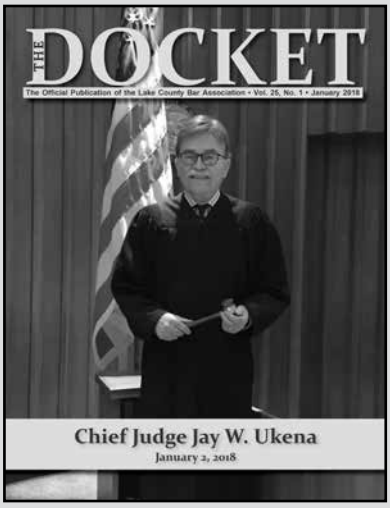
THE DOCKET

The Official Publication of the Lake County Bar Association • Vol. 25, No. 1 • January 2018

Chief Judge Jay W. Ukena

January 2, 2018



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All submitted manuscripts are considered by the Editorial Board. All letters to the editor and articles are subject to editing. Publications of advertisements is not to be considered as an endorsement of any product or service advertised unless otherwise stated.

The President's Page

BY JENNIFER J. HOWE
PRESIDENT

E-Filing

January 1, 2018, marks a New Year and many changes for the Lake County Bar Association. First and foremost, electronic filing is now mandatory for all circuit courts in Illinois. Among the many benefits to e-filing (including the state court system entering the digital age at long last), attorneys will be able to file pleadings with the court 24-7 and should save time and money avoiding travel to the courthouse, parking, and paying staff to deliver the filings. Further, deadlines have now been effectively extended by up to seven hours because the time for filing is no longer limited by when the courthouse closes. Litigants will have until 11:59 p.m. on the due date to make a timely filing on a particular date. Beyond the extended deadlines, attorneys will receive notices through email, which are easier to store and save, and electronic filing should ultimately reduce the need for storage space as our paper files—expensive to store and organize—will transition to electronic data. This a significant change which should make all of our lives easier as we get used to the new process.

January 1, 2018 also marks the transition from the Honorable Judge Jorge L. Ortiz to the Honorable Jay W. Ukena, who will serve as the new Chief Judge of the Nineteenth Judicial Circuit. Judge Ortiz has served as our Chief Judge for two terms since January 4, 2016, and he deserves our gratitude and thanks for his tremendous leadership of the court system over the past two years. Judge Ortiz is a tireless and zealous advocate of the need for our court facilities to provide true and meaningful access to justice for our community. To that end, he worked not only to achieve the construction of a new criminal courts tower at the main courthouse in Waukegan, but also to significantly improve the Depke Juvenile Complex and to implement a state-of-the-art case management system, which will bring Lake County to the forefront of cutting edge technology. While it may be several years before that system is implemented, under Judge Ortiz's leadership, the County has recently issued a request for proposal beginning the process of evaluating and selecting such a system for our courts. As for our new leader, I don't expect anything different. Judge Ukena has been serving as Deputy Chief Judge since 2016 and was recently quoted as saying "I look forward to working with not only the judges and wonderful employees of the 19th Judicial Circuit, but with all of our justice partners in Lake County in the administration of justice and in service to all of the people of Lake County. I will work to the best of my abilities to continue

the excellent leadership provided by my predecessors." I look forward to working with Judge Ukena, just as the LCBA has worked so well with Judge Ortiz these past years.

While the court works to provide access to justice by improving our facilities and technology, we as attorneys need to consider our role in improving access to justice. Only six months into my term as President, I am still working towards implementing a pro bono legal clinic to assist with the pro se litigants in the probate and family division. I want to thank all of the judges and attorneys on that committee who are also working towards that goal. As to when the clinic will be implemented, I am hoping to have more to report to you before the end of my term. I also recently created a committee, chaired by Rick Lesser, called the Wintrust Community Partnership Committee, in which the LCBA has partnered with Wintrust Community Banks to provide six free legal clinics to persons living in low income communities in Lake County. The clinics will be offered by volunteer attorneys from the LCBA and will cover topics such as immigration, debtor/creditor issues, estate planning, and money management. I am excited to see this project come together, and if you have an interest in helping or volunteering, please reach out to Rick Lesser. Also, if you have ideas that could help improve access to justice and which the Bar Association should consider, please reach out to me or one of the LCBA Board members. Now more than ever, good ideas and a willingness to help are needed.

Finally, 2018 marks the transition to new directors of the Gridiron: Craig Mandell and Stella Day. I want to thank Judge Christensen and Judge O'Malley for all of their past years of dedicated service and commitment to the Gridiron show. While transition is always hard, I can't wait to see the new changes! As we move into 2018, my sincere thanks to all of you who help make this organization productive, supportive, and successful. Happy New Year to all!

The 2018 Calendar of Events

February 23-24
Gridiron
Gorton Community Center, Lake Forest

April 19-21
Family Law Conference
Charleston, SC

May 24
Civil Trial & Appeals Seminar and Golf Outing
Glen Flora Country Club, Waukegan

May 31
Installation Dinner
Briarwood Country Club, Deerfield

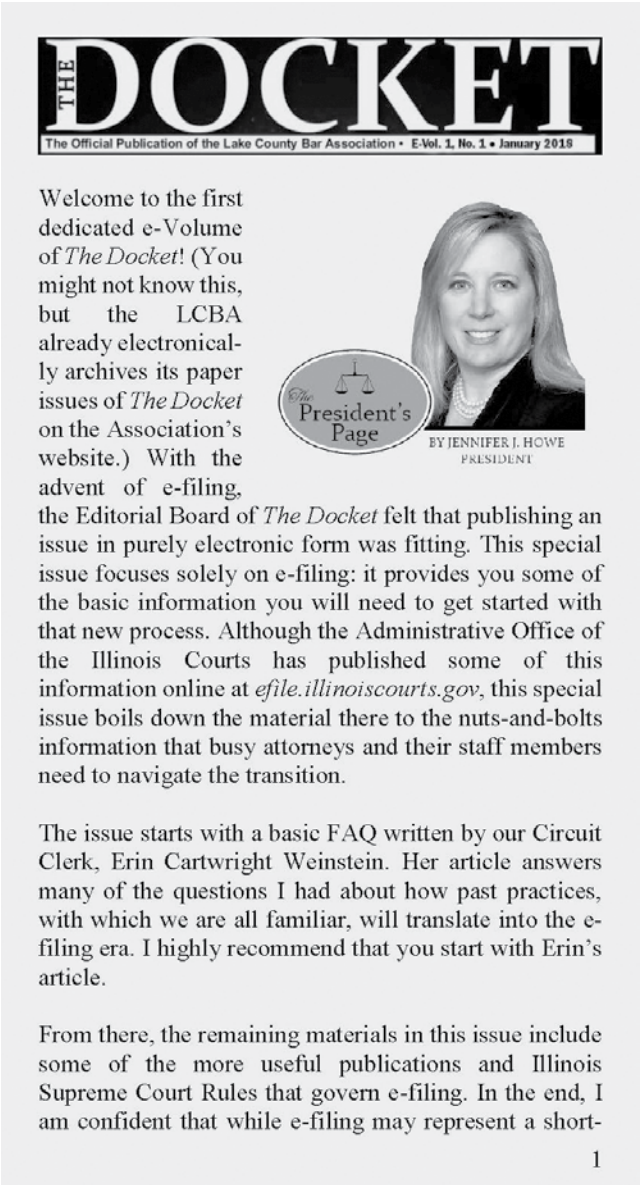
Register for these events on-line at: **www.lakebar.org**

E-filing Edition

Mandatory E-Filing in Illinois began on January 1, 2018.

The Docket's Editorial Board has compiled a compendium of useful materials to help LCBA member's prepare for this change. This e-Docket is formatted to be readable on a smartphone or computer screen.

You may download The Docket-A Guide to E-filing for the Lake County Attorney at www.lakebar.org. If you would like a printed copy, please contact the LCBA office, which will create a copy for you for $10.



THE DOCKET

The Official Publication of the Lake County Bar Association • E-Vol. 1, No. 1 • January 2018

The President's Page

BY JENNIFER J. HOWE
PRESIDENT

Welcome to the first dedicated e-Volume of *The Docket*! (You might not know this, but the LCBA already electronically archives its paper issues of *The Docket* on the Association's website.) With the advent of e-filing, the Editorial Board of *The Docket* felt that publishing an issue in purely electronic form was fitting. This special issue focuses solely on e-filing: it provides you some of the basic information you will need to get started with that new process. Although the Administrative Office of the Illinois Courts has published some of this information online at *efile.illinoiscourts.gov*, this special issue boils down the material there to the nuts-and-bolts information that busy attorneys and their staff members need to navigate the transition.

The issue starts with a basic FAQ written by our Circuit Clerk, Erin Cartwright Weinstein. Her article answers many of the questions I had about how past practices, with which we are all familiar, will translate into the e-filing era. I highly recommend that you start with Erin's article.

From there, the remaining materials in this issue include some of the more useful publications and Illinois Supreme Court Rules that govern e-filing. In the end, I am confident that while e-filing may represent a short-

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The New Year: What Does That Mean?

BY CHIEF JUDGE
JAY W. UKENA

I'd like to start my first Chief Judge's Page by wishing all of you and your families a happy, healthy new year.

As we look at the new year, what does it mean? Sarah Ban Breathnach once said, "New Year's Day, a fresh start, a new chapter in life waiting to be written, new questions to be asked, embraced and loved, answers to be discovered and then lived in this transformative year of delight and self-discovery. Today carve out a quiet interlude for yourself in which to dream, pen in hand. Only dreams give birth to a change." All of us in the Lake County Bar Association—judges and lawyers alike—should heed those words and take that moment of quiet to see what we can do to improve the Judiciary and the Lake County Bar.

Another individual, Neil Gaiman, said, "I hope that in this year to come, you make mistakes because if you're making mistakes, then you're making new things, trying new things, learning, living and pushing yourself, changing yourself, changing your world, you're doing things you've never done before and more importantly, you're doing something."

In Lake County, changes are taking place. We've just had three outstanding judges retire. Judge Nancy Waites, who distinguished herself in private practice before joining the Lake County State's Attorney's Office where she served as a supervisor of child support before she became a judge, retired at the end of the year. Nancy served on the Lake County Bar Association's Legal Aid Committee, supported other worthy causes, and was a recipient of the 19th Judicial Circuit's Liberty Bell Award. Her wit, humor, kindness, and friendship will be sorely missed.

Judge Brian Hughes, with whom I went to John Marshall Law School and rode the Northwestern train to Chicago, is retiring effective January 5. Brian started his career in the Lake County Public Defender's Office before proceeding into private practice. Appointed as an associate judge in 2000, Brian distinguished himself as a thoughtful and caring jurist in every assignment, and did an outstanding job presiding over heart-wrenching Juvenile Court cases, and over Lake County's felony traffic courtroom.

Additionally, Circuit Judge Margaret Mullen, a former Chief Judge, is also retiring. Margaret has done so many great things and has contributed so much to both the Lake County and statewide judiciary that it would take an entire Docket issue to even begin to chronicle her accomplishments as a judge. Suffice it to say that Margaret has not only been a part of every major initiative, project, and development in the 19th Judicial Circuit's recent memory, but has also served as a trusted resource, mentor, and friend to members of the bar and bench alike.

Within a few months we will add three new judges to Lake County's Judiciary from a list of truly exceptional candidates. This will infuse new blood, talent, and a fresh perspective into the judiciary and allow us to keep the fighting Nineteenth as the best in the state.

The initial judicial changes will be as follows: Judge Jim Simonian will be assigned to courtroom C-402; Judge Charles Johnson will be assigned to retiring Judge Brian Hughes' courtroom, C-403; and Judge Jorge Ortiz will be assigned to Judge Margaret Mullen's courtroom in C-304. When the three judicial vacancies are filled, we will be making additional changes.

In becoming the Chief Judge in Lake County, I look forward to working with my colleagues to continue keeping Lake County as the strongest judicial circuit in Illinois, and to continue to serve the citizens of Lake County. Further, Judge Diane Winter is becoming the Deputy Chief Judge of Lake County, Judge Charles Smith will become the Presiding Judge of Family Law, and all other presiding judges will remain in place. I'll strive to follow the excellent example set by my predecessors, Judge Jorge L. Ortiz, Judge John T. Phillips, Judge Fred L. Foreman, Judge Victoria A. Rosetti, and Judge James K. Booras, who were the chief judges I have served under. I will be working with the County Board to continue to build a good relationship so we can partner together to make both Lake County government and the Nineteenth Judicial Circuit even stronger.

In starting my term as Chief Judge, I invite all of you to share any ideas or thoughts you have on how we can improve our court system in Lake County. I have always been someone you can speak to. Feel free to come to my chambers to discuss your ideas. Together we can work to make the Nineteenth Judicial Circuit an even greater institution to serve the people of this county and make Lake County a greater place to live, work, and raise your families.

Once again, Happy New Year.

The Hon. Jorge L. Ortiz will pass the gavel to Chief Judge Jay W. Ukena on January 2, 2018

2018 Waukegan to College Initiative

BY JEFFREY A. BERMAN
PRESIDENT

The Lake County Bar Foundation is excited to launch a new philanthropic initiative in 2018, focused on Youth at Risk and the organizations that work with them. As we unify our efforts to support this important cause, we believe we can have a stronger, more direct impact on our communities by working to help young adults and children to live better, dream bigger, and receive the skills and mentorship they need to succeed.

The first step, as you may recall, was to gather information on Lake County organizations or programs which serve our Youth at Risk. We received a tremendous response to our request. Thank you to everyone who responded. Through your efforts we have created an invaluable database of information concerning the array of organizations that are doing a wide variety of incredibly noble work to support our County's youth. To bring the Foundation's vision to life, we intend to work closely with a number of these institutions over time, utilizing the full spectrum of available resources and our network to the extent possible to help them drive their missions forward successfully.

A Committee of the Foundation Board undertook the arduous task of reviewing that proverbial mountain of information. The Committee's goal was to determine which entity—from among the many worthy prospects—it would recommend to the Board that our organization should prioritize as the inaugural participant in this endeavor (inaugural participant, because we hope to support others in the future). Thank you to Committee Chair Steve Rice and to all who served on the Committee for their superb efforts.

At our December meeting, the Foundation Board received a comprehensive report from the Committee, along with its recommendation. We also had an opportunity to meet with the recommended organization. I am pleased to report that the Foundation Board, after due deliberation, then voted to partner in 2018 with Waukegan To College (W2C), an outstanding not-for-profit organization that inspires and equips at-risk youth to overcome obstacles and achieve goals—the primary goal being admittance to and success at college. W2C works to prepare motivated first-generation students as young

as 5th grade for college admission and continues to work with the students through college graduation. "First generation" denotes students who do not come from families with parents who graduated from college. W2C thus propels disadvantaged youth to fulfill their potential by empowering them to become confident, college-bound, career-focused, and ready to join the next generation of professional men and women.

Think about the most important things that have happened in your life: attending college is certainly one of them. W2C helps foster this same life-changing (and often family-altering) experience for kids who live in the neighborhoods right outside our courthouse doors. The Foundation and W2C are aligned in our commitment to foster hope, self-confidence and success among these young people in our community.

In 2017, W2C is providing services to a total of 165 students, up from 25 in 2009, which was its first year. W2C accomplishes its mission through a dedicated staff of 5 and a corps of volunteers devoted to providing a robust variety of programming, including: counseling and advocacy; family workshops; tutoring; mentoring; assistance with college and scholarship applications; admissions testing preparation; Read to Achieve; math skills builder with Khan Academy; and cultural enrichment opportunities, such as Expanding Horizons and various summer camps. The results, in many ways, speak for themselves. Since its inception, 100% of students participating in the W2C program have graduated from high school and matriculated to college. A total of 29 W2C first-generation college students have since graduated, and 45 more are currently enrolled in college studies. The 10 high school seniors who graduated in 2017 matriculated to Bradley University, College of Lake County, Dominican University, Knox College, Lake Forest College, National Louis University, Northern Illinois University, Northwestern University, and Valparaiso University.

Waukegan to College 2018 presentation, December 19, 2017

The Foundation Board voted to make an initial grant to W2C that will be earmarked to support a new W2C program that will provide college entrance examination preparation and training to participating high school students. The Foundation will underwrite the program in 2018, at a cost of roughly $150 per student. We are proud that our support can be the catalyst for this critical effort, and hope it will provide these students with a greater opportunity to achieve their full potential. We will evaluate other opportunities to provide targeted financial support over the course of the coming year.

Money certainly is important, but our members have much more to offer than that. In partnering with W2C, the Foundation also hopes to facilitate volunteer opportunities for our members, and W2C offers many such avenues already. W2C fulfills its mission by marshalling volunteers in a wide range of activities: it creates mentorships; it organizes reading and math tutoring programs; it assists students with the difficult tasks of entrance test preparation and writing college applications; it organizes trips to college campuses, so students can better envision college life; and it mentors families, among many others. In the coming months, we will be sharing with you more specific information of how, where, and when you can get involved in these efforts.

The Foundation is proud to be in a position to support admirable, local organizations like W2C, and to work to help young people who need support to realize their full potential. I encourage you to join us as we begin this journey. The Foundation Board will be creating a Committee of members of the Lake County Bar who are interested in guiding these efforts, specifically as to W2C and more broadly regarding our Youth at Risk initiative. Please consider becoming a member of the Committee. This is a great way to get involved in both your legal community and our broader community. If you have an interest in serving, or would like more information, please contact me, Steve Rice, or Bar Foundation Executive Director Chris Boadt. You can also do so using the dedicated e-mail address: W2C@lakebar.org.

24TH ANNUAL FAMILY LAW CONFERENCE

Schedule of Events

Thursday, April 19, 2018
- Welcome Reception

Friday, April 20, 2018
- 4 hours of CLE (8:00 am-Noon)
- Group Activity
- Dinner on your own

Saturday, April 21, 2018
- 4 hours of CLE (8:00 am—Noon)
- Reception

Sunday, April, 22, 2018
- Group Departure

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EARLY-BIRD TUITION (paid by 2/28/18)

LCBA Member	8 hours of CLE	# _____	**$375 per person**
Non– Member	8 hours of CLE	# _____	$499 per person
Guests of CLE Attendee, ages 10 and above (includes welcome reception, 2 breakfasts)		# _____	$125 per person
Friday: Optional Activity - ***Coming Soon***		# _____	TBD
Saturday: Closing Event - ***Coming Soon***		# _____	TBD

STANDARD TUITION (paid after 2/28/18)

LCBA Member	8 hours of CLE	# _____	**$450 per person**
Non– Member	8 hours of CLE	# _____	$574 per person
Guests of CLE Attendee, ages 10 and above (includes welcome reception, 2 breakfasts)		# _____	$175 per person
Friday: Optional Activity - ***Coming Soon***		# _____	TBD
Saturday: Closing Event - ***Coming Soon***		# _____	TBD

SEMINAR MATERIALS: I would like my materials to be: _____ Hard Copy ($25) ____Electronic (included w/tuition)

PLEASE RSVP (arrangements only made for those who RSVP and have paid)

Thursday Welcome Reception # _____ included in tuition

TOTAL TUITION $_____

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Guest _____ Guest _____

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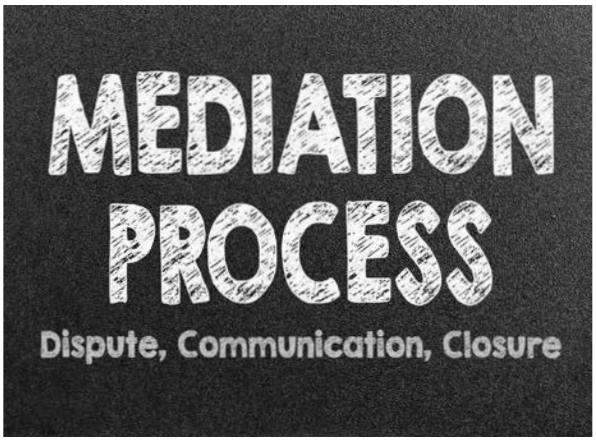

What Every Illinois Estate Planner Should Know About Elder Mediation

BY ROSELYN L. FRIEDMAN

The term "senior tsunami" refers to the large number of people now living past 65 and 70, even into their 80s, 90s and beyond. The result is that many more families are dealing with difficult issues in connection with an aging parent whose wishes are to be honored and respected, including those about health care, living arrangements, and finances. The family sometimes finds itself in significant conflict trying to make decisions about the appropriate course of action. To make matters worse, family decision-making may reflect not only the challenge of a parent's current health and financial needs, but also longstanding conflicts among the adult children going back to when they were young. It is not unusual for childlike feuds to arise over issues such as which sibling is doing the most to help the parent and who was/is the favorite child.

These developments, along with the magnitude of wealth transfers occurring and anticipated, have resulted in a groundswell of trust and estate litigation. It also has meant an increasing likelihood of malpractice actions and suits against estate planners who are caught up in difficult family dynamics in the process of wealth planning for older clients. These developments have caused a corresponding interest in mediating these cases.

Even when such disputes do not become the subject of a lawsuit, family dissension and dysfunction can interfere with a lawyer's effective representation and waste inordinate amounts of the advisor's time. Mediation, whether or not in the context of litigation, can be a helpful tool for managing family disputes while protecting the lawyer from unnecessary risk. The remainder of this article sets forth information about the mediation process; issues in elder mediation; when and how to use elder mediation in an estate planning/elder law practice; and Illinois mediation rules and law generally.

Roselyn L. Friedman, Esq. is an experienced lawyer and mediator, concentrating in estate, trust, elder and family business matters. For her chapter on Mediation for Estate Planners/Managing Family Conflict (ABA 2016), see www.rfmediation.com.

SOME MEDIATION BASICS

MEDIATION ON THE ADR CONTROL SPECTRUM: PARTIES, NOT THE MEDIATOR, CONTROL THE OUTCOME OF A DISPUTE

There is a broad category of conflict resolution processes outside of a courtroom which are referred to as alternative dispute resolution or ADR. These can be either substitutes for litigation, or a means of settling pending litigation in a less costly and more efficient manner than a trial. The most common and well-known ADR processes are arbitration and mediation. In both processes, a third-party neutral is engaged to control the process, and some neutrals practice both arbitration and mediation. However, these two forms of ADR are very different in many ways, particularly in terms of who has control over the outcome of a dispute.

Arbitration is a substitute for litigation. The process may be simpler and faster, but the premise is the same as litigation—**the parties turn over control of the outcome of their dispute to a third-party neutral who rules on the case**. Although the process may differ from litigation as to court rules and motion practice, the arbitrator, like a judge, will look backwards at the facts of a dispute and determine a winner and loser under the law.

Mediation is a facilitated negotiation working towards settlement, and the decision-making process differs from either litigation or arbitration. **Self-determination and autonomy of the parties** is an essential factor in mediation. The mediator is not the decision-maker, and **the parties retain control of the outcome of a dispute and decide whether or not to agree upon a settlement.** An experienced mediator, trained in conflict resolution, is responsible for facilitating productive discussions and helping the parties come up with a durable forward-looking resolution which serves their mutual needs and interests. A mediated solution need not be limited by legal parameters; an important factor in reaching a family settlement may be a simple apology.

MEDIATOR SELECTION

Illinois has no required statewide designation or certification for mediators. Each circuit court program may impose its own certification rules in compliance with Supreme Court Rule 99, and some circuit court programs require that mediators be attorneys.

Having the right mediator for a particular matter is the key to a successful process. Counsel should consider these factors in selecting a mediator:

- Review the candidates' training and experience. Look to certification if required by court rule or otherwise, as well as panels of approved neutrals.
- Consider whether the mediator needs to have subject-matter expertise for a particular case. An elder mediator will need extra training, an understanding of and sensitivity to ageism, and knowledge of available resources for caregiving, housing and other needs.
- Consider using co-mediators. For example, one mediator might have estate planning expertise while another might be an expert in family dynamics.
- Studies have shown that personality traits can be indicia of mediator success. Perhaps the most important trait is the mediator's ability to build trust and rapport with the parties.
- Identify the mediator's style, whether facilitative (or predominantly facilitative), evaluative, transformative or other. Some styles may be preferable to others depending upon the nature of the dispute. As discussed below, the facilitative model is generally preferable for elder mediation and other disputes involving family members.
- Discuss the candidate's approach to mediation before making a decision. Because the process used by individual mediators can vary greatly, this is the lawyer's opportunity to select the right mediator for each case.

> The term "elder mediation" generally refers to a facilitative mediation process which addresses the health, financial, and other concerns of an aging party, whether in the context of a guardianship or other court proceeding.

FACILITATIVE MEDIATION

Generally facilitative mediation is a favored method for resolving family disputes involving trust and estate, elder law and guardianship matters. In the process, a neutral third-party mediator facilitates the negotiations and the parties' communication about the disputed issues. The neutral will assist the parties in trying to reach a mutually beneficial resolution that satisfies their respective needs and interests, but does not determine

a winner and a loser. While the mediator controls the process, the parties control the outcome of a dispute, and settlement is voluntary.

The facilitative mediation process is well-suited for settling these types of disputes, which often involve family members, because it provides the following:

- Consistency with the family settlement doctrine which courts have historically favored in trust and estate cases.
- A confidential forum, unlike litigation which is a matter of public record.
- The opportunity to preserve relationships through improved communication among family members.
- A forum for acknowledging and venting emotions, where highly-emotional parties will have an opportunity to be heard.
- The possibility of a creative and flexible solution that meets the parties' needs and interests, without being limited solely to legal issues.
- The potential for cost and time savings.

EVALUATIVE MEDIATION

Evaluative mediation is a somewhat different process. In this mediation model an expert in a field, after hearing both sides of the dispute, evaluates the respective parties' likelihood of success in litigation. This is intended to help the parties set more realistic expectations, which encourages settlement. Evaluative mediation may be particularly useful in some fact-specific disputes, such as those involving trustee fees or asset valuations where expert opinion can play an important role. It is not unusual for mediators to use a combination of techniques, such as both facilitative and evaluative mediation tools.

WHAT IS ELDER MEDIATION?

The term "elder mediation" generally refers to a facilitative mediation process which addresses the health, financial, and other concerns of an aging party, whether in the context of a guardianship or other court proceeding. Although elder mediation is the term commonly used, the process might be more accurately described as "adult family decision-making." Family crises and the attendant conflict may occur during a change in an aging parent's circumstances, such as the loss of a spouse or a decline in mental or physical capabilities, at a time when the parent still does not want to give up control. Elder mediation focuses on preserving the dignity, self-determination and autonomy of the "elder," while teaching a constructive model for adult family communication going forward.

Some of the disputed matters appropriate for elder mediation include:

- family caregiving responsibilities;
- housing arrangements, including intergenerational housing;
- health care, hospice, and end-of-life decisions; and
- estate planning and expectation of inheritance by younger generations.

This model presents additional challenges, such as being certain that the aging party is able to participate in the mediation to the extent feasible and is adequately accommodated, if necessary. This could mean additional assistance with seeing or hearing the process, or careful regard for scheduling. In mediating a court case including adult guardianship proceedings, legal and other representation of the elder may be required, such as a court-appointed special representative or guardian ad litem, depending on state law. In other cases, depending upon circumstances, representation may be advisable even if not required.

SPECIAL CONSIDERATIONS FOR ADULT GUARDIANSHIP MEDIATION

When a person is adjudicated a disabled person under Illinois law, it means the judge has determined by clear and convincing evidence that the party does not have capacity to make decisions for him or herself. The judge may appoint a guardian of the person to make personal and health care decisions for that party and/or a guardian of the estate to make property and financial decisions. Because the appointment of a guardian is a drastic procedure that deprives a person of important civil rights, it should be the last legal resort. Accordingly, elder mediation or other means may be considered prior to a guardianship proceeding, to determine whether any other health care and financial arrangement might meet the elder's needs.

Even at a late stage where a client's impairment is significant and a guardianship proceeding is already pending in court, there can be value in mediating the circumstances of the guardianship. For family members and professionals who know the alleged disabled person best, mediation can provide a forum for exploring the most effective care plan, help in deciding who should be guardian, and afford an opportunity to consider broader options such as a partial rather than plenary guardianship.

Some issues can be addressed in mediation prior to a court adjudication, such as whether co-guardianship could resolve a dispute over who should be appointed to act. To the extent a less restrictive arrangement with limited court intervention can be established and the family members have worked through other volatile issues during the mediation conferences, the parties are often more satisfied with the ultimate result in the guardianship court. Even though the family may not end up with a group hug, mediation may help them to determine a mutually acceptable care and financial plan for the disabled person, thereby dampening ongo-

ing family conflict and avoiding extra court appearances over these issues.

ELDER MEDIATION AS AN ESTATE PLANNER'S TOOL FOR MANAGING FAMILY CONFLICT

Ethical concerns may arise when attorneys find themselves in the middle of highly emotional family drama. These may become increasingly challenging if the lawyer reasonably believes that the client may be impaired and not mentally capable of handling his or her legal affairs.

The ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 96-404, responding to questions about the ethics of representing a client under disability, describes this issue clearly: "A normal client-lawyer relationship presumes that there can be effective communication between client and lawyer [Rule 1.4(a)], and that the client, after consultation with the lawyer, can make considered decisions about the objectives of the representation and the means of achieving those objectives [Rule1.2(a)]. When the client's ability to communicate, comprehend and assess information and to make reasoned decisions is partially or completely diminished, maintaining the ordinary relationship in all respects may be difficult."

Rule of Professional Conduct 1.14(a) addresses the representation of an impaired client, but how to implement it may not be entirely clear as a practical matter. The rule provides that a lawyer has a duty to maintain a normal relationship with an impaired client "as far as reasonably possible" as well as to abide by the other ethical rules. Only if the lawyer reasonably believes impairment is such that there could be serious physical, mental or other harm to a client with lack of decision-making capacity is the lawyer authorized to take protective action under Rule 1.14(b), and then only to the extent absolutely necessary. Such protective actions might include obtaining relevant information from family and medical professionals and/or seeking a guardianship.

Elder mediation can help the attorney represent a client who might be impaired without breaching the ethical rules. A mediation conference does not have the same ethical constraints as an attorney-client conference because the mediator has privilege and immunity similar to a judge, and also because mediation communications are privileged. In addition, the parties ordinarily sign a confidentiality agreement with respect to the process. Accordingly, the parties attending the mediation conference—including the attorney—can speak openly and with actual or implied consent to discuss confidential information in a way that will shield the information from discovery in subsequent litigation or otherwise. Below are examples of when and how elder mediation can be useful in managing family disputes which might otherwise interfere with normal estate planning / elder law representation.

CASE STUDY 1-- *A COMMON USE OF ELDER MEDIATION: RESOLVING CONFLICT BETWEEN ADULT CHILDREN OVER THEIR MOTHER'S POWER OF ATTORNEY*

Consider the common scenario where an attorney gets the call from a client's adult daughter, who is named to act as agent under her mother's power of attorney, and is a joint tenant on her mother's checking account for convenience. The client is in her late 80s, frail and sometimes forgetful, although not necessarily impaired.

The daughter thought she should take over handling the mother's checking and finances, and says her mother agreed. But when the daughter started reviewing the checking account statements, she found that her brother had not only been added on their mother's account as another joint tenant, but had also written a $200 check to his own daughter with the note "graduation gift." When the daughter asked about it, her mother had said that the son had insisted upon both of these, but that she wanted to let it go and would not even call her attorney. The daughter was concerned, particularly because the mother's care facility bills were in the vicinity of $100,000 a year, which could ultimately dissipate her estate, and because her brother was often in need of money. The daughter called the mother's attorney, asking him to handle the situation.

The attorney became very concerned. Under Rule 1.14, he was charged with maintaining a normal attorney-client relationship to the extent feasible, but also trying to investigate whether the mother was impaired and at risk of harm. He visited his client, who acknowledged that she had asked the banker to add the son as a joint tenant after he had insisted upon it, but she was vague about the check to the granddaughter. The attorney was aware of a potential dilemma, but at the same time he was not sure what to do next. He was hesitant about making contact with the son based upon the client's apparent desire to let things be.

By being knowledgeable about elder mediation, the attorney recognized that the process could be used to further investigate the situation. He suggested that the client engage an elder mediator to facilitate a discussion. The client agreed because the one thing she wanted more than anything else was for her children to get along, or at least stop fighting. The siblings agreed and an experienced elder mediator was engaged to convene a family meeting with the attorney, the client, the daughter, and the son as parties. All had of course signed mediation and confidentiality agreements acknowledging, among other terms, that the mediator was there to facilitate conflict resolution and was not practicing law.

The mediation conference proceeded along the following lines:

- The mediator started by using a variety of conflict resolution skills to get the siblings to stop scream-

ing and start talking. The client did not want to attend, but was encouraged to do so to the extent she was able, and the conference took place in her home to give her flexibility.

- The actual discussion began with the attorney explaining the meaning, purpose, and operation of the power of attorney and the rights and responsibilities of the daughter as agent. The client attended only this part of the conference, and then retired to her room as sparks were already flying between the siblings.
- The mediator facilitated a discussion of how this dispute needed to be resolved in order to avoid its escalation into a guardianship or other court proceeding during their mother's life or after her death. The mediator "reality tested" the parties to be sure they were aware of the cost, time and emotional burden of litigation.
- Neither sibling was thrilled with the possibility of eventual litigation or even court intervention, so the mediator helped them focus on how to avoid it. In particular, they discussed the advantages of the sister acting as agent without court intervention or additional attorney fees and costs. The brother was nervous that his sister would have "free rein" over his mother's assets and estate, so the attorney again explained that (i) the agent was subject to a fiduciary duty while acting under the power and thus did not have "free rein," and (ii) all the money was to be used for the mother's benefit, with his sister only being entitled to reasonable fees. On the other hand, the sister needed to be sure that her brother would not undermine her authority as agent under the power of attorney or try to use the joint account for his personal use.
- With the mediator's assistance, a plan for resolution was crafted to meet the parties' needs, especially the client's need for peace from her squabbling children. To induce her brother to enter into a mediated settlement agreement, the sister was willing to agree to certain actions not otherwise required of her as agent under the law. Specifically, the daughter agreed that (i) she would not charge compensation as long as her brother was cooperative, but would be keeping time records in order to charge if he continued his current behavior, and (ii) if the mother agreed, she would share with her brother account statements setting forth income and expenses on a quarterly basis.
- The parties ultimately signed a settlement agreement pursuant to the terms described above. Although the siblings never again had a personal relationship, they were able to avoid escalating conflict during their mother's final years as well as after her death through the elder mediation process. Further, the attorney was satisfied that he did not need to investigate the client's condition any further pursuant to Rule 1.14 in order to continue his representation or, if it became necessary, to defend his representation if it were to be questioned in an estate dispute after the death of the client.

CASE STUDY 2—*A CREATIVE USE OF ELDER MEDIATION: IDENTIFYING AND RESOLVING UNDERLYING CONFLICT WHICH WAS INTERFERING WITH AN ESTATE PLANNING REPRESENTATION*

An attorney spent two lengthy conferences with a client who was deciding whether to disinherit one adult child. The discussion ended with the client stating that she definitely wanted the new documents, which omitted all benefits to that son. Before drafting the documents, the attorney still wanted confirmation of what she understood to be the client's wishes. But, after receiving explanatory outlines of the proposed plan, the client called to change her mind on several occasions before finally advising the attorney that she wanted to proceed with the new plan, disinheriting her son.

The 90-year old client had appeared to be in good physical and mental health during the conferences, but under the circumstances the attorney's antennae went up regarding the client's decision-making capacity. Under Rule 1.14, did the attorney need to explore further what precipitated these events and whether the client was impaired, particularly because she had been unable to explain her reason for the disinheritance and unwilling to discuss it further? Specifically, was the client losing capacity, subject to undue influence, or something else? Was there impairment causing the representation to fall under Rule 1.14(b) requiring protective action?

The attorney saw an initial need to investigate under Rule 1.14 but was not sure what she could do to obtain information within the meaning of the rule. She was familiar with elder mediation from prior matters and knew that a facilitative mediator was trained in asking probative questions to uncover a client's needs and interests beyond just what the client says. At the attorney's suggestion, the client agreed to engage an elder mediator with the idea of finding help in resolving the conflict with her son. The mediator tried to set up the first meeting with the client alone, but the client requested that her second husband (who was not the father of the son in conflict) also be a party. Due to the husband's attendance, who was not a client, the attorney thought it would be better that he not be present for at least the first conference.

This is how the mediation conference evolved:

Protected by mediator privilege and a confidentiality agreement covering all the parties, the mediator was able to raise the question of the wife's estate planning with the couple openly, both in joint conferences and separate caucuses. For the first time, the client was willing to share information about her dilemma.

The mediator was able to help the parties identify the reason for the client's indecision about her plan. It came out in the discussion that her husband, in attempting to protect his wife, had been contributing to her indecision

and thereby influencing her estate planning. In joint conference, the husband emphatically stated that he was angry about the way his wife's son treated her, and every time the son did something hurtful the husband tried to persuade her to "take him out of the will" and leave the balance of her estate primarily to her other adult children and her grandchildren. With the mediator's support, the client was finally able to speak up to her husband and say: "I don't like my son very much either lately, but he is still my child and I do not want to disinherit him."

The result allowed the client to make a final decision, thereby including her son on a *per stirpes* basis in her estate plan. Just as important, this result allowed the attorney to be confident that the client was neither impaired nor unduly influenced in her decision-making capacity, and that she could proceed with the client representation without concern or further inquiry.

Beyond the legal issues regarding the estate plan, the mediation also provided a forum for the parties to discuss and brainstorm other options for helping the client deal with her son more effectively, thereby minimizing ongoing and future conflict.

CONCLUSION

In recent years, it has become increasingly common for estate planning attorneys to find themselves involved in family conflicts which present ethical issues. Some of these can be very complicated, such as when the dispute involves an aging client who is showing signs of possible impairment, and the ethical rules may not be easy to apply. Elder mediation, as discussed in this article, is a creative process which is well-suited for resolving such disputes arising in estate, trust or elder law matters, while minimizing ethical risks in the attorney-client relationship. Accordingly, it is advisable for estate planners to become familiar with the elder mediation process as well as how and when to use it most effectively.

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2017 Girl Scouts Project Law Track-Lake County

BY KRISTIE CARY FINGERHUT

As a full-time working mom of three kids, I often start my day by reviewing emails, which helps me to start tackling a forever growing list of "To-Dos." One such morning in 2016, I received an email with a flyer for the Girl Scouts' Project Law Track from my daughter's Brownie Troop Leader, who forwarded it to me and a fellow Troop mom (we are both family law attorneys in Lake County). She expressed interest in this activity for when our daughters were older. The idea was to have "real world law professionals" work with girls between 6th and 12th grades to learn about the legal profession and put on a mock trial at the end. Because the program involved the girls attending four sessions—3 on weeknights and one Saturday morning—and that it was being offered in Chicago and DuPage County, I was disappointed because I thought that my daughter would unlikely be able to participate given the time and location challenges that it would present to a working mom like me.

Still, I decided to send two emails of my own: one to the Girl Scouts event contact, asking how we could expand this offering to Lake County, and another to a group of judges and attorneys who I thought would be able to direct me to the appropriate contact people to get permission to bring the event to Lake County.

For the Spring 2016 season, I attended two of the Chicago sessions and two of the DuPage sessions to get a feel for the program, and then began planning. Working with both the Lake County Bar Association's Community Outreach Committee and the Association of Women Attorneys of Lake County, I and two of my colleagues, Karissa Anderson and Rebecca Whitcombe, worked to organize the event for Spring 2017 utilizing the program format that Chicago and DuPage had been using for a few years.

Kristie Fingerhut is a family law practitioner with offices in Libertyville.

Throughout April and May 2017, we held three weeknight sessions in Waukegan for the seven middle school participants who signed up

for the inaugural Lake County activity. The first night we gave them an overview of the law and court system and explored how the law was similar to and different from its portrayal in the media. The second night, our group learned a bit about the process of becoming a lawyer, toured a law office, and met with three different panels of judges plus a few different types of attorneys and a group of courthouse professionals. The third night, the girls worked with volunteer mentor attorneys to understand, practice and perfect their individual roles in the upcoming mock trial activity. On the final day, the girls took a tour of the Circuit Clerk's Office and met again with their mentors before heading to a real courtroom to put on their mock trial before Judge Nancy Waites, her deputy, and a "jury panel" of volunteer lawyers (and a Girl Scout helper—my own Junior Girl Scout daughter).

The seven girls who participated were all very excited to be there, highly engaged in the entire activity, and took their roles seriously as their family and friends watched from the gallery. Following the reading of the jury verdict, the girls were each awarded with a patch and certificate for their hard work, while everyone enjoyed the reward of Girl Scout Cookies. Many thanks are due to Alicia Ayala, Divina Ayala, Mary Brandes, Kathleen Curtin, Joy Gossman, Kathleen Laughlin, Molly Leimback, Sarah Raisch, and Jennifer Snyder for volunteering their valuable time to serve as mentors. Our esteemed jury for the mock trial included Judges Christy Bishop and Elizabeth Rochford, among others.It was a great experience for participants and volunteer mentors alike, and we are excited to improve on the program this March, when we will host this event for a second time. As was the case last year, the program will again be co-sponsored by the Lake County Bar Association and the Association of Women Attorneys of Lake County. The dates for the 2018 Girl Scouts Project Law Track program are March 1, March 8, March 15, and March 17, and we are in need of volunteers to act as mentors and jurors. Anyone who is interested in learning more about the program or volunteering is welcome to contact me at KCF@Fingerhutlaw.com

Calling Girl Scout Cadettes, Seniors, and Ambassadors…

Project Law Track is a series of four exciting sessions, each focusing on a different facet of the practice of law.

Created and facilitated by real-world law professionals, you'll learn whether courtrooms are really like what you see on the big screen, what it takes to have a career in law, and plan and stage your very own mock trial! Girls may register for either the Chicago, Lake County, IL or DuPage track.

You'll get a chance to work side by side with women lawyers who specialize in all areas of the Law, including Corporate Lawyers, Litigators, Intellectual Property Lawyers, Family Law, Prosecutors, and more!

Board of Directors' Meeting

November 17, 2017

BY SHYAMA S. PARIKH
SECRETARY

ACTION ITEMS

1 Motion made to approve the October minutes, Second, Motion passed.

2 Motion made for board to consider cost saving items and table until the next meeting, except for Docket, which will be submitted to the Docket Board for recommendation. Second, Discussion ensures, Motion passed.

3 Motion made to move into Executive session at 12:19pm, Second, Motion passed.

4 Motion to Exit Executive session at 1:02pm, Second, Motion passed.

Next Board Meeting: Thursday, December 21, 2017

Motion to Adjourn, Second, Motion passed

Meeting ends at 1:27pm

MEMBERS PRESENT

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Brian J. Lewis
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Stephen J. Rice
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Richard N. Kessler
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Katharine S. Hatch

Chris Boadt
Executive Director

Do you have a speaker idea or suggestion for our business meetings?

We would like to hear from you!

Send your ideas to:
Chris Boadt (cboadt@lakebar.org)

The Grapevine

Assistant State's Attorney **Jason Grindel** and his wife Kari welcomed twins in November: Paige Joyce Anne and Rowan Christopher.

***

Jencie A. Richtman has joined her father in practice at **Churchill, Quinn, Richtman & Hamilton, Ltd.** in Grayslake. Jencie received her Juris Doctor from Northern Illinois College of Law in 2017. She previously worked at a clinic in Rockford representing domestic violence clients in court as well as assisting clients with estate planning needs. While Jencie will focus her practice on probate and estate planning, she hopes to further develop her practice to other areas of law.

***

Longtime Mundelein Village Attorney **Charles Marino** was honored for having served for 45 years as the Village's attorney. During that time he has served continuously under six different mayors. http://www.chicagotribune.com/suburbs/mundelein/news/ct-mun-charles-marino-attorney-career-tl-1130-story.html

***

Rachael Bernal recently joined Schlesinger & Strauss as an associate attorney.

***

LCBA Associate Member **Paola Meinzer** from the CPA firm **Manning, Silverman, & Co.** noted that the company is celebrating its 30th year in business. The firm is located in Lincolnshire.

***

Daniels, Long & Pinsel again organized its annual gift drive, once again turning the firm's office (and the LCBA's Member Center) into a small-scale, Amazon-like warehouse!

Does Shall Always Mean Shall?

BY GARY SCHLESINGER

On July 8, 2016, the Illinois Supreme Court decided a case in which a non-lawyer asserted that he should win because the other side did not do something an Illinois Supreme Court Rule says "shall" be done. This reasoning deserves notice by Illinois lawyers, regardless of their area of practice.

In *People v. Geiler*,[1] Christopher Geiler received a speeding ticket in Madison County. He filed a motion to dismiss his case based on Illinois Supreme Court Rule 552, which requires the arresting officer to transmit specified portions of the citation to the circuit court clerk within 48 hours after the arrest. That had not been done. The trial court granted Geiler's motion to dismiss. The appellate court affirmed. The State appealed to the Illinois Supreme Court.

It was the practice of the police in the city of Troy, Illinois to deliver traffic tickets to the court on Monday for tickets that had been issued Friday, Saturday, or Sunday. Tickets that were issued on Monday through Thursday were delivered to the court clerk on Friday. The ticket Geiler received was issued on a Tuesday, and was thus delivered to the court clerk on Friday.

The trial court relied on *People v. Hanna*[2], where the police department in question had not submitted the ticket within 48 hours. On appeal , the appellate court in *Hanna* remanded the case for the trial court to determine whether the municipality's failure to comply with Rule 552 was inadvertent, or clear and consistent.

In *Geiler*, both the trial and appellate courts found that the City of Troy had a clear and consistent practice of violating Rule 552; it was not an isolated or inadvertent failure to comply.

Rule 552 provides as follows: [t] he arresting officer shall complete the form or ticket and, within 48 hours after the arrest, shall transmit the portions entitled "Compliant" and "Disposition Report" and, where appropriate, "Report of Conviction," either in person or by mail, to the clerk of the circuit court of the county in which the violation occurred.

Gary Schlesinger has been an attorney since 1971 and has practiced in Lake County since 1972. He has been an active member of the ISBA and LCBA for many years. He is a former member of Ray and Glick.

1 *People v. Geiler*, 2016 IL 119095 (2016)

2 *People v. Hanna*, 185 Ill App. 3d 404 (1989)

Geiler received his ticket on May 5, 2014, but it was not transmitted to the circuit court clerk until May 9, 2014. In *Geiler*, the State argued, and the Illinois Supreme Court accepted, that the timing requirement in Rule 552 is directory, and, therefore, dismissal of a citation is not warranted unless noncompliance with the Rule prejudices the defendant. The Illinois Supreme Court held that the *pro se* defendant's motion to dismiss the case for failure to transmit the material to the court clerk within 48 hours "must be rejected given this Court's established precedent holding that a charge may not be dismissed based on the violation of a directory rule absent a showing of prejudice to the Defendant from the violation.[3]"

The Court reasoned that whether or not an obligation is mandatory or directory is a question of construction. The Court acknowledged that the Troy Police Department violated the Rule in many cases, but found that there was no indication "that violation of the Rule would ordinarily prejudice the rights of a defendant." The court found no evidence that the two-day delay in transmitting the citation to the circuit court in fact prejudiced defendant, nor did the defendant make that contention. Therefore, the Illinois Supreme Court reversed the appellate and trial courts' dismissal of the ticket.

The important point of this case for all Illinois lawyers is that the word "shall" may not always mean "shall." There are many appellate court opinions holding that the word "shall" is mandatory and whatever "shall" be done must be done. However, now, at least in relation to traffic tickets (and who knows where else), the word "shall" is not mandatory but rather, directory and therefore, discretionary. How do we know the difference? Some court will have to tell us because "whether an obligation is mandatory or directory is a question of construction subject to *de novo* review.[4]"

How does this decision square with many other Illinois Supreme Court opinions? Not well. In *Bright v. Dicke*,[5] the Court dealt with the question of whether a response to requests to admit facts may be filed later than 28 days after service, as specified in Illinois Supreme Court Rule 216(c). In that case, the responding party did not request additional time prior to the expiration of the 28 days, but instead asked permission to file responses after the 28 days had expired.

In the concluding paragraph of *Bright*, the Illinois Supreme Court stated:

> under Rule 183, the general Rule pertains: the burden of establishing grounds for relief is on the party requesting the additional time. To hold otherwise would be tantamount to saying that litigants are free to disregard our rules so long as the opposing side cannot show harm. Such an approach is wholly unacceptable. Nonmoving parties such as Bright should not be required to justify application of a Rule before it will be given effect. The rules of court we have promulgated are not aspirational. They are not suggestions. They have the force of law, and the presumption must be that they will be obeyed and enforced as written[6].

The rules of court we have promulgated are not aspirational. They are not suggestions. They have the force of law, and the presumption must be that they will be obeyed and enforced as written.

If the above quoted language from *Bright* is the law, how can the Supreme Court say that there is a distinction between what is mandatory in a Supreme Court Rule and what is directory in a Supreme Court Rule?

Unfortunately, *Geiler* now opens for potential litigation whether or not "shall" is mandatory and must be obeyed or is merely directory and must only be obeyed if no harm can be shown by the opposing party.

3 *Id.* at ¶15 (*citing People v. Zilb*ro, 242 IL 2d 34, 44-45 (2011); *People v. Delvillar*, 235 IL 2d 507, 522 (2009) and *People v. Robinson*, 217 IL 2d 43, 57 (2005)).

4 *Id*. at ¶17.

5 *Bright V. Dic*ke, 166 Ill. 2d 204 (1995)

6 *Id.* at 209.

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LAKE COUNTY BAR ASSOCIATION 1912

Monthly Committee Meetings

DAY	MEETING	LOCATION	TIME
1st Tuesday (Odd Mo.)	Diversity & Community Outreach	LCBA	12:15-1:15
1st Thursday	Real Estate	Primo, Gurnee	5:15-6:15
1st Thursday (Odd Mo.)	Docket Editorial Committee	LCBA	12:15-1:15
2nd Tuesday	Criminal Law	Waukegan Courthouse	12:15-1:15
2nd Tuesday (Odd Mo.)	Immigration	LCBA	4:30-5:30
2nd Wednesday	Family Law Advisory Group (FLAG)	LCBA	12:15-1:15
2nd Wednesday	Trusts and Estates	Park City Courthouse	12:15-1:15
2nd Thursday	Young & New Lawyers	Chili U, Libertyville	4:30-5:30
3rd Tuesday	Local Government	LCBA	12:15-1:15
3rd Tuesday	LCBF Board of Trustees	LCBA	4:00
3rd Wednesday	Debtor/Creditor Rights	Varies	5:30-6:30
3rd Wednesday	Family Law	C-105	12:15-1:15
3rd Wednesday (Odd Mo.)	Employment Law	Bobby's, Deerfield	5:15-6:15
3rd Thursday	LCBA Board of Directors	LCBA	12:00 noon
3rd Thursday	Civil Trial and Appeals	Primo, Gurnee	5:30-6:30

- RSVP to a meeting at www.lakebar.org.
- Meetings subject to change. Please check your weekly e-news, the on-line calendar at www.lakebar.org or call the LCBA Office @ (847) 244-3143.
- Please feel free to bring your lunch to the LCBA office for any noon meetings. Food and beverages at restaurants are purchased on a individual basis.

Bar Bulletin Board

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What to do with Bonuses, Commissions, and other Variable Income

BY ERIC SCHULMAN*

Over the years, it has become common practice to build into marital settlement agreements provisions for "automatic" adjustments to child support and maintenance where the payor has variable income due to commissions, bonuses, overtime, and the like. Negotiating and inserting such provisions into the agreement served as a proactive measure to help avoid future litigation and provide a sense of fairness to both parties. Including such terms was fairly routine or straightforward, depending on the complexity of the income stream.

The common approach to address bonuses, commissions or other variable income streams was to provide that certain documentation would be periodically exchanged, and there would then be a "true-up" in terms of paying the net percentage pursuant to statutory guidelines. The true-up could be as simple as requiring "20 percent of the net income properly calculated" within x days of receipt. The only restrictions on such agreements were that the agreement not be contrary to public policy, unconscionable, or violate section 505(a)(5) of the IMDMA.[1] That section provides that although the guidelines were set up according to percentages of net income, the final order must state an amount of child support in actual dollar amounts. The practical effect of a child support order that based payments on a percentage of the support obligor's net income was that child support automatically increased when the payor's net income increased.

Now that the income share model of child support has been adopted in Illinois, what impact does the change in the law have on these types of variable-income situations? Can agreements still be drafted that effectively respond to these fluctuations, despite the fact that income from both parents must now be considered? Time will ultimately tell, but, for now, the answer appears to be "yes."

Eric L. Schulman is a senior partner at the family law firm of Schiller DuCanto & Fleck LLP. He can be reached at eschulman@sdflaw.com.

1 750 ILCS 5/505(a)(5) (West 2017)

Before tackling the problems associated with variable income dilemmas, it is critical to have a basic understanding of the primary policy considerations behind the enactment of our new statute. Our new statute was based upon the economic assumption that as income increases, families spend proportionately less money on children, and as such, the old statute had the effect of sometimes creating a windfall to a recipient. Also, an important aspect was the perception of fairness provided by a system that requires consideration of income from two persons, rather than one; the goal with such a system is to avoid dis-incentivizing people from entry into the labor market. With an understanding of the policy implications, the statute can be better understood, enabling more persuasive arguments to a court.

The adoption of the income share model adds a new wrinkle to the use of base-plus-percentage orders of support typically relied upon where a payor's income fluctuates.

THE INCOME SHARE STATUTE – RELEVANT PROVISIONS

1. "Gross Income". The starting point in this analysis is what constitutes "gross income" under the new statute? The answer is found in IMDMA Section 505(a)(3)(A), which provides as follows:

> "(3) Income.
> As used in this Section, "gross income" means the total of all income from all sources, except "gross income" does not include (i) benefits received by the parent from means-tested public assistance programs, including, but not limited to, Temporary Assistance to Needy Families, Supplemental Security Income, and the Supplemental Nutrition Assistance Program or (ii) benefits and income received by the parent for other children in the household, including, but not limited to, child support, survivor benefits, and foster care payments. Social security disability and retirement benefits paid for the benefit of the subject child must be included in the disabled or retired parent's gross income for purposes of calculating the parent's child support obligation, but the parent is entitled to a child support credit for the amount of benefits paid to the other party for the child. "Gross income" also includes spousal maintenance received pursuant to a court order in the pending proceedings or any other proceedings that must be included in the recipient's gross income for purposes of calculating the parent's child support obligation."

Under the prior version of the statute, questions arose as to what exactly was "gross income," as the statute did not define the term. Instead, the prior statute provided, in relevant part, as follows: *"'Net income' is defined as the total of all income from all sources, minus…"*

The new income share statute incorporates this concept and provides for a similar definition: *"…'gross income' means the total of all income from all sources, except…"*[2] Therefore, there is nothing really new here, and what constitutes "income" or "gross income" remains conceptually unchanged, except that now, in determining gross income, maintenance paid is included in the recipient's income. Further, the term "*all sources of income*" has previously been interpreted very broadly by the Illinois Supreme Court in *In Re Marriage of Rogers*:[3]

> [T]he first step in calculating a parent's "net income" is ascertaining "the total of all income from all sources" received by that parent. That determination, in turn, depends on what items may properly be considered "income." "Income" is not separately defined in Section 505 of the [IMDMA]. We will therefore give it its plain and ordinary meaning.
>
> As the word itself suggests, "income" is simply "something that comes in as an increment or addition * * *: a gain or recurrent benefit that is usually measured in money * * *: the value of goods and services received by an individual in a given period of time." Webster's Third New International Dictionary 1143 (1986). It has likewise been defined as "[t]he money or other form of payment that one receives, usu[ually] periodically, from employment, business, investments, royalties, gifts and the like." Black's Law Dictionary 778 (8th ed. 2004).
>
> Under these definitions, a variety of payments will qualify as "income" for purposes of section 505(a)(3) of the [IMDMA] that would not be tax-

2 750 ILCS 5/505(a)(3) (West 2017)
3 *IRMO Rogers*, 213 Ill. 2d 129 (2004)

able as income under the Internal Revenue Code. As our appellate court has recognized, however, the Internal Revenue Code is designed to achieve different purposes than our state's child support provisions. Accordingly, it does not govern the determination of what constitutes "income" under the statutory child support guidelines enacted by the General Assembly.[4]

Rogers, along with other Illinois cases, provides that anything of value can fit under the umbrella of income, including automobile allowances,[5] IRA distributions,[6] and moving expenses.[7] Now, the legislature has codified the concepts of economic value into our statute by declaring that perquisites received, if not included in taxable income, can be included as gross income under IMDMA Section 505(a)(3.1)(B).[8] The laundry list of examples now in the income shares statute includes, but is not limited to, a company car, housing, housing allowance, and reimbursed meals. All of those items are now on the table for calculating gross income.

2. <u>Variable "Gross Income"</u>. Where one parent has variable income sources, or fluctuating income from year to year, calculating his or her "gross income" becomes challenging, and this impacts the other calculations down the line, such as net income. IMDMA Section 505(a)(5)[9] addresses this issue, and remains largely substantively unchanged from its prior version:

> (5) If the net income cannot be determined because of default or any other reason, the court shall order support in an amount considered reasonable in the particular case. The final order in all cases shall state the support level in dollar amounts. However, if the court finds that the child support amount cannot be expressed exclusively as a dollar amount because all or a portion of the obligor's net income is uncertain as to source, time of payment, or amount, the court may order a percentage amount of support in addition to a specific dollar amount and enter such other orders as may be necessary to determine and enforce, on a timely basis, the applicable support ordered.[10]

Thus, for cases in which net income cannot be determined because of variances or fluctuations, IMDMA §505(a)(5) still requires that the court provide for reasonable support, in a set dollar amount, but also potentially as some percentage amount. Our appellate court has addressed handling the issue of variances or uncertainty of income by looking to past income as a harbinger of future income, and includes, in some instances, income averaging as a reasonable solution to determine a support award. Some of the cases dealing with issues of variable income include the following:

- *In re Marriage of Carpel*, which held that fluctuations in husband's income as an attorney working on a contingent basis made it difficult to determine his net income, and that the trial court should consider his previous income to determine his prospective income;[11]
- *In re Marriage of Garrett*, which held that a 3-year average of the father's income where his income varied significantly from year to year, and the past year's reduction in income was not typical and unexplained;[12]
- *In re Marriage of Nelson*, which held that it was appropriate to average his income over three consecutive years for purposes of child support, because the father's income fluctuated;[13]
- *In re Marriage of Freesen*, which held that the trial court's consideration of only one prior year's income was error when the husband's income varied due to large bonuses, and that the trial court should have averaged income from at least three prior years;[14] and
- *In re Marriage of Pratt*, which affirmed the decision of the trial court to determine the father's estimated annual income from stock dividends by multiplying the first quarter's dividends by four.[15]

ISSUES AND STRATEGY UNDER THE NEW STATUTE

The adoption of the income share model adds a new wrinkle to the use of base-plus-percentage orders of support typically relied upon where a payor's income fluctuates. In the past, it was relatively easy to draft orders providing that support would be set at a base amount plus a percentage over that base amount consistent with the child support guidelines. Percentage awards have proved to be a flexible means of adapting support to fluctuating income levels without having to resort to the filing of a petition to modify support as a result of changes in the payor's financial circumstances.

However, it must be kept in mind that under the new provisions, the income of both parents must be considered. Accordingly, this makes it impossible to simply provide in a settlement agreement that the statutorily-required level of support would be paid on an obligor's additional income except in those cases

4 *IRMO Rogers*, 213 Ill. 2d at 136-37 (citations omitted)
5 *In re Marriage of Einstein*, 358 Ill. App. 3d (4th Dist. 2005)
6 *In re Marriage of Lindman*, 356 Ill. App. 3d 462 (2nd Dist. 2005)
7 *In re Marriage of Shores*, 2014 IL App (2d) 130151
8 750 ILCS 5/505(a)(3.1)(B) (West 2017)
9 750 ILCS 5/505(a)(5) (West 2017)
10 *Id.*
11 *IRMO Carpel*, 232 Ill. App. 3d 806 (4th Dist. 1992)
12 *IRMO Garrett*, 336 Ill. App. 3d 1018 (5th Dist. 2003)
13 *IRMO Nelson*, 297 Ill. App. 3d 651 (3rd Dist. 1998)
14 *IRMO Freesen*, 275 Ill. App. 3d 97 (4th Dist, 1995)
15 *IRMO Pratt*, 2014 Ill App (1st) 130465, ¶ 26

where only the obligor is employed. In a case where only the obligor has variable income, it is possible to draft a percentage order based upon the ratio of the obligor's child support obligation to his or her gross income with a further provision that any additional income would be paid as child support based upon that percentage. Yet, even this could be problematic, as the child support obligor could overpay support in the event of substantial income, due to the fact that under the new statute as income increases the relative percentage of support paid decreases.

As another option, it is foreseeable that the use of Family Law Software may become a common practice to help determine the overall percentage of net or gross income that the obligor is paying based upon the income share guidelines considering the income of both parents. Thus, the settlement agreement could provide for mutual disclosure and exchange of income records, and then if the overall percentage no longer corresponds to the prior settlement amount, then child support would be determinable per the guidelines and the matter could then be reviewed as a *de novo* matter.

Because the income share model makes the child support assessment less straightforward than it previously was, the case law regarding income averaging will likely be of great weight. Income averaging can be an appropriate and fair mechanism to employ so as to avoid continuously having to recalculate child support, exchange and pursue financial updates, expend legal fees, and return to court for additional litigation.

When the obligation for child support is not established by a marital settlement agreement, but is set by the court either as a result of a trial or a default hearing, trial courts have on occasion placed a provision in the judgment that required an automatic increase in child support. Such provisions have usually not withstood attack on appeal. The basis for the disapproval of automatic increases in support was well-expressed in the case *of McManus v. McManus*,[16] in which the father was ordered to pay $70 per month until the child's sixth birthday, $140 per month until the tenth birthday, $180 per month until the fourteenth birthday, and $200 per month thereafter. In that case, the appellate court stated as follows:

In ordering the payment of child support, a circuit court must consider the needs of the child, the separate income of the wife, and the income of the husband. Because changes in these facts cannot be anticipated with accuracy, a circuit court should ordinarily not try to anticipate such changes by making its award of child support to increase automatically with the child's age. The self-adjusting aspect of the award of child support must, therefore, be reversed.[17]

16 *McManus v. McManus*, 38 Ill. App. 3d 645 (5th Dist. 1976)

17 *Id.* (citations omitted).

In *Marriage of Moore*,[18] the trial court entered a child support order similar in structure to the order in *McManus*. In *Moore*, the father was a surgeon who had been practicing for approximately four years at the time of the judgment. His income was on the rise. The parties had two minor children. The father was ordered to pay $1,000 per month, per child, for support, with annual increases of $1,000 per child per year. The mother urged that the trial court could reasonably expect that the father's income would increase. The appellate court held that the trial court was not entitled to rely on the possibility of a likelihood of future increases in income.

The same principle as in *Moore* and *McManus* was also present in *Coons v. Wilder*.[19] Mr. Coons was a lawyer who had just passed the bar examination. The support order was based on what the father was expected to earn as a lawyer. The support order was reversed on appeal. Similarly, in *Schwartz v. Schwartz*,[20] a support order providing for an increase in child support in two years, based on anticipated income that the father would receive from a trust in two years, was reversed.

In contrast to the above disapproved approaches is the approach that was affirmed in *Vollenhover v. Vollenhover*.[21] In that case, the father's income fluctuated because he received quarterly bonuses. The trial court's decision, which was affirmed on appeal, provided for increases in support payments, which were contingent on the increase in the father's income actually taking place, but it also contained a provision for automatic reduction during those months when the father's earnings decreased. Thus, the *Vollenhover* decision may be cited and relied upon when urging a true-up or true-down under the income sharing amendments, although the age of the case, and the decisional case law that has evolved since 1954 calls into question the weight to be afforded the case.

Moreover, while a substantial change in circumstances pursuant to IMDMA Section 510(a) encompasses a change in income as a basis for a petition to modify support,[22] that petition can only affect a prospective modification. If we know a parent typically gets bonuses, or has commission based compensation, overtime or other variable income, here are some potential ways to set child support that adequately accounts for that variability, and does so in certain instances retrospectively.

SOME IDEAS FOR HANDLING VARIABLE INCOME

18 *IRMO Moore*, 117 Ill. App. 3d 206 (5th Dist. 1983)

19 *Coons v. Wilder*, 93 Ill. App. 3d 127 (2nd Dist. 1981)

20 *Schwartz v. Schwartz,* 38 Ill. App. 3d 959 (1st Dist. 1976)

21 *Vollenhover v. Vollenhover*, 4 Ill. App. 2d 44 (1st Dist. 1954)

22 750 ILCS 5/510(a) (West 2017)

1. True-up child support periodically. A true-up agreement could be applied retroactively—*i.e.,* to the past year or other period of time over which child support was paid—or prospectively—*i.e.*, based on the inclusion of the additional income to set child support for the next period of time if it becomes clear that changes to a payor's income warrant some future adjustment. True-ups can allow for a sense of fairness because the "correct" amount of statutory child support is always being paid, albeit after the fact under these arrangements. They can present some negative challenges as well, including the time, cost, and aggravation of having to continue with obtaining records, running new calculations, and incurring more legal fees in some instances. Regardless, when negotiating a true-up agreement, be certain to include and contemplate the following:

- What is the timing of the true-up (annually, semi-annually, quarterly, annually, etc.)?
- What documents will be used to prove gross income (tax returns, paystubs, schedule K-1s, 1099s, general ledgers, etc.) and how will it be defined?
- Who has the burden of moving forward to prove the correct amount of support?
- How will the computations be done and by whom, and is there a verification process?
- What is the timing for the exchange of information and computations?
- What are the terms of repayment, and whether there will be interest accrual?

Sample Marital Settlement Agreement Language: "Husband shall pay Wife child support in the amount of $875 per month. This child support amount is based upon Husband's gross income of $100,000 and Wife's gross income of $50,000, and the parties' minor child primarily residing with Wife. The payments shall be made on the first day of each month, commencing December 1, 2017, by Husband to Wife through a direct wire into Wife's checking account no. XXXX at Chase Bank. The parties acknowledge that Husband's gross income from employment has fluctuated annually, and that in an effort to achieve consistency within the framework of the Schedule of Basic Child Support Obligation, they have agreed to complete a re-computation or "true-up" of child support each year. To effectuate this "true-up" the parties shall exchange complete federal and state income tax returns within 7 days of filing, together with all schedules and attachments, including, but not limited to, W-2 forms, Schedule K-1s, 1099s, etc., and a year-end paystub from employment. Within the 21 days of exchanging income tax returns, they shall re-calculate the amount of child support that should have been paid under the Schedule of Basic Child Support Obligation for the prior calendar year based upon the parties' total gross incomes, as that term is defined under Section 505 of the IMDMA; if there was an overpayment or underpayment of child support, the parties shall "true-up" the overpaid or underpaid amount. Further, in running their child support calculations, the parties shall utilize the Individualized Tax Amount approach pursuant to Sections 505(a)(3(D), and 505(a)(3)(E) of the IMDMA. The Husband shall be responsible for circulating the initial proposed amount to Wife, together with his calculations and any source back-up materials (such as Family Law Software program printouts), and if the parties cannot by agreement resolve the "true-up" amount, then prior to either party proceeding with a petition, they shall immediately employ the services at their equal expense of an agreed-upon neutral accountant to assist in a good faith effort at resolving the "true up" calculation. Once the "true up" amount is agreed upon, or determined by court order if no agreement, the parties shall effectuate the actual "true up" payment within 14 days, with[out] interest.

2. Use predetermined ratios for implementing future child support awards. In situations where only the obligor has variable income, it is possible to draft a percentage-based order predicated upon the ratio of the obligor's base child support obligation to his or her total gross income. Any such agreement would include a provision that any additional income (earned above the amount on which the initial child support award was calculated) would be paid as child support based upon that percentage. Remember, however, that there still is a requirement for a specific dollar amount in your child support orders despite this mechanism.

Example: Husband earns $100,000 per year from his base salary, and receives variable bonuses annually. Wife earns $50,000 per year and has primary residence of one minor child. Husband's basic child support obligation from salary alone would be $875 per month. The ratio of Husband's child support obligation to his total gross income is 11%. Husband then earns a $50,000 bonus. Applying the 11% ratio to the gross bonus, results in additional child support of $458.33 per month on the $50,000 bonus.

Note: As suggested above, this result is not without fault. It is potentially problematic because the child support obligor, the Husband in the above example, could be overpaying child support in the event of substantial income. Under the same facts above, assuming the total income was simply $150,000, without any application of the ratios, child support would be a total of $1,145 per month

compared with $1,313 in the above example (a difference of $168 per month).

3.Employ Income Averaging. The income shares amendments make it far more difficult to implement accurate percentage awards of child support, due to a variety of factors, including: (i) as income goes up, the relative support percentages decline; and (ii) the new statute considers the income of both parents. Thus, income averaging may become more prevalent in income variance cases moving forward to avoid constant re-adjustments to child support awards based upon the difficulty both logistically and practically in our cases, and the fact that the case law clearly supports employing income averaging.

See *In re Marriage of Karonis* (holding that the circuit court may consider past earnings in determining the non-custodial spouse's net income for purposes of making a child support award, where it is otherwise difficult to ascertain the net income of a non-custodial spouse,).[23] See also *In re Marriage of Hubbs* ("Using an average income for the previous three years of employment is a reasonable method for determining net income where income has fluctuated widely from year to year").[24]

This approach requires another look at our cases on income averaging to ensure consistency and fairness. In other words, do we employ simple averages, or perhaps, weighted averages more akin to business valuation cases, where it seems one year of income compared to another is determined to be an unreliable predictable of future income (e.g., when the obligor suddenly suffers a suspicious and dramatic drop in income in the year of divorce)?

The other aspect of using income averaging relates to the timeframe over which incomes will be averaged. While three years seems to be a general trend throughout Illinois cases,[25] three-year averaging does not necessarily have to be the last three years where there is evidence that a recent downturn in income, attendant to divorce, is atypical.[26]

4. Determine a predetermined amount or percentage of additional income to be paid as additional child support. While the amount of support changes if net income changes, one can run several alternative scenarios and look realistically at other income results to predetermine additional support amounts to be paid, even if these do not supply precisely accurate predictions of what later occurs. This can always be expressed as additional dollar amounts or percentages on different ranges of income. A helpful tool in analyzing different child support scenarios is to run alternative options through the Guideline "What If" worksheet in Family Law Software. This allows you to change variables for child support, including various income levels, to see how it modifies the child support obligations in amount and allocation.

5. Provide for permissive modifications retroactively in the agreement. If this is an agreement, there is no reason why the bar to retroactive modifications could not be waived in certain well-defined circumstances. The agreement can provide for periodic production or exchange of income information, and permit either party to trigger a review of the support amount for a prior period with specific terms for any shortfall or overpayment.

6. Work outside the confines of guideline support. In addition, while the new income share provisions now apply to all child support determinations, there can still be deviations from the guidelines (as long as appropriate findings are made and the actual support amount is referenced). For negotiated cases, consider whether support guidelines have any meaningful application, or whether the family's best interests might be served by allocating or sharing payment of the children's direct and indirect expenses rather than an arbitrarily-defined child support amount. While the support amount is supposed to reflect expenditures (for an intact family) at various income levels for the children, those statistical averages may not in any way reflect your client's family's expenditures. Consider moving outside these defined amounts to allow the clients to make their own agreements in mediation, collaborative, or other settlement processes.

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23 *IRMO Karonis*, 296 Ill App.3d 86 (2nd Dist. 1998)
24 *IRMO Hubbs*, 363 Ill. App. 3d 696 (5th Dist. 2006)
25 See *IRMO Elies*, 248 Ill. App. 3d 1052 (1st Dist. 1993); *IRMO S.D and N.D*, 2012 IL App (1st) 101876
26 See *IRMO Garrett*, 336 Ill. App. 3d 1018 (5th Dist. 2003).

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