, each and every Thursday morning, please call the DCBA office. Because things are changing so fast, and this magazine is published 2 months ahead of your reading it, we will not be publicizing many events in the *DCBA Brief*. The weekly e-newsletter (print copies available at the Bar Center and in the ARC), as well as the DCBA website and Facebook Pages, are your link to the latest in what is going on. Use these tools and help us stay connected to you.

It is great to be back and it is great to have you back! Let's make the absolute most of this new world together. □

About the Author

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

Legal Aid Update

Here's to a Brighter Future

By Cecilia Najera

About 43 years ago, the DCBA membership founded DuPage Legal Aid ("DLA") and began a tradition of service that gives those with limited means a voice within the legal system. DLA was founded on the premise that service is a component of our profession. DLA in the time of COVID-19 has continued to serve and thrive. Looking back on this time, I'll remember the anxiety of "doing my best to find a new norm." I would never have thought that "zoom" would take on a whole new meaning, or that I'd be using the application almost daily let alone conducting Board Meetings via Zoom. I'll remember spending a lot, maybe too much, quality time at home with my family and working from home while e-learning with my kindergartener. I'll remember feeling heavy hearted and hoping for social justice for friends, family and clients while praying for the safety of my law enforcement family who are committed to serve and protect our community with honor. May we be committed to learn from each other, act in compassion first, and recognize we are one. "Social justice and progress are the absolute guarantors of riot prevention. There is no other answer."- *Martin Luther King, Jr.*

What I will remember most about this time is how our dedicated staff continued to work together to support each other to deliver compassionate legal assistance to our clients. Throughout the time that our courthouse was hearing only emergency matters in person (from mid-March to mid-July), the Order of Protection call was one of the few to run business as usual. Staff Attorneys, **Ann Russell, Jennifer Nunez** and myself made over 106 court appearances in Order of Protection and emergency guardianship matters while continuing to assist existing clients. Ann and Jennifer's courage and caring natures continue to amaze me, and we could not have done this without our hard-working, kindhearted, and good-humored support staff who helped to anchor the program and keep us on track. Much thanks to **Maribel Rodriguez, Lucy Cortez, Nicole Janssen, and Cheryl Garcia.**

During this time, I have had the pleasure of participating in information-sharing Zoom sessions, put on by the **DuPage Federation on Human Services Reform**. During these sessions, numerous not-for-profit organizations had a platform to learn from each other's policies, procedures, and about the services offered. Additionally, thanks to DuPage Federation's Language Access Resource Center ("LARC"), DLA has been able to access telephonic interpreter services of several languages, remotely, and outside of regular office hours. This has resulted in DLA enhancing services to individuals who speak little to no English. This has been an invaluable service that has allowed our attorneys to communicate more clearly and effectively with our clients and allow clients to communicate more freely without feeling fearful of reprimand and pressed for time taking a telephone call while at work.

One of the most exciting things that has ever happened to DLA occurred this summer. DLA received a $300,000.00 lump sum award through an estate case. *(Continued on page 38)*

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.

Final Verdict: An Astonishing Biography

By Honorable Robert G. Gibson

You probably never heard of Earl Rogers. I hadn't. In the late 1890s and early 1900s he was the Michael Jordan of trial work, a genuine folk hero, and a man who tried 77 murder cases, many of them virtually unwinnable, and won 74. When someone was in legal trouble, a common catchphrase of the day was: "Get me Earl Rogers."

Rogers' daughter, Adela Rogers St. Johns, wrote her father's biography, ***Final Verdict,*** the finest legal book I have ever read. Earl Rogers called his daughter "Nora," and Nora accompanied her dad to most of his client interviews and trials, starting when she was a young girl.

He impressed upon his daughter the gravity of defending a person accused of a crime. "You and I, Nora, *we* are always on the side of the accused…That's our job. Our life. Everything's against him except the presumption of innocence and the best defense. Only then does he get a square deal. You see that, Nora?"

Many of us learned what little we knew about law and trials growing up by watching the television show ***Perry Mason,*** based on novels by Erle Stanley Gardner. Gardner was a lawyer and the 20th century's best-selling American author at the time of his death. He based Perry Mason on Earl Rogers.

Earl Rogers dressed in the finest suits, often silk, with a vest, usually wearing a flower in his lapel. At trial, he frequently produced a lorgnette from his pocket during cross-examination and utilized it to great theatrical effect. He advised Nora, "True, clothes do not make the man or the woman, but they are the first thing you see. Why handicap yourself?"

Final Verdict includes a wealth of wisdom for trial attorneys. Earl Rogers' ability to sway judges and juries was legendary. He often used humor at opportune times to gain favor with the jury and to throw the prosecuting attorney off balance. In several political corruption trials in San Francisco, Rogers' opponent was Francis Heney, a special federal prosecutor who President Theodore Roosevelt lent to the San Francisco district attorney's office to prosecute graft. Their trial battles were legendary:

> Into that final speech (closing argument), Heney poured it on, painting so black a picture of corruption, political chicanery, a system of graft and greed that it horrified the country. A much more powerful and impassioned speech than Earl Rogers' closing argument; President Theodore Roosevelt had a right to be proud of his boy Heney that day. He generated sincerity. While I listened, moved myself, I kept asking myself how so strong and shrewd and intelligent a man could allow Rogers to make him lose his temper every single time – *every time* – so that he looked like a fool. For instance, the record showed:
>
> HENEY: 'I wish Your Honor would ask Mr. Rogers to stop repeating that question. Besides how can the witness remember details that far back? I can't remember what I had for breakfast.'
>
> ROGERS: 'Then you ought to see a doctor, Mr. Heney.'
>
> HENEY: 'Don't you tell me what to do! You don't remember getting thrown out of a saloon Saturday night, either.'
>
> ROGERS: 'Yes I do. And so do the three fellows it took to do it.'

Commotion ensued, as Mr. Heney attacked Mr. Rogers. Then this exchange:

> MR. HENEY: 'Your Honor, Your Honor, what has this drivel about

pest houses got to do with the case before Your Honor?'

MR. ROGERS: 'I thought you wanted the whole article; it makes good reading '–

MR. HENEY: 'So does the Bible, what's that got to do with the case?'

MR. ROGERS: 'To us, the Bible always has a great deal to do with a man's moral guilt or innocence, all Law is based on moral principles '–

MR. HENEY: 'I don't need you to teach me the Law.'

MR. ROGERS: 'You need someone. I don't insist it be me.'

Earl Rogers knew how to tell a story and he translated that knowledge into trying a case. He also possessed an encyclopedic knowledge of forensic medicine and terminology and revolutionized the way lawyers presented evidence in the courtroom. Rogers recognized long before anyone else that expert testimony is convincing and interesting only when the examining counsel knows what questions to ask, how to ask them, and has some sense of stage management. Rogers displayed these abilities beautifully in defending William Alford.

William Alford was a plumber claiming self-defense in the shooting of a wealthy customer, Jay Hunter. Virtually everyone believed the defendant guilty. The prosecutor was Rogers' mentor, former United States Senator, Stephen White, known as the "Little Giant." At trial, Rogers qualified his own expert, Dr. Palette, and then turned the courtroom into a medical amphitheater, conducting a classroom lecture on anatomy. He had the victim's intestines, preserved in glass, admitted into evidence. Nora described the scene: "Meanwhile charts in many colors appeared and were set up on easels. Maps of the lengths of the intestines were hung up on racks before the jury. Clinical opinions and tests on the resistant power of tissue were offered and supported by photographs handed to the jury with extreme courtesy."

Rogers' final question to Dr. Palette was succinct: "In other words, Dr. Palette, Alford must have shot from the floor." Dr. Palette's response was equally concise: "No other position could possibly account for the place in which we have seen the bullet entered and went through the intestines."

The jury found Alford **Not Guilty**. ***The trial took place in 1899.***

Rogers masterfully managed the "stage" in the Catalina Island murder case, in which he introduced the actual poker table where the murder occurred into the courtroom. Three men were playing poker: the victim, William A. Yeager, the defendant, Alfred Boyd, and the chief witness for the prosecution, Harry Johnson. The author used trial transcripts to recall Rogers' eloquent words as well as his masterful cross-examination:

In Your Honor's court, we are trying a boy not yet of age for the most terrible of crimes and the district attorney has asked for the supreme

About the Author

Robert G. (Bob) Gibson is an Associate Judge in DuPage County, Illinois, serving in the Chancery Division. He graduated from the University of Notre Dame with a BA in Government and the University of Illinois College of Law. He served on the Illinois Character and Fitness Committee and the Illinois Supreme Court Rules Committee.

> penalty. Should this jury find him guilty, it would be their duty to condemn him to death. If we err in this court, Your Honor, surely we must err in favor of giving him more of a fair trial rather than less.

Earl Rogers prevailed upon the judge to permit Rogers to recreate the scene using the actual poker table and chairs during the cross-examination of Harry Johnson. Judge Smith allowed the display, including Earl Rogers cross-examining Harry Johnson about what happened at the poker table while Johnson was seated *in his very seat* from the scene of the crime. Rogers produced, like a magician, the derby hat the victim wore, with bullet holes in the crown.

> Now Rogers was able to get closer to Johnson, he began a series of questions to which McComas [the prosecutor] shouted one objection after another with increasing vehemence. *'I can't hear my own witness,'* he kept bellowing, *'my own witness has his back to me,"* and finally Earl Rogers, friendly, concerned, persuaded him to take a seat at the [poker] table so he could see and hear Johnson better. By chance he took the seat of the corpus delicti and, absent-mindedly, Rogers put the derby hat on *him*. A roar of tense, nervous laughter swept the courtroom, the judge's gavel banged, Rogers apologized to everybody. I saw that his eyes were on the jury. The jury had laughed.

Later, Earl Rogers had a gun in his hand, not the murder weapon, but his own Colt .45. For a fraction of a second, it pointed at Harry Johnson's stomach. Johnson yelled and his chair crashed backwards. He was breathing in gasps and his faced blanched white. After a commotion, Earl Rogers justified his action to the judge. Ethical rules and restrictions on trial tactics were less fully developed in 1902. Incredibly, the cross-examination continued and concluded with Harry Johnson, the chief witness for the prosecution, *confessing to the murder on the stand in open court*.

What makes *Final Verdict* even more compelling is Nora's examination of her father's weaknesses. After Earl Rogers' father Lowell Rogers, a devout Methodist minister, died suddenly and unexpectedly, Rogers would have nothing more to do with God or religion. His drinking gradually increased. For a while thereafter, Rogers' drinking was manageable and he worked, usually with a man's life at stake, without drinking until a trial had finished. The author described the aftermath superbly:

> Then he'd bust loose in what started out as a rowdy but elegant raza-muh-taz and come home with an orchestra or a pickpocket, or, once, a camel ... For a while, his binges were irresistible. Motley and madcap extravaganzas and the bright dancing waves of wit and the scintillating froth of drollery and danger hid the rocks.

When Earl Rogers began representing Clarence Darrow, perhaps the most famous lawyer in history, on jury bribery charges in Los Angeles in 1912, Rogers had begun to disappear on benders for extended periods of time, but was still a formidable trial presence. The backdrop of this trial involved a murderous divide between organized labor and management. Darrow had represented the McNamara brothers in bombings in Los Angeles, including the dynamiting of the L.A. Times building, which killed 21 people and injured many more. Earl Rogers had been present in a neighboring building, and had friends die in the explosion. Darrow ended up pleading the McNamara brothers guilty; one received life imprisonment, the other, fifteen years.

Before the plea, Clarence Darrow had allegedly attempted to bribe members of the jury through an intermediary and was charged with jury bribery. Darrow had been a hero of Earl Rogers, twelve years Rogers senior, and already a legend. The two were complete opposites. Darrow wore unpressed, threadbare suits and a dirty collar, utterly humorless, a man who would do *anything* for the cause of organized labor. The two had distinct notions of what constituted a win in court.

> Someone called Clarence Darrow the Champion of Lost Causes and Papa said sweetly, *'And of Lost Cases.'* For it was true that Darrow considered life imprisonment for Leopold and Loeb – a murder *guilty* plea for the McNamara brothers – the jury convictions in the Swopes and Massie cases to be *victories*. To Earl Rogers, they seemed, would always have seemed, defeats. No such blots, no such half-compromises, were part of his achievement.

The two constantly argued about trial strategy while Darrow often wallowed in self-pity, and to Rogers' dismay, cried both publicly and privately. Nora listened and recorded their private exchanges:

> 'Injustice is the hardest thing of all to bear,' Darrow said.
>
> 'So Socrates found,' Rogers said, 'but he drank the hemlock cup without a tear, it says. We must present a brave man, an innocent man fighting his valiant best against injustice. Not wilting under it.'
>
> 'I believe in your innocence of this charge,' Rogers said. 'We'll get you off if you will stop looking so guilty. The jury's beginning to keep its eyes away from you. You know how dangerous that is.'
>
> 'I am through anyhow, 'Darrow said. 'My career is over. It's all right. I have done my best to serve. Let the young men have a chance.'
>
> 'Moonshine,' Rogers said. 'You're only ten years older than I am. Your real work has just begun. If we can keep you out of jail this time, you'll practice law another fifty years.' He gave him a let's go smile to which the response was a rueful shake of the head as usual…
>
> Now I had the feeling that he had begun to look at Darrow from time to time like a pitcher watching a shortstop boot away four unearned runs behind him.

Both men made closing statements. Darrow's lasted two days. The jury came back with a **Not Guilty** verdict after twenty-seven minutes. Clarence Darrow never paid Earl Rogers for his services, not even expenses, and ultimately left town without saying goodbye, or thank you, to his lawyer. Darrow believed his own closing speech had won the case. Then when he was charged again with bribing a juror in a related case, he did not believe he needed Earl Rogers. This time the result was a hung jury, with 8 jurors holding out for a conviction. Ultimately, Clarence Darrow agreed to never practice law again in the state of California, and the state agreed not to retry him.

Earl Rogers' jury trial victory for Darrow had a profound effect on the course of legal history. Hugh Baillie, one of the great journalists of the time, wrote: "Only Earl Rogers saved the great Darrow from ending his career prematurely within what Darrow called, in his closing address to the jury, 'the gray dim walls of San Quentin.'"

The author expanded on this point:

> If he had not been acquitted on the odious charge of jury bribery, Darrow would never have had a chance to win the moral victories of the Leopold-Loeb, Scopes, Scottsboro, and Massey trials, all of which, of course, he lost in court. Let's face it, he would have been disbarred, in the penitentiary, or in his grave. The Great Defender came after and sprang from the acquittal Rogers won for him on a charge of which we believed he was guilty.

Rogers' drinking accelerated thereafter, but with ebbs and flows. He represented one of his best friends, Tom Hays, for bank embezzlement, and won an acquittal, in part because crucial records went missing from the bank. When the bank had fired Tom Hays, a charismatic and popular man, no one had the heart to ask him to return his set of keys, which he retained. Many suspected Rogers had gone into the bank with his client's keys and removed the records that would have proven the case.

Rogers used two of his trial principles. One was *Try Someone Else*. Another was to focus on the weakest link in the prosecution's case, in this instance the lack of incriminating records, and hammer away at the weak link. The two trial principles merged in this case as Rogers effectively put the bank on trial for maintaining poor records, and the lack of incriminating records was also the weak link in the prosecution's case. Judge Wellborn, in announcing the Not Guilty verdict, called it ***"a serious and unprecedented miscarriage of justice,"*** and called for a thorough investigation into the missing records. The suspicion that Earl Rogers destroyed the bank records fueled talk that Rogers should be disbarred. Ultimately no further investigation occurred.

Later in life, Earl Rogers represented 17-year-old Louis Bundy, who was convicted and condemned to die for a brutal murder. Rogers argued before the California Supreme Court. He cited the

youth's age and medical history, which included being hit in the head with a baseball bat as a young boy, which put him in a coma for days. He argued about the brain changes Bundy's 3 pack a day cigarette habit had on his young brain. He also argued against the death penalty, one of his most passionate articles of faith: "As long as there is such an inhuman and ungodlike law as capital punishment, I will defend with my last breath any man who might be his victim."

Rogers failed, and Bundy was executed.

After his own father's untimely death and after his divorce from Nora's mother, Earl Rogers remarried in 1915, to Edna Irene Landers, known as "Teddy." Nora was 21 at the time and loved her father's new wife, who was only five years Nora's senior. Earl Rogers no longer openly drank, although Nora suspected he had a bottle hidden somewhere and nipped at times. The union was a happy one. Tragically, Teddy contracted influenza and passed away at age 29, three years into the marriage. Earl Rogers' drinking accelerated rapidly thereafter. Nora recalled her father's words earlier in life: "Don't ever let anybody tell you a man doesn't die of a broken heart. We have seen it happen."

Both the beginning and the end of ***Final Verdict*** describe Nora's decision to testify against her father in court to have him involuntarily hospitalized for persistent drunkenness. Earl Rogers represented himself and cross-examined his own daughter. The greatest authority on trial work in the country, Francis Wellman, stated, "Earl Rogers invented the art of cross-examination as it is now practiced." This short cross-examination of his daughter was at the very end of his career, but was effective.

> With his courtly bow to the Bench, Mr. Rogers said, 'I have only two questions, Your Honor.'
>
> 'Nora,' he said, and after a moment, 'look at me please.'
>
> So I did. I *am*.
>
> He said, 'You don't really think I'm crazy, do you, Nora?'
>
> 'No, Papa,' I said.
>
> 'Then you don't wish to go on with this' – his hand indicating the long blue legal document on the Judge's desk – 'this farce?'
>
> 'No Papa,' I said, and burst into tears.

Nora dismissed the complaint. Her father passed away not long after. She explained her decision in several ways, one of which struck me as particularly thought-provoking: "Every soul that comes into this world must have one person who is always on his side, right or wrong, always cheering for him, everybody is with you when you're *right*. No, no, Papa, I don't think you're crazy, all the rest of the world may, but I don't."

Final Verdict blends fascinating stories about a true legal genius with musings about family, philosophy and history. Perhaps, most of all, this biography of Earl Rogers is an ode to the deep love between a daughter and her father. The words of Earl Rogers to his daughter Nora reflect this:

> You mustn't grieve, Nora. The best of me – how can you lose it? It's been yours all your life, hasn't it? You know how I think. You know my mind. Anything I've done or been that's any good you know. It's been yours as much as mine, hasn't it? The blessed gift of memory will create it once more and let you live with it again always. With me as I was. When you read our books or hear music we've loved or go to places where we've been or cross the bay on a ferry, we'll be together. No way to escape that or want to. Perhaps that's what immortality is. When something comes your way, you'll say Papa would have said this or that, or thought so-and-so about it. Your love for me, which has survived so much worse things, will survive death. Of course it will. And to love – that's the important thing always, whether it's a man alive or a memory.

Final Verdict is an inspired work that succeeds on every front, including immortalizing Earl Rogers and his daughter, Nora. There is so much more to this book that cannot possibly be recounted here due to space limitations. To lovers of the law and of history, ***Final Verdict*** stands out as a must-read. □

Virtual Installation Issues in New Era

Judge Monique O'Toole swore Wendy Musielak in as the new President at an outdoor ceremony

Wendy Musielak was installed as DCBA President on June 19, 2020 at noon in the courtyard of the DuPage County courthouse. The Honorable **Robert Douglas** began the official portion of the proceedings by leading those who were able to gather in person in reciting the Pledge of Allegiance. Next, immediate past president, **Stacey McCullough,** made opening remarks and Ms. Musielak, along with several others, were administered their oaths of office by the Honorable **Anne Hayes.** As more completely explained in Ms. Musielak's President's Page in this edition, the Theme of her year as President is: Together We Are Stronger.

This installation marked the first time that the proceedings were made available for viewing live using video conference technology and multiple members of the association are known to have participated in that fashion. Also installed on June 19, were **Kiley Whitty**. President Elect, **Angel Traub**, Second Vice-President, **Richard Veenstra** Third Vice-President, new Board Members, **Mark Bishop**, **Ronald Menna** and **Rebecca Krawczykowski**, General Counsel, **James Laraia**, Associate General Counsel **Jennifer Friedland,** Secretary-Treasurer, **Aaron Ruswick** and Assistant Treasurer, **DeAnna Rosinski**.

At the completion of the ceremony, the group retired to Cooper's Corner for light refreshment in its outdoor seating area.

A more formal speech and ceremony is planned for the occasion of the Presidents Ball on September 18, 2020 at the Lisle Doubletree at 7:00 PM. The Presidents Ball has a Casino Night theme and the winners of the 2020 Lawyer of the Year Award and Ralph Gabric Award will be formally presented with those two prestigious awards. ☐

LRS Stats

5/1/2020 to 5/31/2020

The Lawyer Referral & Mediation Service received a total of **452 referrals, including 21 in Spanish** (398 by telephone, and 54 online referrals) for the month of May.

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	1
Appeals	0
Bankruptcy/Credit Law	8
Business	21
Collection	7
Consumer Protection	5
Contract Law	1
Criminal Law	48
Elder Care	3
Employment Law	37
Estate, Trusts and Wills	57
Family Law	84
Federal Courts	1
Government Benefits	1
Immigration Law	0
Insurance Law	6
Intellectual Property Law	0
Mediation	0
Modest Means	1
Personal Injury	50
Real Estate Law	109
School Law	1
Tax Law	7
Workers Compensation	3

ISBA Update

ISBA Assembly Holds First Ever Zoom Meeting

By Kent A. Gaertner

As you know, the 2020 ISBA annual meeting, scheduled to be held in St. Louis in June, had to be cancelled due to the COVID-19 outbreak. Our new President, **Dennis Orsey** of Granite City, was installed in a small ceremony presided over by Supreme Court Justice **Lloyd Karmeier**. Dennis takes over from outgoing President **David Sosin** in guiding the ISBA through the pandemic. It is one hell of a challenge and I know Dennis will do a great job.

Besides handling the challenges of COVID as it affects courts and law offices throughout Illinois, Dennis will be concentrating his efforts in several areas:

1. He is introducing a new program called the Rural Practice Initiative. Once you leave the urban/suburban areas of the state, there are numerous counties with only a handful of attorneys in private practice. The demographics clearly show that many of these practitioners are approaching retirement age. Unfortunately, in these counties, there is a lack of younger attorneys moving in to take their place. Dennis will be establishing a special committee to review this situation which will make recommendations for pairing younger attorneys with older, established attorneys who wish to work out an arrangement with a younger attorney/attorneys to take over their practices, after training and a period of working with the firm's clients. Such succession planning will be a win/win for the retiring attorney and the younger attorney taking over an established practice. To achieve good results, it will be necessary to keep in mind that the younger attorney will likely be coming into the practice with student loans in addition to normal costs of living. Therefore, compensation will have to be sufficient to allow the young attorney to manage their debt obligations and still have a decent quality of life.

Dennis will also be continuing the ISBA Leadership Academy which debuted last December with the first class entering the academy. The academy is a six-month course in ISBA leadership skills and requirements designed for newer attorneys. It allows its students to interact with established attorneys, judges and bar executives to develop overall knowledge and skills for future bar leadership. Applications for the next class of academy students will be accepted starting in September with details forthcoming.

Finally, Dennis will also continue the emphasis on supporting the Lawyer Assistance Program. Now, more than ever, the ISBA needs to be able to reach out to members of our profession who are struggling with physical or mental health issues. Financial stress caused by the pandemic only elevates the already existing stress being felt by many of our fellow attorneys.

On June 19th, the ISBA Assembly met for its annual meeting. For the first time

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.

ever, the meeting was totally electronic. As you know from previous columns I've written, attendance at Assembly meetings has been an issue in recent years. The ISBA even has a special committee currently reviewing the situation. This year, with the meeting held electronically, attendance totaled 175 out of 185 sitting Assembly members. Amazing!

By far the most prominent agenda item was the proposed adoption of a resolution outlining the ISBA response to the civil unrest generated by the death of George Floyd at the hands of four Minneapolis police officers in May. We were fortunate to have several members work together before the meeting to develop an initial draft of a resolution which was then sent out to Assembly members for review and proposed modifications. To all those who participated in this process, a big thank you is in order. By the time we got to the Assembly meeting, we had a workable draft to propose as a resolution. There was lengthy debate, but mostly it involved the choice of verbiage as opposed to actual content. When the vote was finally taken, more than 90% of the Assembly members voted in favor of the resolution.

The resolution, which can be read on the ISBA website, calls for the ISBA to undertake a number of steps to do our best to promote equality and justice for all citizens of our state. These include:

1. The examination of areas of law to identify structures in the legal system that fail to support and promote equal justice and full equality for all.

2. Advancing policy and legislative solutions across all areas of law which will serve to correct imbalances and support equal justice and full equality for all.

3. The examination of structures of the legal profession to address areas which may be in need of reimagination, reformation or reconstruction to eliminate barriers to full inclusion and to create affirmative approaches to advancement of equality, justice and inclusion.

To accomplish the foregoing, the resolution provides for an ad hoc committee to assist existing section councils and committees in examining their respective areas of law to identify potential issues, directs the various section councils/committees to work to effectuate this resolution, provides for ISBA staff assistance to the committees and provides for financial backing from ISBA to accomplish the goals of the resolution.

Other items dealt with by the Assembly included the standard budget approval process, modification of the bylaws regarding certain election practices and passing a resolution supporting the ABA's position regarding banning the sale of shark fins (yes, the ISBA even deals with such fishy matters).

For now, ISBA section council and committee meetings will continue to be held electronically. Hopefully, by the time this article appears, we will have a breakthrough in drugs or even a vaccine that will put a hurtin' on the COVID bug. Until then, be smart. Wear a mask, wash your hands, use sanitizer and social distance. You may be young and bulletproof, but us old geezers are not. Thanks! □

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

Daily interactions with colleagues stopped. Video conferences became the way we interacted with clients, colleagues, family and friends. I have felt a myriad of emotions throughout all of this. As lawyers, we are problem solvers (and maybe a little control freaks) and accustomed to fixing things and figuring out the answers. But here the answers were not to be found; and we are still searching.

While each person's experiences over the past few months has been different, we are all facing these challenges together. Although we may not be able to resolve all the issues, we can come together to support each other and learn how to navigate this new legal world together. As I was reflecting on everything during our time apart, I realized how much more we can do together. For a single person, a burden is often too heavy, but when we work as a team, that burden becomes so much lighter. From that thought, my theme for this year, "Together We are Stronger", was born.

Right now, we are not able to walk the hallways of the court the way we once did; and I will not be able to greet you the way I had intended. But whether you see me in person or reach out over the phone or email, or Facetime or Zoom, know that as your President, it is my goal to be there for the organization and our members to keep us going strong, together. I also want our organization to have the opportunity to get to know the amazing people who serve on the DCBA Board, so over the next several weeks, we will be releasing videos to help you get to know our Board better.

Traditionally, this column would have been exclusively the speech given at the Installation of the Officers and Directors; however, with the changes we have had, I felt it was important to say a little more before sharing my speech from June 19, 2020.

Together we are Stronger!

This is the theme of my Presidential Year.

Traditionally, at an installation, the incoming president gives a speech and outlines the plan for the upcoming year. However, just like everything else right now, today's installation is NOT traditional.

I will have the privilege of giving TWO installation speeches, one now, and one in September. This one I will use to honor our strengths, and in September, at the full installation celebration, I will honor and report on our plans for the DuPage County Bar Association.

Even though today is not traditional, I still want to take this opportunity to thank everyone for being here either in person or online. We are stronger because of you, our members. Thank you for your continued support of the DCBA, your active participation and your strength. We are nothing without our members.

Stacey McCullough, thank you for leading the DCBA this last year. Even when things were not easy or as planned during your Presidential year, you have ensured that we did, indeed, SOAR.

Thank you for your leadership. And thank you for your friendship.

Stacey, we are stronger because of your dedication. During a massive change in our members' ability to do business, the DCBA ensured that we continued to provide educational opportunities and brought our members into an online world to keep things moving forward and to keep our members in the know.

Kiley Whitty, **Angel Traub**, **Rick Veenstra**, **Jay Laraia**, **Jennifer Friedland**, **Aaron Ruswick** and **DeAnna Rosinski** - our incoming officers, I look forward to this team continuing to lead our Association as one of the premiere bar associations in the State.

And our Board, the Section and Committee Chairs and Vice Chairs, thank you for your commitment to the DCBA and for taking on these leadership roles. I look forward to working with all of you

this year and will enjoy sharing ideas on how we can continue to work together to make and keep the DCBA strong and vibrant.

I want to especially thank our Executive Director, **Robert Rupp**, and all of our staff – **Deborah Kennedy, Barb Mendralla, Ann Martin, Tim Doyle, Jennifer Webber** and **Maria Pineiro**. NOTHING we do is possible without you - thank you and I look forward to working together this year.

To the Judiciary, your continued support of the Bar Association historically has been a visible and integral part of our Association. You have helped us navigate this new legal world together, you have made our members stronger and wiser with the development of new courthouse protocols and your willingness to keep us informed. We know you are committed to being on the forefront of delivering timely and accurate information and guidance to attorneys, courthouse personnel and the public to ensure the Eighteenth Judicial Circuit Court remains a place of justice for all. Thank you.

On a more personal note, thank you, Judge **Robert Douglas** for leading us in the Pledge of Allegiance.

Thank you, Judge **Anne Hayes** for swearing us in.

I am grateful that you both could be part of this special day for me.

I'd like to thank my firm and especially my partner, Andy Cores for your support of me throughout the years.

To my friends and family, nothing I do would mean anything without you. Thank you for making me a better me.

To my brother, Brian, thank you for being the best brother a girl could ask for.

To my mom, Marie, thank you for loving me unconditionally and supporting me in all that I do. And to my dad, Don, I miss you every day and thank you for all that you did to make me who I am today. I am so blessed to have you and Mom as my parents. You and Mom led by example and taught me about hard work, compassion, and love. I am who I am today because of you and I thank you.

I know I have not mentioned everyone who has had an impact on me. This list is way too long, but know that I appreciate every one of you.

As Helen Keller said, "Alone we can do so little; together we can do so much." I take those words to heart and know that Together We are Stronger! Thank you. □

Welcome

Welcome to the new DCBA members.

New Attorney Members:
Anel Bautista, McCalla Raymer Leibert Pierce, LLC; **Delia Di Venere; Edward V. Edens; Nicholas R.P. Fitz,** The Fitz Law Group, LLC; **Gregory V. Ginex,** Bollinger Connolly Krause; **Kimberly A. Nagle,** Huck Bouma, PC; **Melisa Quinones,** Giamanco Law Partners; **Nicholas Smith,** BankFinancial; **Kelly Whalen Yates,** Borla, North & Associates, P.C.; **Elma Dzaferbegovic,** Office of the State's Attorney; **Michael P. McBride,** Office of the State's Attorney; **William Yung,** Office of the State's Attorney.

Affiliate Members:
Brett Mathieson, Mathieson, Moyski, Austin & Co., LLP; **Lisa Stover,** Presto Real Estate Services; **Kent Sanderson Travis,** Cetera Advisor Networks.

Legal Community Members:
Ewa Piech, Mirabella Kincaid Frederick & Mirabella.

Student Members:
Ummehani G. Majeed; Samuel Robert Walker; Sydney A. Gresham; Veronica I. Gutierrez.

Legal Aid Update

(Continued from page 27)

Thanks to **Mr. Jack Zanker and his estate, the Office of Public Guardian, Judge Robert G. Gibson, James Bromberek, and Frank Valenti,** DLA will be setting up its first endowment ever. The Jack Zanker Endowment will allow DLA to effectively plan for its future and meet financial challenges that the future may bring. The award will also allow DLA to overhaul our IT so we can more efficiently deliver assistance to our clients and volunteers. We are so grateful for this generous gift and opportunity it brings to DLA. Here's to a brighter future! □

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Naperville

Turn-key High Tech 4-5 office space available Fall 2020. A++ Building. All high-end furnishings available if needed. Full-service gym in building, indoor heated executive parking. Must see. Naperville... **Call Bob anytime (630) 816-6574.**

Oak Brook

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 $950/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

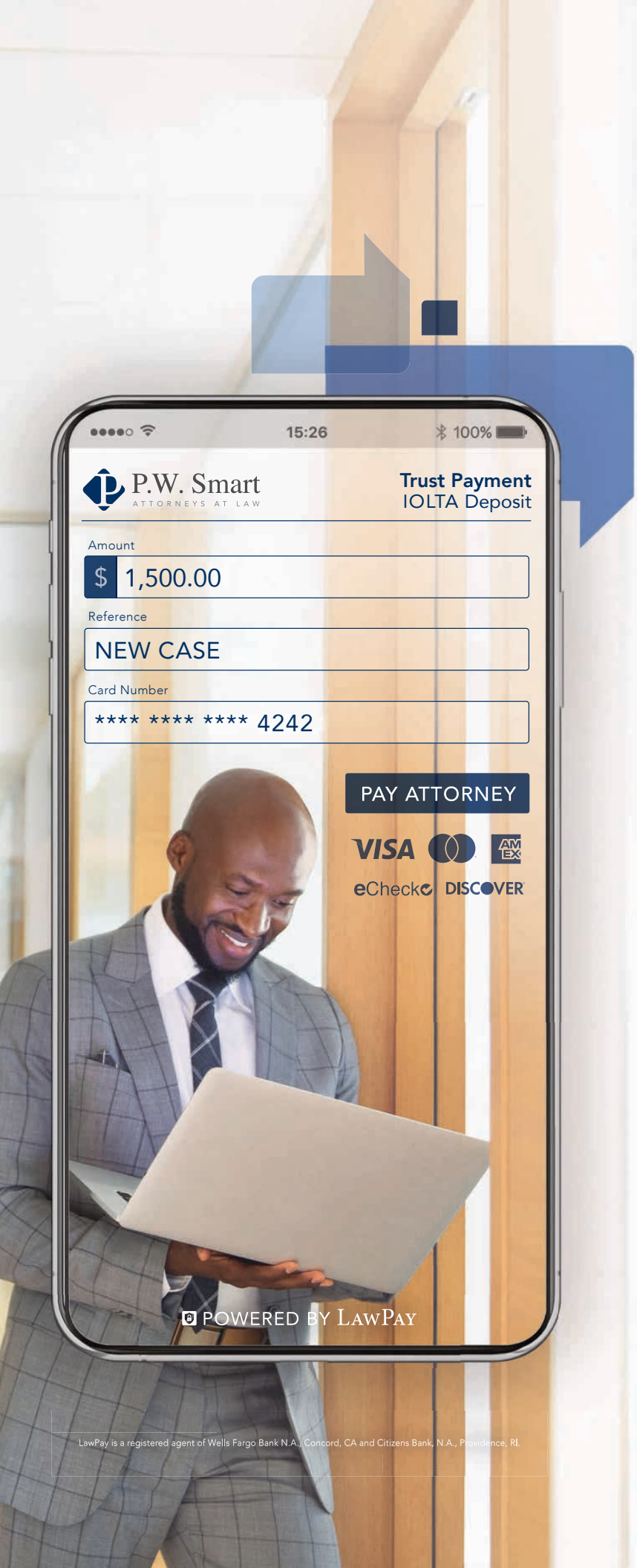
Together We Are Stronger

Wendy Musielak could not have picked a better theme for this year. Postponed due to Covid-19, this year's Installation Celebration and Presidents Ball is planned for September 18 at the DoubleTree by Hilton Lisle/Naperville. Ms. Musielak was officially installed as the DuPage County Bar Association President on June 19th in an unusual, small ceremony at the courthouse courtyard. To read about why Ms. Musielak chose her theme, please read the excellent piece she authored contained within this issue.

Festivities are planned to include cocktails and dinner. This year's celebration is going to be casino themed so bring your best poker hands/faces.

In addition to the Installation Celebration, the annual Lawyer of the Year and Gabric Awards will be presented to Honorable **Paul Marchese** and **Jack Donahue**, respectively**.** The Director Awards were presented at a separate meeting which took place during the Leadership Conference on July 16th. At that time, awards were given to **Michael Bergmann**, **Honorable Bryan S. Chapman**, **Joseph F. Emmerth**, **Lisa M. Giese**, **Markus May**, **Cecilia Najera**, and **Aaron Ruswick** for their respective contributions and service to the DCBA.

Please watch the weekly, Thursday Docket email for details as they become available regarding ticket pricing and sales, as well as sponsorship opportunities. If you are not currently receiving the Docket, please contact **Robert Rupp** at rrupp@dcba.org to be sure DCBA has your contact information and for other details concerning the Installation Celebration and Presidents Ball. The DoubleTree by Hilton Lisle/Naperville is located at 3003 Corporate W. Drive in Lisle. □



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