DCBA Brief

The Journal of the DuPage County Bar Association

Volume 31, Issue 5 | January 2019

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President-Elect, Stacey McCullough, President, Matt Pfeiffer, 3rd Vice President, Kiley Whitty and 2nd Vice President, Wendy Musielak pause in the holiday party merry-making for a photo op. A wonderful time was had by all.

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News & Events

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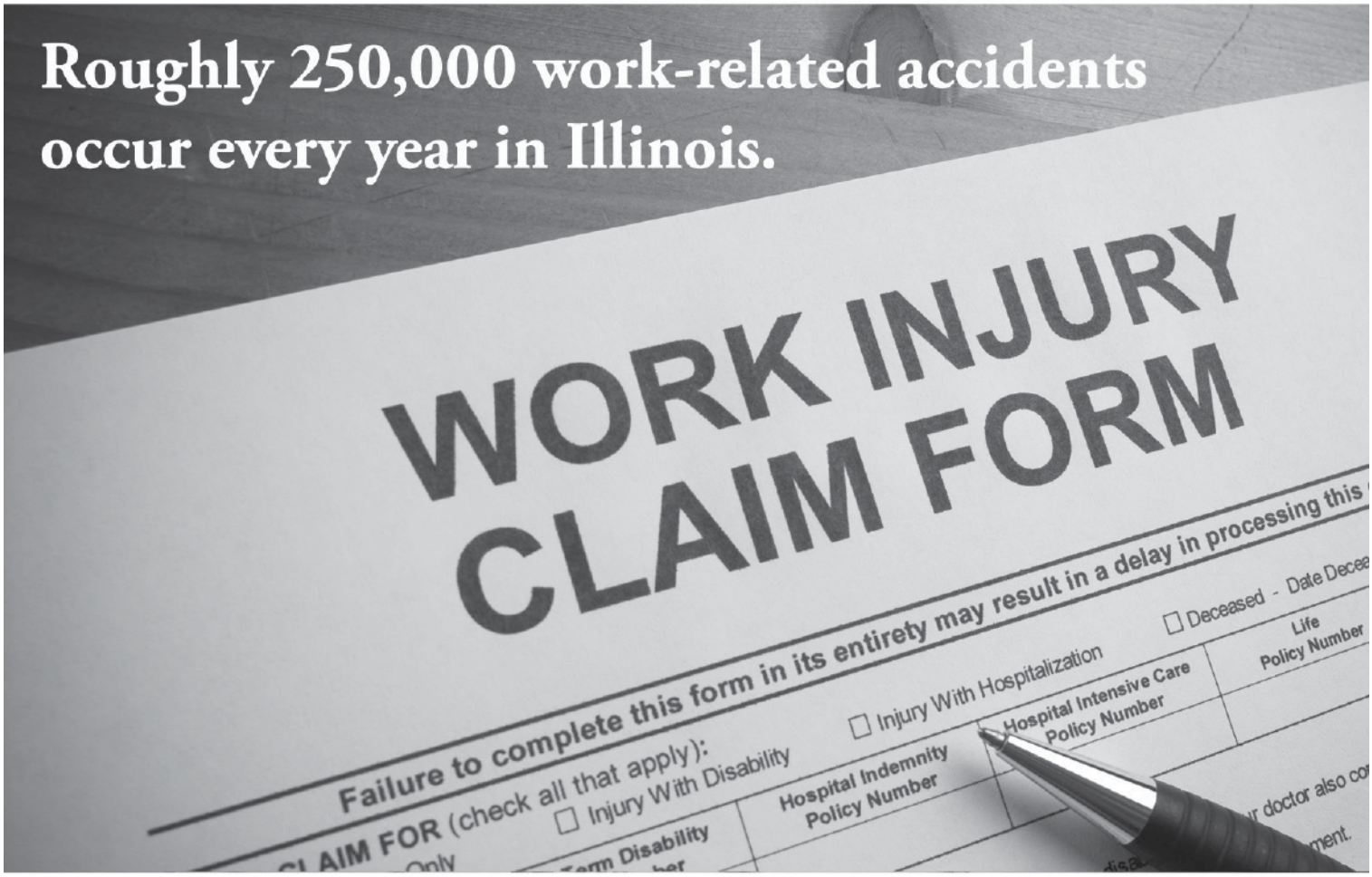

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Pop Quiz!

By Brian Dougherty

Brian M. Dougherty is a partner in the litigation group at Goldstine, Skrodzki, Russian, Nemec and Hoff, Ltd. in Burr Ridge. His practice area primarily includes representing employees and employers in employment disputes arising under state and federal law as well as business torts and general business-related litigation. He also counsels businesses on best practices under labor and employment law and contract law. He is an active member of the DCBA and is a member of the DCBA's Labor and Employment Section. In his spare time, he manages youth baseball and basketball teams.

It is getting close to that time of the year when students are getting ready for their mid-term exams, so I thought I would take this opportunity to provide a test of my own when it comes to discrimination in the workplace. I gave this presentation at my firm a few months ago and it was a good refresher course given what has transpired as a result of the MeToo movement.

The answers are at the end of the questions (no peeking). Here is the key to some terminology:

EE = Employee
S = Supervisor
ER = Employer

And of course, a disclaimer is in order: *this is not meant to operate as legal advice and you should consult an attorney concerning the specific problem at issue.*

True or False

1. Title VII is an anti-harassment statute?
2. Title VII and the Illinois Human Rights Act require employers to create anti-discrimination policies?
3. A discrimination complaint needs to be in writing to be valid?
4. An anti-discrimination policy should designate only one person to receive complaints?
5. Person investigating a harassment complaint should not address it until it reaches a pervasive or severe level?
6. A harasser needs to be terminated if he/she is found culpable?
7. A discrimination investigation needs to be done by an attorney or someone outside the company?

Substantive Questions and Answers

8. Former EE files discrimination charge. ER then investigates and fires S who was culprit. Is ER insulated from liability?
9. During an exit interview, EE tells ER that S was harassing EE. ER should ignore the complaint since EE is leaving the ER?
10. S swears at males and female employees. Sexual harassment?
11. EEs overhear males talk about sexual exploits. Comments are not directed at them and males do not know others are listening. Sexual harassment?
12. **Situation 1:**
    S harasses EE. EE complains to ER. One month later, S tells ER that EE engaged in misconduct, and S wants to terminate EE. How should ER handle?
13. **Situation 2:**
    Same as S1. But now, 6 months have passed, and S wants to terminate EE.
14. **Situation 3:**
    S dates EE at ER. Other employees dislike the favoritism and complain. Valid sexual harassment complaint?
15. **Situation 4:**
    Same as 3, but S engages in sex talk with all females, but not with males. Valid complaint?
16. S1 harasses EE. EE complains to ER. S1 tells S2 that EE engaged in misconduct. Based on that information alone, S2 fires EE. Valid retaliation complaint?
17. EE1 complains of harassment. S retaliates against EE2. Valid retaliation complaint?
18. Customer sexually harasses EE. EE complains to ER. Valid complaint?
19. ER and EE have employment agreement which requires arbitration of employment disputes, including sexual harassment. Would this prevent EE from having a jury trial?
20. Severance agreement with EE. Can EE still file EEOC/IDHR charge?

(Continued on Page 6)

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President's Message

2019: New Year, New You

By J. Matthew Pfeiffer

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

Already, a new year is upon us. For some of us, the only real change will be writing checks and drafting court orders with the year "2018" scribbled out and replaced with "2019" alongside those scribbles during the next few weeks. For many of us though, it also means that it's time for the seldom-welcomed and often-dreaded New Year's resolutions.

The custom of making New Year's resolutions has existed for millennia. Its origins are rooted in religion, but New Year's resolutions as we know them today are primarily secular in our culture. Instead of making promises to gods, the vast majority of people who make resolutions now do so for themselves with the hope of giving up a bad habit, accomplishing a specific goal, or otherwise making some sort of improvement in their personal lives from the prior year.

New Year's resolutions are the butt of many jokes because they very often are not achieved. Some folks say that resolutions are broken before they've even been made. But it certainly doesn't have to be that way. It is uniquely your choice whether you're going to fulfill that resolution or not. Whether you make good on a New Year's resolution is entirely up to you.

Whether you've made resolutions or not in the past, consider making at least one for the upcoming year. But instead of choosing the typical ones – the promise of a healthier diet, to give up smoking, to read more books and watch less television – think about making a resolution that affects your career. Some of my past business-related resolutions (that I've both made and achieved) have been:

1. To meet in person with at least one colleague and one client every week for the entire year just to solidify my personal relationships with those people;
2. To donate more of my personal time, professional skills and finances to charitable organizations; and
3. To connect with at least three new professionals, within or outside of the legal industry, each month during the entire year.

These resolutions undoubtedly helped me on a professional level, but they also were personally gratifying. That's one good thing about resolutions in business matters: if you can achieve them, you often will feel good about personally helping yourself in addition to helping your career.

In my examples, the key to the resolutions I made was that they were reasonable to achieve in my estimation. I didn't set goals that would be too vague or very difficult to accomplish. I put them in writing in a location where I would have to see them every day and ask myself what I've done that day or that week to accomplish those resolutions. When I achieved one, I would cross it out. And it felt good to cross items off those lists because I could see the progress being made.

New Year's resolutions are decisions that you make on your own when you want to do something or not do something to improve upon your most recent year. Take inventory of your professional lives and see if there is anything you'd like to improve upon, something you'd like to start doing, or something you'd like to stop doing. Ask yourself what it would take to accomplish that improvement or activity. Don't just make a resolution; create a plan for how you're going to fulfill it. As the great

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

From the Editor *(Continued from page 3)*

Answers:

1. False. Anti-discrimination statute.
2. False, but should have one to assert the *Faragher-Ellerth* affirmative defense.
3. False. Law does not require this.
4. False. What if that person is the harasser?
5. False. Law provides protections to employers if they have an anti-discrimination policy and take corrective action.
6. False. Corrective action can be any form of action intended to prevent further harassment.
7. False. But not a bad idea if the investigators have experience in those matters.
8. No. Also a bad idea because your best witness is now gone and likely will not be cooperative or helpful.
9. False. While the ER is not liable for harassment it had no knowledge of, it now has notice of S's behavior generally. ER should remind EEs to come forward with complaints or require company-wide training.
10. Unlikely because both groups treated the same.
11. Yes, second-hand behavior is actionable but it's on weaker end of the spectrum.
12. What policies/rules were violated? Have any males violated those policies in the past? If so, what was the discipline? If not, why not? ER should determine if discipline, if any, is warranted.
13. Same answers as before, but now, 6 months is a longer time and now it would be more difficult to show that S was engaging in retaliation.
14. Probably not. Paramour exception. S favors EE not because of her gender, but because of their relationship.
15. Yes, because behavior is now directed at other females.
16. Yes. S2 did not conduct independent investigation and relied exclusively on S1 who had the retaliatory motive. Known as the "cat's paw" theory.
17. Yes.
18. Yes. ER has control over the work environment and has the legal right to remove customers from the premises.
19. Yes. But Congress is considering changing this.
20. Yes, but one cannot recover damages.

Hope everyone passes with flying colors!

Now on to more important things. **Christopher DiPlacido** provides us with an in-depth look at the business records exception to the hearsay rule. This is a must-read article for litigators. **Gran McKerlie** gives us a historical overview of the Fourth Amendment and its application to traffic stops by the police. Professor **Jeffrey Parness** educates us on international child relocations and how that intersects with Illinois law. **Teresa Dettlof** was the Article Editor for this issue and **David Schaffer** was the Illinois Law Updates Editor; their fine attention to detail is much appreciated. □

Articles

Articles Editor

Teresa Dettlof

Teresa M. Dettloff obtained a bachelor's degree in International Relations and a minor in Russian Language from Michigan State University. She graduated from Loyola University Chicago School of Law in 2017. Teresa currently practices in the area of medical malpractice defense at Brennan Burtker LLC in Chicago, Illinois.

Objection, Hearsay!

Eliminating Confusion on Business Records Admissibility

By Christopher DiPlacido

A primer on Supreme Court Rule 236 and its interaction with the Illinois Rules of Evidence (S.Ct. Rule 236, Il. Rule Ev. 803(6) and 902(11)).

Hearsay exceptions are the hardest thing to understand about evidence. *Preski v. Warchol* recognized that even a lot of judges get it wrong by reading limitations into Rule 236 that are not in the text of the rule itself. [1] Indeed, the business records exception to the hearsay rule is rife with pitfalls for the unprepared practitioner seeking to admit documents. Confusion often enters when an opponent, or sometimes the court itself, voices objection. Standard objections, such as authorship by a third party, or lack of personal knowledge, are objections based on the hearsay nature of the evidence. Most of the time, the record is hearsay, but that misapprehends the point of an exception.

How should we think about hearsay exceptions? Exceptions evolved in the law because they recognized that, despite the hearsay nature of the statement, the evidence nevertheless contained sufficient indicia of reliability.[2] Business records are among the well-known exceptions.[3] In the case of business records, the exception is founded on a routine of accuracy, because a record is useless unless accurate.[4] Accuracy is the indicia of reliability underlying this exception, not the identity of the record's proponent.[5]

The foundation for admitting business records is designed to ensure the accuracy of the record. To lay a foundation for the record in Illinois, there are two requirements: (1) that the

1. *Preski v. Warchol Construction Co.,* 111 Ill. App. 3d 641, 628 (1st Dist. 1982). ("While some cases, reading into [Rule 236] limitations not set forth, would require the custodian to be the preparer of the records, *the better rule is to the contrary.*" [Emphasis added.]).
2. *City of Chicago v. Old Colony Partners*, 364 Ill. App. 3d 806, 819 (1st Dist. 2006) ("The exceptions to the hearsay rule are well established in the law as providing indicia of reliability to overcome the presumption against hearsay statements.").
3. For a historical perspective on the business-records exception, see *People v. Wells,* 80 Ill. App. 2d 187, 193 (5th Dist. 1967) ("Although in the purely technical sense, the testimony of a supervisor under these circumstances is hearsay, it is of a type that falls within a well recognized exception to the general rule applicable to hearsay testimony. We have seen the development of the rules of evidence governing the admissibility of business records, commencing with the rule in England that shop-books of "divers men of trades and handicraftsmen" were admissible in evidence of "the particulars and certainty of the wares delivered" (Wigmore on Evidence 347, 3rd Edition), and as presently set forth in Supreme Court Rule 236. The basis for the admissibility of the records is that the circumstantial probability of their trustworthiness is a practical substitute for cross-examination of the individual making the entries. The same reasoning has been applied to make admissible entries made by one individual on the basis of statements or memoranda made by another person.")
4. *City of Chicago*, 364 Ill. App. 3d at 819 ("The rationale under the exception for business records is that businesses are motivated to keep records accurately and are unlikely to falsify records upon which they depend."); *Birch v. Township of Drummer,* 139 Ill. App. 3d 397, 406 (4th Dist. 1985) ("The rationale for the rule rests on the notion that in carrying on the proper transaction of business, such records are useless unless accurate.")
5. *Birch,* 139 Ill. App. 3d at 407 ("The business record exception to the hearsay rule depends on a routine of accuracy."); *Preski*, 111 Ill. App. 3d at 652 ("The accuracy of the records does not depend on whether its preparer is the custodian but whether they were, as here, prepared in the regular course of business under such circumstances as to call for accuracy in the making of the record."); *Krawczyk v. Centurion Capital Corp.,* No. 06-C-6273, 2009 U.S. Dist. LEXIS 12204 at 16, 17 (N.D. Ill. 2009) ("Although Kavanagh did not author the record in question, the business record exception does not impose any such requirement. *** As set forth earlier, to establish that a writing falls under the business records exception, the party need not produce the individual who actually created the record.")
6. S. Ct. Rule 236. See also *Kimble v. Jorgenson Company,* 358 Ill. App. 3d 400, 414 (1st Dist. 2005) ("Because the accuracy of the record is presumed (for how could an inaccurate record be of any value to the business that produced it?), *Rule 236* requires only that the party tendering the record satisfy the foundational requirements that (1) the record was made in the regular course of business and (2) at or near the time of the event or occurrence."); *Patrick Apa v. National Bank of Commerce*, 374 Ill. App. 3d 1082, 1087 (1st Dist. 2007) ("We believe the *Kimble* court's focus on the foundational evidence surrounding the making of the purported business record properly reflects the language and purpose of *Rule 236*.…")
7. *In re Estate of Weiland*, 338 Ill. App. 3d 585, 601 (2d Dist. 2003) ("We note that the fact that a record is made in response to a singular occurrence or event does not require a conclusion that it was not made in the regular course of business."); see also *Kimble*, 358 Ill. App. 3d 400.
8. *Preski.,* 111 Ill. App. 3d at 650 ("[T]he purpose of the rule is to liberalize the rules of evidence pertaining to regular business records and to eliminate the need for the preparer's testimony. . . ."); *Agrico Chemical Corp. v. Forreston Fertilizer Co.,* 32 Ill. App. 3d 986, 989-90 (2d Dist. 1975) ("The modern trend necessarily tends to be more liberal as to the admission of business records as business gets more complicated and transactions are broken down into various operations so that no particular person can identify any particular operation. . . . Rule 236 appears to be a necessary modification of the general hearsay

record was made at or near the time of the event it records; and (2) that it was made in the regular course of business.[6] Although the record may have been made in response to a single occurrence (e.g., the business does not normally maintain such records), it is nevertheless admissible when its proponent testifies that it was made in response to that event.[7] Examples include an on-site accident report (which we certainly hope is not a regular occurrence) or a status report of an account in direct response to an inquiry about the account.

The foundation does not require proof that the record is not hearsay. As previously mentioned, most of the time the record is hearsay, because while its proponent may be familiar with how the business uses the record, the proponent will not personally have authored it. The foundation is only to ensure that the record meets a routine of accuracy.

Finally, the rule has become increasingly liberal in recognition of the increasing complexity of modern business transactions, and favors the admission of relevant evidence.[8] The Illinois Rules of Evidence have embraced this trend.

Third-Party Records: The Same Standard Applies

The admission of a business record is not determined solely by the identity of the proponent, or the fact that the record's author may not be a party to the litigation at hand.[9] It is determined by a motive for accuracy behind the generation of the record, and whether that record is used and relied on. It is immaterial whether a specific witness can identify the entries as being connected with the particular transaction in question, from his personal knowledge, as long as he is familiar with the use of the record.[10]

A third-party record authorized or commissioned from a third party will qualify when it is used or relied on by a party.[11] A third party record that is merely retained in the files of another business *may* qualify for the exception so long as its proponent lays a proper foundation. Earlier Illinois decisions appeared to

rule requiring proper foundation for the admission of certain types of evidence and gives recognition to the growing complexity of modern business methods and procedures. We agree with the trial court that the records in question here were admissible under that rule.") *Birch,* 139 Ill. App. 3d at 406 ("The modern trend necessarily tends to be more liberal in the admission of business records as business becomes more complex. (citing Cleary & Graham, Handbook of Illinois Evidence, sec. 803.10, at 567 (4th ed. 1984). . . .")); *Preski,* 111 Ill. App. 3d at 650 ("The basic modern approach to the competency of evidence starts from the premise that all evidence is competent until the reverse is shown.") *Kimble*, 358 Ill. App. 3d at 417 ("While admissibility of photographs depicting injuries is stated to be within the sound discretion of the court, the standard to be applied favors admissibility. See *Darling v. Charleston Community Memorial Hospital,* 50 Ill. App. 2d 253 (4th Dist. 1964); see also *Hiscott,* 324 Ill. App. 3d 114, 124 (2d Dist. 2001) (stating that, generally, relevant evidence is admissible), rev'd on unrelated grounds by *Thorton v. Garcini*.

9. *Birch*, 139 Ill. App. 3d 397 at 406 ("The records can be either those of a party or of a third person.").
10. *Ford Motor Credit Co. v. Neiser,* 196 Ill. App. 3d 515, 522 (1st Dist. 1990) ("In *Atlee Electric Co. v. Johnson Construction Co. (1973), 14 Ill. App. 3d 716, 303 N.E.2d 192*, the court allowed records to be introduced even though they were typed by one department from material developed in another department and no specific witness could identify the entries as being connected with the particular transaction in question, from his personal knowledge."); *City of Chicago*, 364 Ill. App. 3d at 819 ("Anyone familiar with the business and its procedures may testify as to the manner in which records are prepared and the general procedures for maintaining such records in the ordinary course of business. *Raithel v. Dustcutter, Inc.,* 261 Ill. App. 3d 904, 909, (4th Dist. 1994)).
11. *Birch,* 139 Ill. App. 3d 397; *Argueta v. Baltimore & Ohio Chicago Terminal R.R.,* 224 Ill. App. 3d 11 (1st Dist. 1991).

About the Author

Christopher DiPlacido graduated *cum laude* from Wabash College. While serving in the United States Marine Corps Reserves, he attended DePaul University College of Law. He is Senior Attorney with Resurgence Legal Group, P.C. He coauthored the 2014 Practice Handbook, *Collection Litigation: Representing the Creditor.* He has presented seminars for the Illinois Institute of Continuing Legal Education, Illinois Creditors Bar Association, and Illinois State Bar Association.

> **“Accuracy is the indicia of reliability underlying [the business records’] exception, not the identity of the record’s proponent.**

exclude retained records altogether, but a more recent case to analyze Rule 236 took a more expansive view.[12] Considering the earlier decisions, the court found that retained documents were not inadmissible *per se*, but only that a proper foundation had not been laid.[13] Earlier cases are not contrary approach to the modern trend, but they establish that without a proper foundation, the record is inadmissible.

A business that acquires the interest of another is part of the business records exception in Illinois. In *Estate of Weiland*, decedent Weiland had originally opened an account at Affiliated Bank on January 3, 1991.[14] Affiliated was acquired by Comerica Bank, after which Weiland opened two additional accounts on February 17, 1994. Finally, LaSalle Bank acquired Comerica Bank. At trial, several witnesses were called from LaSalle Bank to testify to the accounts that originated with Affiliated and Comerica. The ability of employees from LaSalle Bank to testify to records originating with Affiliated and Comerica was not challenged despite that fact some them had never worked for Comerica or Affiliated.

The Rule 236 discussion in *Estate of Weiland* centers on a July 8, 1997 letter written by Lisa McCarthy, who was employed as a personal banker at LaSalle Bank in 1997, some three to six years after the Affiliated and Comerica accounts originated. Her letter, written at the request of the Lake County public guardian, summarized the status of Wieland’s accounts at LaSalle Bank. The objections to the letter will be familiar to practitioners who have wrestled with these issues at trial: first, it was not a record of a transaction; second, it was not made within a reasonable time of the transaction; and third, it was not made in the regular course of business. The court disagreed with all three objections, allowing the evidence, given its proper foundation.

Some readers will recognize that, had *Estate of Weiland* been brought in 2012, there would have been yet a fourth merger, when Bank of America bought LaSalle Bank in 2007. Such transactions typify the present day and necessitate the modern trend to admit all relevant evidence.

Consumer loan defaults have made headlines since 2008. The fact that records are transferred to other businesses indicates commercial value, while at the same time evidences the increasing complexity of commercial transactions. Transfers are now frequent with all forms of consumer debt, including car notes, mortgages, student loans, and credit cards. At many car dealerships, the note itself assigns the loan to another lender. When one business buys the asset of another, the accuracy of its predecessor’s records is presumed.[15] Otherwise, the records have no value, and could not be sold in an open economic market.

Looking at financial documents such as banking records and credit card statements, it is fair to say that most litigants, practitioners, and judges are familiar with their use. Anyone familiar with the use of the record may testify. As well, per

12. For records retained, but not commissioned, see, e.g., *Pell v. Victor J. Andrew High School,* 123 Ill. App. 3d 423 (1st Dist. 1984); *International Harvester Credit Corp. v. Helland,* 151 Ill. App. 3d 848 (2d Dist. 1986).
13. *Apa v. National Bank of Commerce*, 374 Ill. App. 3d 1082, 1087-88, (1st Dist. 2007).
14. *Weiland*, 338 Ill. App. 3d at 600.
15. *Krawczyk,* 2009 U.S. Dist. LEXIS 12204 at 11-12, (“Given the common practice of financial institutions buying and selling loans, the court in *Beal* determined that it is normal business practice to maintain accurate business records regarding such loans and to provide them to those acquiring the loan. *** The *Beal* court also stated that ‘to hold otherwise would severely impair the ability of assignees of debt to collect the debt due because the assignee’s business records of the debt are necessarily premised on the payment records of its predecessors.”)

the federal circuits, a foundation for admissibility can be established by judicial notice of the nature of the business and the nature of the records as observed by the court, particularly in the case of banking and similar statements.[16] Unless there is some evidence from a business record's opponent that a credit issuer or other federally regulated bank or lending institution was not following applicable laws, the statements should be admissible with proper foundation.[17] The rule in *Old Colony Partners* and *Birch* is the best approach: does the need for accuracy outweigh a motive for falsification?

How to Admit Evidence Authored by Parties Other Than Their Proponent

A foundation for admitting records maybe established through testimony of the custodian of records or another person familiar with the business and its mode of operation. *Patrick Apa v. National Bank of Commerce* best illustrates the breadth and liberality of Rule 236.[18] Apa purchased a bus from a third party, and the defendant bank ("NBC") had failed to file its lien. The bus was repossessed by NBC, Apa sued for conversion, with trial held on the issue of damages.

Apa attempted to introduce his personal banking statements from LaSalle Bank to prove loss of income without the bus. NBC, argued that Apa needed an employee from LaSalle Bank to testify to the record's creation. The court disagreed, explaining "more recent jurisprudence has recognized that admissibility under the business records exception is not determined by the identity of the proponent of the document."[19]

Here, the problem was that "[a]lthough his bank statements could have been admitted under the business records exception to the hearsay rule despite their preparation by an entity other than their proponent, Apa did not present any evidence of the circumstances of their creation."[20]

Be aware that the documents were not admitted in *Apa*. Some jurists use the specific holding to conclude that third-party documents are inadmissible. However, the reason they were not admitted is not because they were inadmissible, but because *Apa* failed to lay the proper foundation. The *Apa* court seemed to think it was perfectly acceptable for Mr. Apa himself to lay the foundation for records generated by LaSalle Bank. This is in accord with the modern rule that anyone familiar with the use of the record may testify, as well as the rule adopted in some federal circuits on the general reliability of banking records.

Once you elicit testimony from your witness establishing the two threshold questions in Illinois Supreme Court Rule 236, the evidence should be admitted regardless of authorship. Nevertheless, when laying a foundation for third party records, you should consider additional questions, as supported by the case law. The testimony you elicit from your witness is designed to show the credibility of the records. These include that the record was used and relied on. In some cases, the use goes so far as incorporation of third-party record into one's own records.[21]

How Much Knowledge is Sufficient?

The defendant in *City of Chicago v. Old Colony Partners, L.P.*, facing building code violations, hired an independent engineering firm to show that the historic Old Colony building was in compliance.[22] At trial, the building manager for Old Colony testified to documents generated by the engineering firm, and the court admitted the records. She was not an engineer, and lacked the technical background to testify how the records were created. In affirming the trial court, the appellate court held that a layman could testify to third-party engineering reports that her company had commissioned. Even though she did not know how the documents were generated, she was familiar with their use. Thus, knowing how to use a record satisfies the Rule 236 exception. The witness does not have to know how the records were generated from her "personal knowledge".[23]

Overcoming Common Objections

Confusion arises because objections are based on the fact that business records are hearsay. However, because they fall within a class of exceptions to the general rule prohibiting hearsay,

16. *U.S. v. Samaniego*, 187 F. 3d 1222, 1224 (10th Cir. 1999), citing *U.S. v. Johnson*, 971 F.2d 562, 571 (10th Cir. 1992), in turn citing *F.D.I.C. v. Staudinger*, 797 F.2d 908, 910 (10th Cir. 1986), in turn citing *Weinstein's Evidence*, 803-179 (1985).
17. *Preski,* 111 Ill. App. 3d at 650. ("The basic modern approach to the competency of evidence starts from the premise that all evidence is competent until the reverse is shown."); *Krawczyk,* 2009 U.S. Dist. LEXIS 12204 at 36-37, ("Any other rule would require financial institutions to verify every entry in the account history of every loan that it bought from another institution — an untenable proposition absent a red flag concerning the record keeping practices of the prior institution.").
18. *Apa*, 374 Ill. App. 3d 1082.
19. *Id.* at 1087.
20. *Id.* at 1088.
21. *Krawczyk,* 2009 U.S. Dist. LEXIS 12204 at 12; *see also U.S. v. Adefehinti,* 510 F.3d 319, 326 (D.C. Cir. 2007) (finding that pursuant to "the rule of incorporation," the record of which a business takes custody is thereby "made" by the business within the meaning of the rule); *Matter of Ollag Construction Equipment Corp.,* 665 F.2d 43, 46 (2d Cir. 1981) (finding that "business records are admissible if witnesses testify that the records are integrated into a company's records and relied upon in its day-to-day operations"); *U.S. v. Carranco,* 551 F.2d 1197, 1200 (10th Cir. 1977) (holding that freight bills, though drafted by other companies, were business records of a shipping company because they were "adopted and relied upon by" the shipping company).")
22. *City of Chicago,* 364 Ill. App. 3d at 806.
23. *Id.* at 819.

they are allowed into evidence. Thus, all objections to a business record on the basis of its hearsay nature are red herrings. The only valid objection is that a record's proponent failed to establish the two foundational questions.

Lack of Personal Knowledge
This is an objection raised when the person introducing the record did not author it. However, lack of personal knowledge does not affect admissibility, only the weight. It is in Rule 236 itself: "All other circumstances of the making of the writing or record, *including lack of personal knowledge by the entrant or maker*, may be shown to affect its weight, but *shall not affect admissibility*." If you have laid a foundation, the record is admissible, regardless of authorship. The judge, or trier or fact, may construe lack of authorship against the weight afforded the record, but may not use authorship as a means of excluding it.

Consider what is happening with an objection to better understand how to defeat it. You opponent is asking the court to exclude this evidence by applying the hearsay rule. You are asking the court to admit the evidence on the basis that business records are an exception to the hearsay rule. If your client has testified that the records were made (or integrated or maintained) in the normal course of business, near the time of the transaction, then you have demonstrated that the exception applies.

Double Hearsay
One supposes double hearsay describes an out-of-court-statement about another out-of-court-statement with the implication that the evidence is somehow twice removed from the testimony of an authenticating witness. The reality is that if double hearsay exists as a proper objection at all, it does not apply as a bar to admitting business records.

In *Estate of Weiland* discussed above, the estate objected to the admission of Lisa McCarthy's letter. One specific objection was the letter was not a record of a transaction; it was a memorandum of another memorandum and therefore constituted double hearsay. The court disagreed:

> *Moreover, even if respondent's characterization of the letter as 'double hearsay' is correct, we find their argument unpersuasive. Respondents do not cite any authority for the proposition that 'double hearsay' falls outside the ambit of Rule 236, and we find nothing in Rule 236 that disqualifies what respondents categorize as 'double hearsay.'…In fact…Rule 236 expressly provides that lack of personal knowledge by the maker may affect the weight of the evidence but not its admissibility.*[24]

Admission under the Illinois Rules of Evidence
We have several appellate court opinions considering Illinois Rules of Evidence 803(6) or 902(11), which address business records. These opinions hold that the Illinois Rules of Evidence do not alter existing case law under Supreme Court Rule 236, so we can amplify the rules in light of earlier case law.

In construing the Rules of Evidence, the definitional sections are important. Take Article IX: Does 902(11) require the certification of a custodian or other qualified person to introduce a business record authored by a third party? Maybe not. How may we arrive at this conclusion?

Our examination starts with Article VIII, Hearsay. Rule 803 governs hearsay exceptions. Exceptions to the hearsay rule contain factors mitigating the acknowledged unreliability of hearsay evidence, such that we have decided to trust the evidence anyway. In the case of business records, we trust them because inaccurate business records are useless. In the case of banking statements, we trust them even more because

24. *Weiland*, 338 Ill. App. 3d at 600-01.

of the additional level of statutory control governing banks, so much so that some federal circuits take judicial notice of their likelihood to be accurate. Public records are another example. We do not require the recorder of deeds to come to court to testify about the entry of a quitclaim deed when pursuing a fraudulent conveyance action.

Rule 803 states, in its very subheading, that the availability of the declarant is immaterial. Another way of thinking about it might be that the declarant is excused. Rule 803(6) includes business records among the list of exceptions. Section (6) requires the record to have been made by, or transmitted from, a person with knowledge, but it does not require that person be present to lay a foundation. To reiterate, that is the point of an exception. If the declarant were available to testify, we would not need the exception, which is why 803 specifically states "availability of declarant immaterial". This reading of the Rule coincides with existing case law.

Moving on, Rule 803(6) also references 902(11), but we look first to 901 to establish our definitions for Article IX. Section (a) says the requirement of identification is satisfied by evidence that the matter in question is what its proponent claims. What type of evidence satisfies the requirement? Section (b) lists 10 examples, by way of illustration, not limitation. Section (b)(1) includes the age-old method of introducing any evidence: by a witness with knowledge. And what kind of knowledge? The extant case law does not require "personal knowledge", and does not require the entrant to be the maker of the record. As well, a layman can introduce evidence generated by an expert, even if the lay witness does not know how the record was generated, so long as she is familiar with its use.[25]

The beginning of 902 explains that extrinsic evidence is not required if you have certification. In other words, if your client seeks to introduce business records pertaining to an asset purchased from another business, your client must lay the foundation. That is extrinsic evidence. However, if your client has the 902(11) certification from the business that sold your client the asset, the foundational requirement is excused because it has been made via the certification.

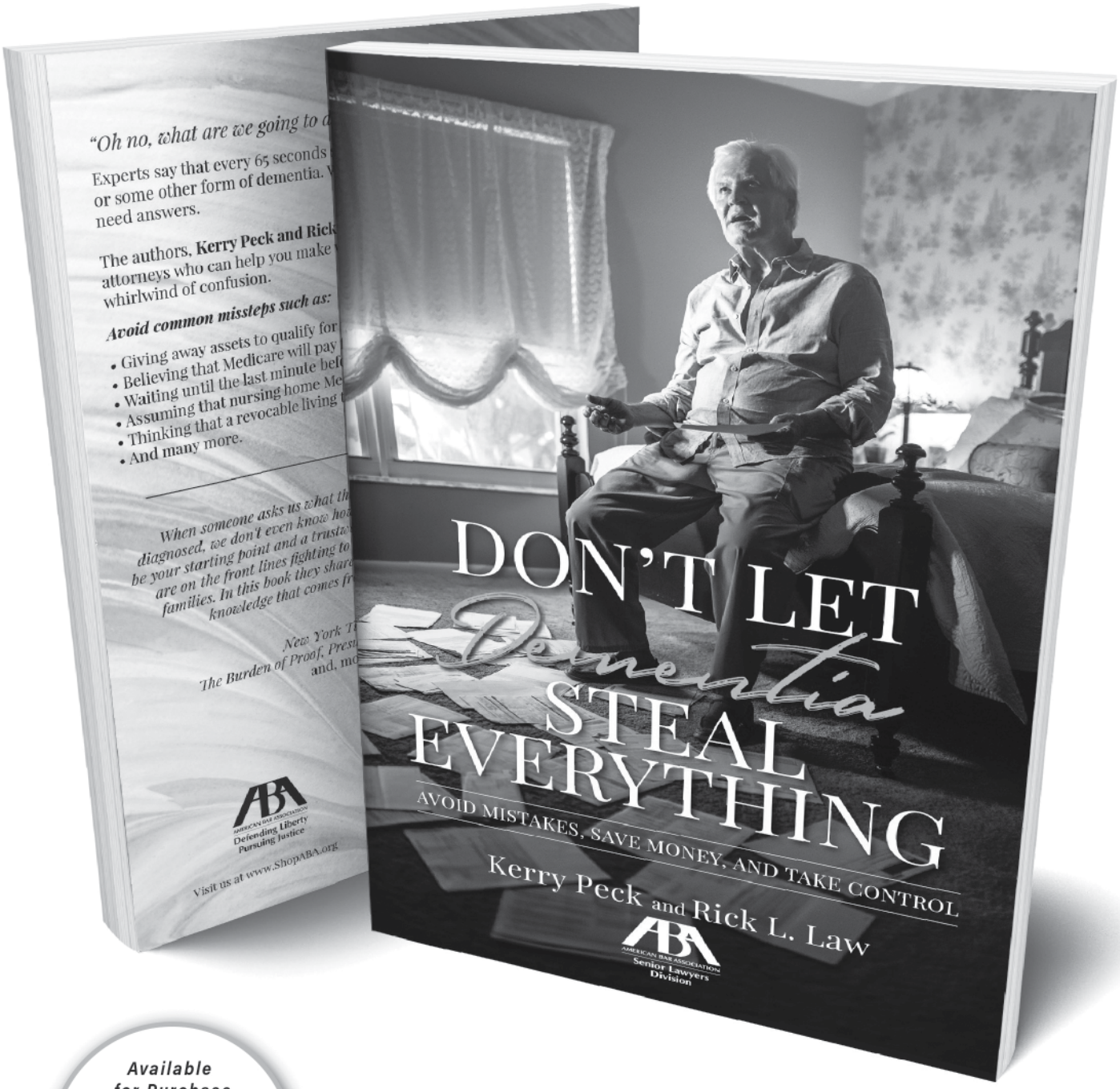
This reading of 902 is consistent with earlier case law. Both *Birch* and *Old Colony* involved engineering reports. When the opponents objected to the documents, the courts noted that the opponents were aware of the documents and their authorship through discovery. Had there been a question about the records, they had every opportunity to depose the engineering firms who generated the records. They chose not to do so, essentially gambling on excluding the records through a hearsay objection; but the courts held that these were business records, and the hearsay objection did not apply.

Conclusion

Why are Supreme Court Rule 236 and the Illinois Rules of Evidence so lenient? The general rule is that all relevant evidence should be admitted. Moreover, the basic modern approach to the competency of evidence starts from the premise that all evidence is competent until the reverse is shown. Favoring the admission of relevant evidence means the burden actually shifts, and if your foundation answered the two threshold questions, a party opposing the record has the burden of showing why the evidence is not trustworthy. □

25. "We observe first that the adoption of the Illinois Rules of Evidence relating to the admission of business records did not make any substantive changes to the requirements under *Illinois Supreme Court Rule 236." JPMorgan Chase Bank v. East-West Logistics*, 9. N.E.3d 104, 126 (1st Dist, 2014).

"OH NO, WHAT ARE WE GOING TO DO?"



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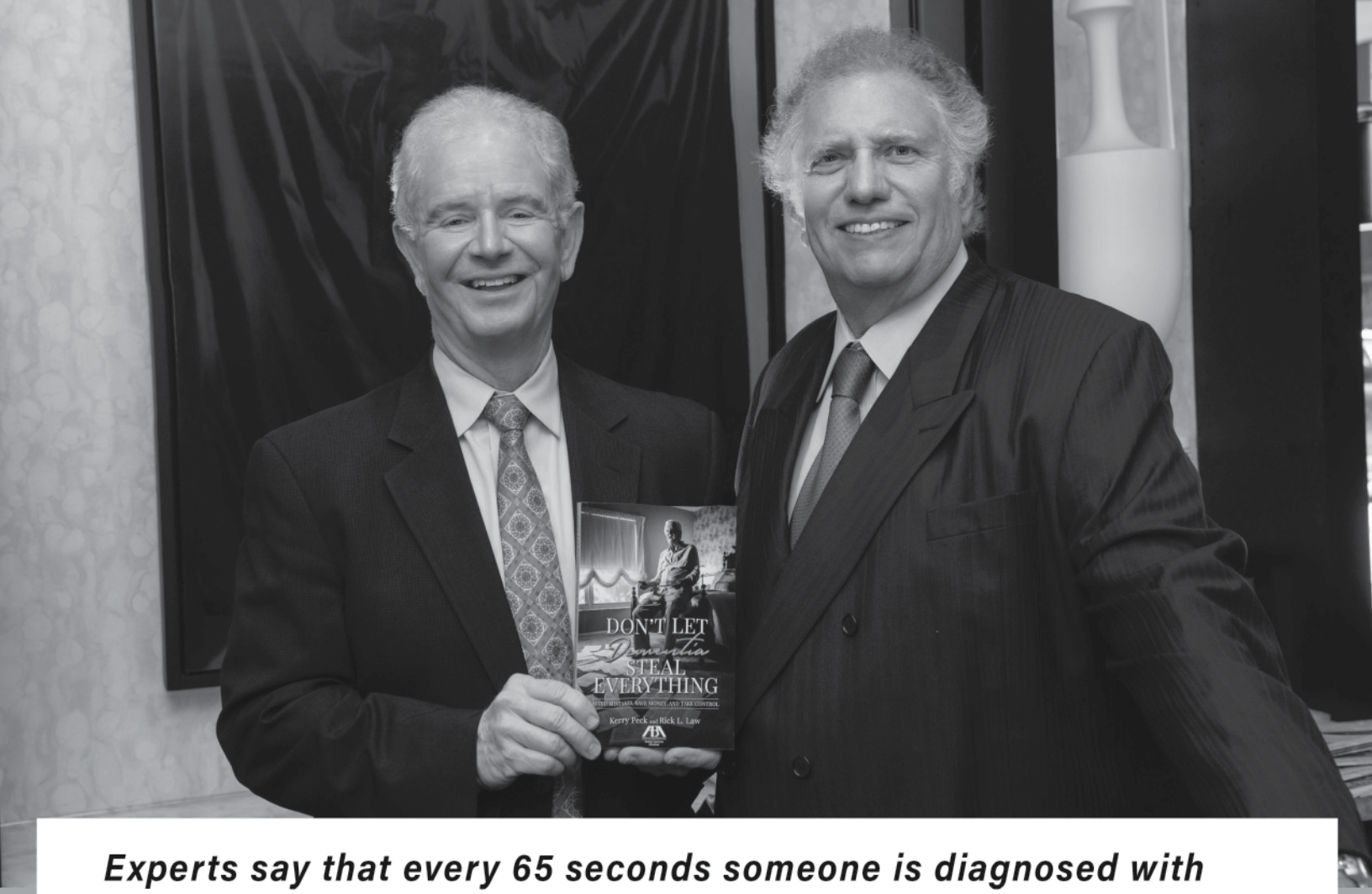

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The Diminishment of the 4th Amendment While Driving:

Stops And Seizures Based On Criminal Activity,* Noncriminal Civil Traffic Violations Also Included

By Gran McKerlie

Introduction

The most common interaction between civilians and police officers comes in the form of a "routine" traffic stop.[1] Due to the voluminous amount of traffic statutes at the state and municipal level, criminal defense and State's attorneys battle over whether the "routine" traffic stop is permissible more than any other Fourth Amendment issue.[2] The Supreme Court has made clear that stopping an automobile or other motor vehicle for a traffic or equipment violation and detaining its occupants constitutes a "seizure," for purposes of the Fourth Amendment.[3] However, the jurisprudence regarding the permissibility of a routine traffic stop under the Fourth Amendment isn't all that clear… Or routine. As recent as 2007, the Sixth Circuit Court of Appeals in *United States v. Sanford* conceded: "There is a degree of confusion in this circuit over the legal standard governing traffic stops."[4] The confusion stems from whether a traffic stop is permissible under the Fourth Amendment's probable cause standard, the well known constitutional standard for arrest, or the reasonable suspicion standard as articulated in *Terry v. Ohio*,[5] or a combination of both.[6]

This Article will not take a stance on whether the probable cause or reasonable suspicion standard governs the permissibility of traffic stops. Rather, this Article will muddy the waters even more and perhaps add litigation fodder to Fourth Amendment jurisprudence by arguing that traffic stops based

1. Jordan Blair Woods, *Decriminalization Police Authority, and Routine Traffic Stops*, 62 UCLA L.Rev. 672 (2015).
2. Wayne R. LaFave, The *"Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment,* 102 MICH. L. REV. 1843, (2004).
3. See *Delaware v. Prouse,* 440 U.S. 648, 653 (1979).
4. *United States v. Sanford,* 476 F.3d 391, 394 (6th Cir. 2007).
5. *Terry v. Ohio,* 392 U.S. 1 (1968).
6. Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment, § 9.3(a) Grounds for Stop,* (5th Ed.) (2018).

solely on a civil traffic violation (as opposed to stops based on criminal traffic violations) should be prohibited by the Fourth Amendment.[7]

Generally, the Fourth Amendment allows a law enforcement officer to effectuate a "stop" or "seizure" when they have probable cause, knowledge of reasonably trustworthy facts and circumstances sufficient to warrant a reasonably prudent person to believe that the suspect has committed or is committing a *crime*,[8] or reasonable suspicion, the authority to briefly detain a person for investigative purposes even if they lack probable cause to arrest if supported by articulable facts of *criminal activity* or articulable suspicion the defendant is armed and dangerous.[9] Currently, the Fourth Amendment has been diminished so much that it fails to prevent warrantless stops and seizures for even noncriminal activity, such as civil traffic violations. But before delving deeper into that argument, it must be made clear that there are actually meaningful differences regarding other protections in the Constitution when a legislature decides to codify a statutory scheme as "criminal" instead of "civil." The differences are not just ceremonial.

Distinction Between Criminal and Civil Penalties Regarding the Fifth and Sixth Amendment and Other Non-Fourth Amendment Constitutional Provisions

"The distinction between a civil penalty and a criminal penalty is of some constitutional import."[10] The meaningful difference between a criminal and civil proceeding are the various protections in the Bill of Rights that are only afforded to criminal defendants. As opposed to a civil proceeding, the defendant in a criminal proceeding is protected by the the Fifth Amendment in regards to the privilege against self-incrimination and double jeopardy;[11] the Sixth Amendment, which guarantees a speedy trial, trial by jury, confrontation of witnesses, compulsory process, and assistance of counsel;[12] Article I, Section 9 referring to the prohibition on *ex post facto* laws;[13] and the requirement that guilt be proven beyond a reasonable doubt.[14] Usually, the distinction between a criminal or civil statutory scheme is relatively easy to decipher and thus determines what procedural protections are applicable to those accused of a violation.[15] However, it is not uncommon where the legislature designates a penalty as "civil" but the punishment is essentially "criminal in nature." When this occurs the defendant may challenge the constitutionality of the statute; courts will then have to determine whether a proceeding designated by the legislature as "civil" is essentially punitive or so "criminal in nature" that the statute should instead be classified as "criminal," and thus entitle the defendant to the various criminal procedural protections mentioned above.[16] Thus, in states or municipalities where a traffic violation and resulting proceeding is "civil" instead of "criminal" the legislature is left free to divest the accused of their criminal procedural protections in the Bill of Rights.[17] With that being said, the jurisprudential make up regarding what test

7. See *State v. Holmes*, 569 N.W.2d 181, 185 (Minn.1997) ("*Terry* authorizes a police officer to temporarily seize a person on less than probable cause. As a protective measure, the Supreme Court necessarily has limited such seizures to those situations where the suspected violation is serious. As a result, we hold that a police officer who merely has reasonable suspicion that a parking violation has occurred cannot seize an individual for the purpose of investigation").
8. *Beck v. Ohio,* 379 U.S. 89 (1964).
9. *Terry v. Ohio,* 392 U.S. 1 (1968).
10. *United States v. Ward,* 448 U.S. 242, 248 (1980).
11. U.S. Const. Amend V.
12. U.S. Const. Amend VI.
13. U.S. Const. Art. I, § 9.
14. *Ward,* 448 U.S. 242, 248 (1980); *Addington v. Texas,* 441 U.S. 418, 428 (1978); *United States v. Regan,* 232 U.S. 37, 47-48 (1914).
15. See e.g., A.R.S. § 28-1591 (Violation of traffic statute treated as civil matter); Knoxville City Code § 1-9 (Any person violating any of the provisions of this general penalty article shall be guilty of a *misdemeanor*).
16. See *supra*, notes 11-15; see, e.g., *Kansas v. Hendricks,* 521 U.S. 346 (1997) (held a civil statute which required as punishment involuntary commitment based on a "mental abnormality" for pedophelia did not violate double jeopardy even after the defendant served a criminal prison sentence); *United States v. Ursery,* 518 U.S. 267 (1996) (held civil property forfeitures did not constitute a "punishment" for purposes of the double jeopardy clause in the Fifth Amendment); *Allen v. Illinois,* 478 U.S. 364 (1986) (held defendant had no privilege against self-incrimination in a sexually dangerous person proceeding because those proceedings were civil in nature); *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963) (held a civil statute that divested a U.S. citizen of their citizenship was penal in nature thus entitling defendant to criminal procedural protections in the Fifth and Sixth Amendments).
17. See *supra,* notes 11-17.

About the Author

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the court employs to determine whether a nominally civil proceeding will be so "punitive in nature" to entitle a defendant to criminal procedural protections is beyond the scope of this Article.[18] The point of this mild digression was to merely elucidate that other Constitutional provisions are guaranteed or denied when a legislature decides to codify a statute as criminal or civil.[19]

The Supreme Court Has Not Recognized a Distinction Between "Criminal" and "Civil" Traffic Violations for Purposes of 4th Amendment Stops and Seizures

After recognizing the constitutionally important distinctions between a "civil" proceeding and a "criminal" proceeding, this Article will now assert that the Fourth Amendment is violated when a law enforcement officer effectuates a traffic stop based solely on a civil traffic violation. Currently, the Supreme Court has not drawn a distinction in regards to stops and seizures under the Fourth Amendment between traffic stops based on criminal traffic violations and civil traffic violations.[20]

At first, most lawyers may think this argument is superficial or draws a distinction without a difference. But again, there are key distinctions between "civil" and "criminal" proceedings when it comes to whether the Fifth and Sixth Amendments, as well as the Article I, Section 9 prohibition on *ex post facto* laws, and the proof beyond a reasonable doubt standard, attach.[21] Likewise, applying a strict interpretation of both the probable cause and reasonable suspicion standards, the Fourth Amendment should only permit vehicle stops based upon suspicion of *criminal* activity. Thus, if a given traffic offense is codified as "civil" instead of "criminal" because the legislature has decided a violation of such an offense isn't serious enough to merit criminal procedural protections in the Fifth and Sixth Amendments,[22] then along the same lines, a "civil" violation being committed also shouldn't be serious enough to permit a seizure under the Fourth Amendment.[23]

> **"Currently, the Fourth Amendment has been diminished so much that it fails to prevent warrantless stops and seizures for even noncriminal activity, such as civil traffic violations.**

In addition to the Supreme Court never making a distinction between stops and seizures based on criminal or civil traffic violations, there is also confusion among circuits whether the probable cause standard, or the lower standard of reasonable suspicion is appropriate to effectuate a routine traffic stop.[24] Today, most courts use a reasonable suspicion standard to determine whether the vehicle stop was permissible under the Fourth Amendment.[25] Regardless, the Supreme Court has never held that the reasonable suspicion standard applies to police initiations of all routine traffic stops, especially those based solely on civil traffic violations.[26]

18. For a critique of the Supreme Court's current test to determine when a nominally civil proceeding becomes so "criminal in nature," see Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts,* 94 GEO. L.J. 1, 5 (2005) ("the legislature is left free to interpret or modify the civil rights guaranteed to certain suspects and defendants by the Constitution so long as the legislature labels the penalties imposed as 'civil' and provides at least a fig leaf of apparent consistency with traditional (albeit conflicting) notions of civil law."))
19. See *supra,* notes 11-15.
20. Woods, *supra* note 1, at 712.
21. See *supra,* notes 11-15.
22. *Id.*
23. Woods, *supra* note 1 at 679-80 ("since 1970 twenty-two states have decriminalized minor traffic violations by removing criminal sanctions, reclassifying the violations as noncriminal offenses, and streamlining their adjudication to the administrative realm. These decriminalization reforms have centered on modifying sanctions and have rarely restricted police authority and discretion in routine traffic stop settings.")
24. See *supra*, note 5; see also Woods, supra note 1, at 713 n. 181.
25. Woods, *supra* note 1, at 713 n. 181 (noting that most courts have assumed that Terry's reasonable suspicion standard applies to routine traffic stops. Specifically, the federal circuits that apply a reasonable suspicion standard to routine traffic stops are the First, Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and D.C.). See also *United States v. Chaney*, 584 F.3d 20, 24 (1st Cir. 2009); *United States v. Stewart*, 551 F.3d 187 (2d Cir. 2009); *United States v. DelfinColina*, 464 F.3d 392 (3d Cir. 2006); *United States v. Breeland*, 53 F.3d 100, 102 (5th Cir. 1995); *United States v. Lewis*, 910 F.2d 1367 (7th Cir. 1990); *United States v. Martin*, 411 F.3d 998 (8th Cir. 2005); *United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000); *United States v. Callarman,* 273 F.3d 1284 (10th Cir. 2001); *United States v. Southerland*, 486 F.3d 1355 (D.C. Cir. 2007); see also LaFave, *supra* note 2, at 1848. Furthermore, on the other hand, the Sixth Circuit "'has developed two separate tests to determine the constitutional validity of vehicle stops: an officer must have probable cause to make a stop for a civil infraction, and reasonable suspicion of an ongoing crime to make a stop for a criminal violation.'" *United States v. Collazo*, 818 F.3d 247, 253-54 (6th Cir. 2016), quoting *United States v. Blair*, 524 F.3d 740, 748 (6th Cir. 2008).
26. Woods, *supra* note 1, at 712.

Instead of making a distinction between stops and seizures based on criminal traffic violations as opposed to civil traffic violations, the Supreme Court in *Atwater v. City of Lago Vista*[27] used the term "minor traffic violation" in reasoning a vehicle stop and arrest based on probable cause was permissible under the Fourth Amendment because an officer observed the defendant violate a state criminal statute which required front-seat passengers to wear seatbelts.[28] In *Atwater,* the defendant was pulled over and arrested for not wearing a seatbelt, which under Texas law was codified as a criminal offense.[29] Subsequently, the defendant filed a suit in Texas state court under 42 U.S.C. § 1983 against the arresting officer, the Chief of Police and the City of Lago Vista alleging her Fourth Amendment '"right to be free from unreasonable seizure,'" was violated.[30] In a 5-4 decision, the *Atwater* Court held the Fourth Amendment does not forbid a warrantless arrest, again using the phrase, "minor criminal offense" such as a misdemeanor seatbelt violation punishable only by a fine.[31] Additionally, it must be reiterated that the seizure at issue in *Atwater* was based on probable cause of a violation of a *criminal* offense, not civil; although the Supreme Court used the term "minor traffic violation" in its reasoning.[32]

Prior to the decision in *Atwater*, the Supreme Court in *Whren v. United States* also reasoned that a vehicle stop was permissible under the Fourth Amendment if there is "probable cause to believe that a traffic violation has occurred."[33] Although, unlike *Atwater* where the traffic violation was codified as a criminal statute, the defendant in *Whren* was stopped by police after violating a civil traffic statute.[34] In *Whren*, plainclothes police officers were patrolling a "'high drug area'" in an unmarked car when they observed young black males in a truck with temporary license plates.[35] Officers then observed the defendant make a right hand turn without signaling and "sped off at an 'unreasonable' speed."[36] Shortly thereafter, the officer's effectuated a traffic stop and upon approaching the vehicle noticed what appeared to be crack cocaine in the defendant's hands.[37] The defendant was arrested and charged with violating various federal drug laws.[38] At a pretrial suppression hearing the defendant challenged the legality of the stop and the resulting seizure of drugs,[39] arguing that the stop had not been justified by probable cause or reasonable suspicion on the grounds that petitioners were engaged in illegal drug dealing activity.[40] Instead, defendant argued, that the officer's asserted ground for approaching the vehicle, to give the driver a warning concerning traffic violations, was pre-textually based on race.[41] However, at the pretrial suppression hearing the officer denied he stopped the defendant because of racial profiling.[42] The *Whren* Court ultimately held that the stop was permissible under the Fourth Amendment reasoning:

> *We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.*[43]

For purposes of this article, it's important to elucidate that the challenge and resulting decision in *Whren* focused on whether a warrantless stop and seizure is permissible under the Fourth Amendment when an officer has an objective basis a traffic law has been violated regardless if a pretextual motivation based on race existed.[44] The *Whren* Court never addressed the issue of whether the Fourth Amendment permits a warrantless stop and seizure for noncriminal civil traffic violations. Instead, the *Whren* Court essentially declared *in dicta* that the stop and resulting seizure was lawful because the officer observed a "minor traffic violation." Thus, the *Whren* Court never specifically declared the Fourth Amendment is now broad

27.
28. *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001).
29. *Id.* at 323.
30. *Id.* at 325.
31. *Id.* at 355.
32. *Id.* at 364.
33. *Whren v. United States*, 517 U.S. 806, 810 (1996).
34. *Id.*
35. *Id.* at 808.
36. *Id.*
37. *Id.* at 808-09.
38. *Id.* at 809.
39. *Id.*
40. *Id.*
41. Id.
42. *United States v. Whren*, 53 F.3d 371, 373 (D.C. Cir. 1995) ("[Officer Soto] testified that the decision to stop the Pathfinder was not based upon the 'racial profile' of the appellants, but rather on the actions of the driver.").
43. *Whren*, 517 U.S at 813.
44. See *supra* note 44.

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strategic (strə-tē jĭk) *adj.*

1. Carefully designed or planned to serve a particular purpose or advantage.
2. Decisions or plans designed to impact favorably the key factors on which the desired outcome of an organization, game, system, venture, or war, depends.
3. A cleverly chosen action or position, that is set up to be most useful or have the greatest effect.
4. Able to operate in an uncertain environment where complex problems and external events may impact the success of the venture.

[*syn.* judicious, prudent, deliberate, advantageous]

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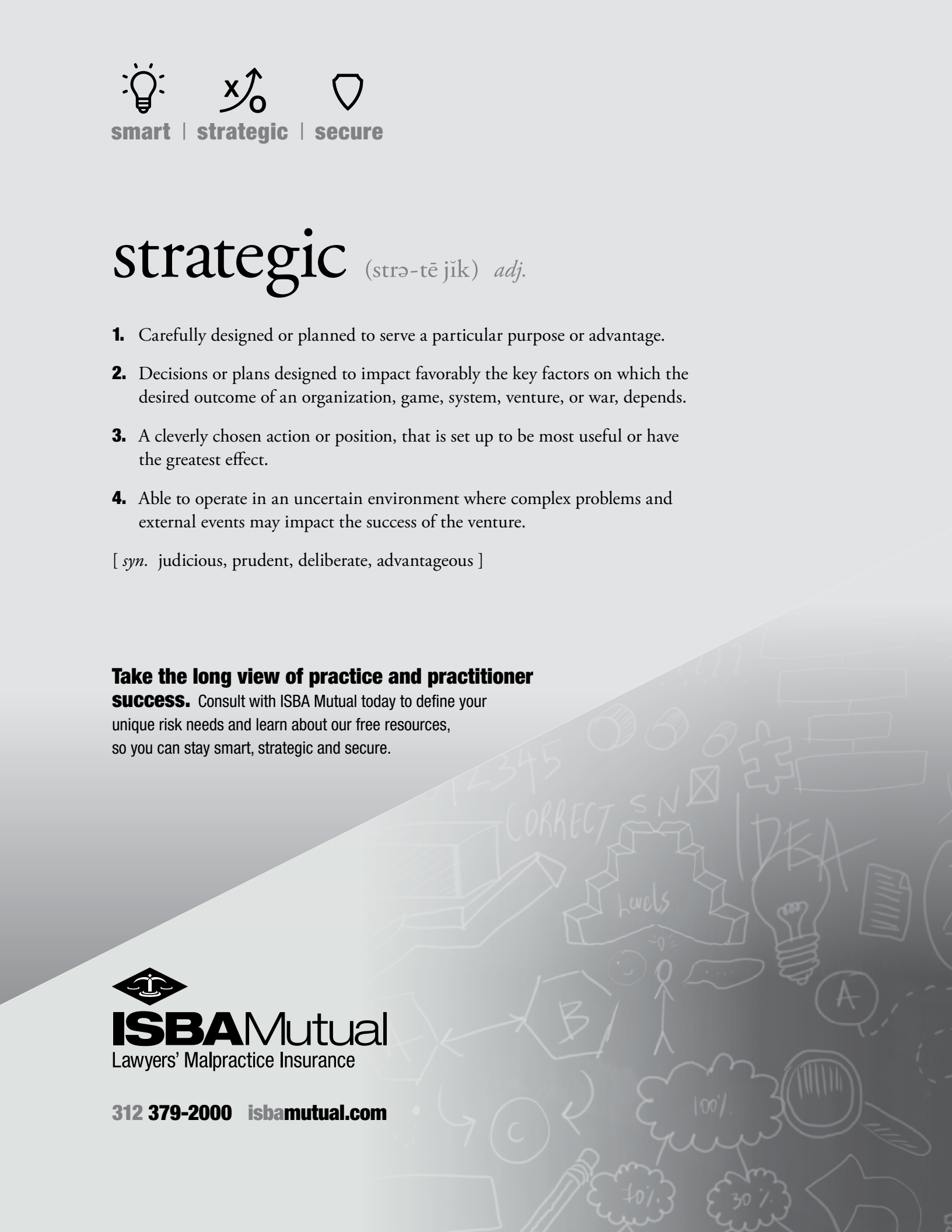

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enough to not only encompass stops and seizures based on probable cause or reasonable suspicion of *criminal* activity, but also stops and seizures based on noncriminal activity, such as a violation of a civil traffic statute.

Another case that must be mentioned briefly is *Knowles v. Iowa*; here the Supreme Court reasoned a routine traffic stop is a relatively brief encounter and is more analogous to a "*Terry* stop" than to a formal arrest; thus a seizure for a traffic violation is permissible under the reasonable suspicion standard rather than probable cause.[45] Additionally similar to *Atwater*, the defendant in *Knowles* was also stopped pursuant to a state criminal traffic violation.[46] Again, the Supreme Court in *Knowles* failed to draw a distinction between stops and seizures based on criminal traffic violations verses civil traffic violations, namely, whether warrantless stops and seizures are permissible under the Fourth Amendment for noncriminal activity.

Conclusion

In *Terry v. Ohio* the Supreme Court dramatically changed existing law.[47] Contrary to all of the Court's prior criminal cases, *Terry* allowed the police to stop individual criminal suspects without probable cause, when they had "articulable suspicion, founded upon reason" that a crime was afoot and that the suspect might be armed and dangerous.[48] Subsequently, "armed and dangerous" and "criminal activity" are broad enough to encompasses civil traffic violations. Thus, when it comes to civil traffic violations, under current Supreme Court precedent a defendant may be stripped of his criminal procedural protections in the Fifth and Sixth Amendment, as well as the requirement that guilt is proven beyond a reasonable doubt so long as the statutory scheme is codified as "civil."[49] At the same time, stop and seizure based on probable cause or reasonable suspicion of criminal activity under the Fourth Amendment is broad enough to encompass noncriminal activity such as "civil" traffic violations. □

45. *Knowles v. Iowa*, 525 U.S. 113, 117 (1998).
46. *Id.* at 114-116.
47. David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry V. Ohio,* 72 St. John's L. Rev. 975 (1998).
48. *Id.* at 975.
49. See, e.g, A.R.S. § 28-1596(D) (The hearing is informal and without a jury)

International Child Relocations From Illinois

By Jeffrey A. Parness

Introduction

The U.S. Court of Appeals for the Seventh Circuit ruled in 2016 that under the Hague Convention on Civil Aspects of International Child Abduction (Convention), one unwed parent's "initial removal" of a child from a habitual residence in Illinois to Mexico was not an abduction under the Convention per Illinois law, and that Mexico had become the child's "habitual residence" since the child was "settled" there.[1] Therefore, the court held there could be no possible order of return of the child to Illinois, as the non-relocating Illinois parent could not complain of, or have a hearing on, the initial move to Mexico because the relocating parent, at the time of the move, had sole custody of the child under Illinois law because there was no court order on child custody benefitting the non-relocating parent.[2]

This ruling is problematic for several reasons. The outcome likely would have differed if the relocating parent had not been the birth mother, but the father of the child born of sex, or if the relocating parent had been a woman who served as the second mother to a child born of assisted reproduction to her partner. It is also troublesome because had the relocating parent desired to move within some parts of Illinois or to another American state, and not to Mexico, the non-relocating parent in Illinois would have had a day in court. Finally, the ruling is troublesome because it incentivizes a parent, who otherwise is amicably raising a child with another parent, to seek a child custody order simply to prevent a future, quite unlikely, international relocation.

The Seventh Circuit Ruling on International Child Relocations

In *Martinez v. Cahue* in 2016, the U.S. Court of Appeals for the Seventh Circuit considered a childcare dispute involving two unwed legal parents, a birth mother and a biological father who had signed a voluntary acknowledgment of paternity (VAP) at the time of the child's birth.[3] The child was born in 2006 in Illinois and was raised in Illinois until 2013 by his biological parents, who mainly lived separately but "appear to have cooperated effectively well" with respect to childcare.[4] The birth mother, a Mexican citizen, was the primary caretaker.[5] The father also child cared until February 2010 through cooperative efforts with the mother. Thereafter, until the Summer of 2013 he child cared under "a private written custody agreement" by which he pledged not to "fight custody in court," but was "guaranteed 'constant access' and overnight visits '2 nights a week'."[6] This agreement was never memorialized in a court order.[7]

In the summer of 2013, the mother relocated with the child to Mexico, having received the father's written permission to travel to Mexico "on vacation."[8] Later, the parents agreed the child would visit the father in Illinois during "school vacations."[9] An April 2014 visit went as planned, but a summer 2014

1. *Martinez v. Cahue*, 826 F.3d 983, 993-94 (7th Cir. 2016).
2. *Martinez*, 826 F.3d at 991-992. Had there been such a court order, Illinois courts likely would have retained jurisdiction over childcare issues, as in *Moreno v. Zank*, 2017 WL 5476372 (W.D. Mich. 2017) (Michigan court order on joint custody in a dissolution case is followed by a mother's move to Ecuador with her child and her later request for the child's immediate return to Ecuador after a visit in the United States).
3. *Martinez*, 826 F.3d at 987.
4. *Id.* at 987.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* (The federal district court determined that the father did not know the mother intended to establish residence with the child in Mexico, a finding accepted on appeal).
9. *Id.*

visit ended with the father not returning the child to Mexico.[10] The mother flew to Illinois in late August 2014 to "reclaim" her child, surprised the father, and took her child to her parents' home in Illinois.[11] That prompted an Illinois state court child custody petition by the father, who won an "emergency motion" that caused the police to seize the child and return him to his father.[12] The mother tried, but failed, to overcome the "temporary" Illinois custody order.[13]

In March 2015, the mother filed a petition for custody under the Convention with the Mexican Central Authority.[14] In December 2015, she "commenced emergency proceedings" in an Illinois federal court seeking the child's return to Mexico.[15] Finding there was no "shared parental intent" for the child's relocation to Mexico, the district court deemed, under the Convention, that Illinois "remained" the child's "habitual residence" during the year the child lived in Mexico.[16]

On appeal, the Seventh Circuit found habitual residence of the child had been established in Mexico[17] and that the father's "retention" of the child was "wrongful" under the Convention.[18] In doing so, it determined that the father's lack of intent regarding the child's residence in Mexico had little "salience" as he "did not obtain a custody order during the time that mattered,"[19] which he needed to do under Illinois law, per the Convention, in order to avoid a presumption of sole custody in the birth mother.[20] This presumption by the Seventh Circuit was garnered from, of all places, an Illinois criminal law indicating that an unwed birth mother had sole custody, and thus could relocate with the child and exercise her "exclusive right to establish" the child's habitual residence, as long as there was no "valid court order" favoring the father.[21] Any such relocation was subject only to "scrutiny" by an Illinois court employing a child's best interests, which would be prompted by a petition for review of a pending or completed international relocation.[22] Here, the Seventh Circuit observed there was no such petition by the father, before or after the 2013 move to Mexico,[23] though there had been a "temporary" Illinois custody order.

The Seventh Circuit deemed neither the father's VAP nor his seven years of childcare established that he had "custody" as required by the Convention in order to make the mother's relocation an abduction from the child's habitual residence in Illinois.[24] Such "custody" under the Convention was solely held by the mother in 2013 (and before and after) because the aforementioned Illinois criminal statute on child abduction "presumed that, when the parties have never been married to each other, the mother had legal custody of the child unless a valid court order states otherwise."[25] Here, there was no court order on custody.[26] This criminal statute remains in force though its use of the term custody is outdated given recent sweeping changes in the Marriage and Dissolution of Marriage Act that speak to "parental responsibilities." It remains in force though it seemingly denies deserved equality between established parents who gave birth and established parents (both male and female) who did not give birth.

While the VAP did prompt for the father under an Illinois statute "all of the rights and duties of a parent,"[27] and is viewed as having the force and effect of a court judgment, the Seventh Circuit distinguished a VAP, as well as any paternity court judgment and any oral or written custodial agreement, from the more narrow court custody order it deemed required by the criminal statute.[28] The Seventh Circuit recognized that the mother's move to Mexico "may have violated the terms of the

10. *Id.* at 988.
11. *Id.*
12. *Id.*
13. *Id.* (the mother answered the petition and attended a September 17, 2014 hearing).
14. *Id.*
15. *Id.* (she acted after learning the father had obtained a new U.S. passport for the child).
16. *Id.* (this obviated any need to consider whether the child's "habitual residence" in Illinois was reestablished between July 2014 and December 2015).
17. *Id.* at 992 (as of this time, the father retained the child in Illinois in August 2014).
18. *Id.* at 993.
19. *Id.* at 990-91.
20. *Id.*
21. *Id.* at 990, citing 720 ILCS 5/10-5(a)(3).
22. *Id.* at 990-91, citing 750 ILCS 45/13.5(a).
23. *Id.* at 991 (father "never took the proper steps to secure the rights on which he is trying to rely").
24. *Id.* at 991-92.
25. *Id.* at 990-91, citing 720 ILCS 5/10-5(a)(3).
26. *Id.* at 991. The problems with employing parental decision-making presumptions, rather than children's' best interests, in child relocation cases generally were well described in *Cooper v. Kalkwarf*, 532 S.W.3d 58 (Ark. 2017).
27. *Id.,* citing 750 ILCS 46/305(a).
28. *Id.* at 991-992.

About the Author

Professor Emeritus Jeffrey Parness teaches at the Northern Illinois University College of Law. He received his B.A. from Colby College and his J.D. from The University of Chicago.

couple's private custody agreement," but it "did not violate a right of custody for Convention purposes."[29]

The dependence of the father's right of custody for Hague Convention purposes on the existence of a court order was also said by the Seventh Circuit to be supported by noncriminal Illinois laws. One cited law presumed a mother's "legal custody" if no court order granted "custody to the father," unless the father "has had physical custody for at least six months prior to the date when the mother seeks to enforce her custodial rights."[30] The Seventh Circuit determined that the father's "constant access" to, and regular "overnight visits" with, the child for at least three years under a written agreement did not constitute such statutory "physical custody," as his pact with the mother "provided him only with agreed visitation rights."[31] It employed the custody/visitation language, which had been eliminated from Illinois statutes while the events in the case unfolded. And, it again failed to address the serious constitutional issues raised involving loss of parental childcare interests.

A second noncriminal Illinois statute cited by the Seventh Circuit simply declared that for two legal parents, "joint custody does not arise automatically."[32] Rather, joint custody required a court order upon a finding of "the best interests of the child."[33] Again the court determined a custody order for Convention purposes means a joint custody, not a visitation, order.[34] Terminology mattered in a setting, once again, where the terms – custody and visitation – were jettisoned from many Illinois statutes and replaced by the phrases "parenting responsibilities" and "parenting time."[35]

Conclusion

The troubling implications of the Seventh Circuit ruling go beyond unwed Illinois fathers, who, in some instances, may have been the primary or exclusive caretakers, where their opportunity for Illinois court "scrutiny" of international child relocations is limited to a post relocation judicial inquiry into their children's' current best interests, assuming they know which process to employ. Consider unwed lesbian partners, whose eggs prompted births and whose childcare interests were recognized in valid, written agreements, but who never obtained court orders before their children were relocated (not abducted) overseas by their birth mothers. And consider unwed gestational surrogates who, before or after birth, relocate internationally without notice to the intended parents who failed to secure a (child or fetal) custody order. Finally, consider stepparents whose premarital or mid-marital agreements providing them, subject of course to later court oversight, continuing parental-like, if not parental, interests in their stepchildren upon marriage dissolution are avoided by international relocations.[36] In all these settings, there is often little incentive for a non-birth mother with actual and/or future childcare interests to secure a child custody order other than the fear of an international relocation, especially since there are clear constraints on birth mothers wishing to relocate with their children intrastate or interstate.

In fact, it is harder today for one legal parent to relocate a child from a habitual residence in Illinois to another habitual residence in Illinois, or to a habitual residence in another American state, over the objection of second legal parent than it is for an unwed birth mother to relocate an Illinois child outside the country. Both under the former and the current Illinois laws, intrastate and interstate relocations at the behest of a primary parental caretaker are harder than international relocations where a secondary parental caretaker has no child custody order, at least according to the Seventh Circuit.

As noted, in the international setting the second, non-relocation childcare parent without a court custody order may only be able to seek judicial scrutiny of an earlier relocation under a child's current best interests test,[37] assuming the child has not "settled" elsewhere. By contrast, in the interstate setting today in Illinois, one childcare parent has a right to a hearing before an interstate child relocation by the other parent. A hopeful

29. *Id.* at 992.
30. *Id.* at 991, citing 750 ILCS 45/12(a)(2), which was repealed as of January 1, 2016, though replaced by the only somewhat comparable 750 ILCS 46/802 (c), which says the mother is presumed to have "all parental responsibilities" only if a "parentage order or judgment" contains no provisions on child support, parenting time or parenting responsibilities; in the case seemingly there was no "parentage order or judgment").
31. *Id.* at 991. It proceeded to note that even had the agreement "spoken to custody," the result would be the same since "Illinois courts generally do not respect private agreements affecting custody." *Id.* at 991, *citing In re Marriage of Linta*, 2014 IL App (2d) 130862 (emphasizing that no "custody pacts" are allowed in premarital agreements). *Compare Quinones v. Bouffard*, 2017 VT 103 (Vt. 2017) (recognizing a father's visitation rights under court order evolved into "a *de facto* shared custodial arrangement" in an interstate relocation which must be considered).
32. *Martinez*, 826 F.3d at 991, citing 750 ILCS 5/602.1(b).
33. *Id.* at 991, citing 750 ILCS 5/602.1(c).
34. *Id.* (also noting Illinois did not accord the father the "lesser right" to "determine a child's country of residence").
35. 750 ILCS 5/600(d) and (e).
36. Since July 2012, the National Conference of Commissioners on Uniform State Laws has expressly recognized, in its Uniform Premarital and Marital Agreements Act, the relevance of agreements on "custodial responsibility" when judges determine childcare issues upon marriage dissolutions. Jeffrey A. Parness, *Parentage Prenups and Midnups*, 31 Georgia State Univ. L. Rev. 343 (2015).
37. *Martinez*, 826 F.3d, at 991, citing 750 ILCS 45/13.5(a).
38. *See, e.g.*, 750 ILCS 5/600(f) (the agreement is a "parenting plan") and 750 ILCS 5/609.2(f) and (g)..

relocating married parent must seek judicial permission to relocate interstate, whether or not the non-relocating parent has a court childcare order, as long as the non-relocating parent has undertaken childcare recognized in "a written agreement that allocates significant decision-making responsibilities, parenting time, or both."[38] Comparable limits operate for unwed parents.[39] In determining whether to grant permission to relocate interstate, the best interests analysis encompasses several statutory factors, including norms that focus more on the intentions of and the effects upon both parents, as well as on the effects on child's extended family members.[40] Interstate relocations are judicially reviewed under guidelines focusing on the interests of all family members, not on the formalities of court orders, with an emphasis on promoting the best interests of all children on a case-by-case basis rather than on a basis that simply presumes those interests based on where the children sleep.

In the intrastate setting today in Illinois, a non-relocating childcare parent has a substantially comparable hearing right, with the same petition requirement for the wishful relocating parent, as long as the desired new residence is far enough away from the child's "current primary residence."[41]

The non-international child relocation standards in Illinois at the relevant times in the Seventh Circuit case differed a bit from what they are today, but they were still more protective of the childcare interests of the non-relocating parents than the protections afforded those parents by the Seventh Circuit in international child relocations from Illinois. Thus, before January 1, 2016, there was no single statutory approach to intrastate and interstate child relocations. For intrastate child relocations, the "general rule" was that a "custodial parent" may move anywhere in Illinois "without judicial approval."[42] Yet it was recognized that in determining custody, a court could "condition custody upon the custodian living within a reasonable distance from the non-custodial parent to facilitate visitation."[43] For interstate relocations, an Illinois court was authorized to grant leave "to any party having custody of any minor child or children to remove such child or children from Illinois whenever such approval is in the best interests of such child or children," with the "burden...on the party seeking removal."[44] Unlike current laws, this authorization was not accompanied by specific statutory factors to be utilized in best interests analyses.[45]

Beyond its misapplication of Illinois laws on parental childcare, the Seventh Circuit ruling is problematic as it invites violations of the federal constitutional childcare interests of prospective and actual legal parents. In *Lehr v. Robertson*, the U.S. Supreme Court recognized that a biological father of a child born of consensual sex to an unwed mother had both a parental opportunity interest in establishing a "custodial, personal or financial relationship" with his child, as well as a parental childcare interest in a child with whom such a relationship had been established.[46] *Lehr* is not yet widely applied to childcare interests arising from such established relationships due to contracts involving, e.g., lesbians partners with assisted reproduction pacts, or stepparents with premarital or mid-marriage pacts. But its rationales seemingly are applicable, especially where biological and adoptive childcare parentage are significantly supplemented by intended parent doctrines operating pre-birth, as with surrogacy and non-surrogacy assisted reproduction, or post-birth, as with *de facto* parenthood and/or equitable adoption, where non-biological, nonadoptive childcare parentage can arise from established parental-like relationships, usually developed with the express or implied consents of the existing parents.[47]

As with intrastate and interstate child relocations, non-relocating established childcare parents deserve a voice in any international relocations of their children, even where there were no earlier court childcare orders. The Illinois statutory intrastate and interstate child relocation norms should be accompanied by new Illinois international child relocation norms so that the childcare interests of all non-relocating parents are adequately protected, regardless of the relocation destination. □

39. *See, e.g.*, 750 ILCS 46/808 (under the Parentage Act of 2015, a court considering a "relocation judgment modification" must be guided by the factors specified in the Marriage and Dissolution of Marriage Act).
40. 750 ILCS 5/609.2(g) (stating reasons why a parent wishes to relocate or objects to relocation, as well as the presence of extended family members at existing and proposed new location). These norms were recently applied in *In re Parentage of P.D.*, 2017 IL App (2d) 170355, ¶17 ("We are unaware of a prior appellate opinion reviewing" a trial court order under Section 609.2(g)).
41. 750 ILCS 5/600(g) (addressing both some intrastate and interstate relocations).
42. *See, e.g., In re Marriage of Samardzija*, 365 Ill. App. 3d. 702, 709 (3d Dist. 2006) ("In general, a parent with primary physical custody of the children need not obtain judicial approval before moving to another location within Illinois") ..
43. *Id.*, at 710. Of course, such a condition could not unduly burden a custodian's constitutional rights, as with the right to travel.
44. *See, e.g., In re Marriage of Collingbourne*, 204 Ill.2d 498, (2003) (applying former 750 ILCS 5/609(a)). .
45. *Id.* at 522-535 (reviewing and applying common law factors on best interests).
46. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).
47. *See, e.g.*, Jeffrey A. Parness, "Parentage Law (R)Evolution: The Key Questions," 58 Wayne L. Rev. 743, 752-763 (2013). In Illinois, intended parent childcare doctrines operate in assisted non-surrogacy and surrogacy reproduction settings, but not in post-birth settings where children are born of sex. *See, e.g.,* 750 ILCS 47/1 et. seq. (Gestational Surrogacy Act); 750 ILCS 46/701 et. seq. (assisted production births outside the Gestational Surrogacy Act); *In re Scarlett Z.-D.*,2015 IL 117904 ("equitable adoption", a common law doctrine, does not apply to proceedings for parentage, custody and visitation; such proceedings are dependent on legislation, which necessarily arises as a result of a "policy debate" in which all may be heard); and *In re Marriage of Schlam*, 271 Ill. App. 3d 788 (2d Dist 1995) (biological mother's agreement during a marriage dissolution proceeding to allow continued childcare by the stepfather limits the mother's ability later to end unilaterally such childcare).

Illinois Law Update

- Editor David Schaffer

Election Law

Quinn v. Board of Election Commissioners, 2018 IL App (1st) 182087

HOLDINGS: [1] The circuit court lacked subject matter jurisdiction under 10 ILCS 5/10-10.1 (2016) to review an electoral board's decision ordering that two referenda not appear on the ballot because service on the objectors' attorney did not satisfy the statute's requirement that service be made personally upon the electoral board and other parties to the proceeding; [2] Because § 10-10.1 had not adopted the Administrative Review Law, 735 ILCS 5/3-101 et seq. (2016), a separate claim for a writ of mandamus fell within the original subject matter jurisdiction of the circuit court under Ill. Const. art. VI, § 9 and therefore should not have been dismissed; [3] The court declined to consider whether there might be other reasons to affirm the dismissal of the mandamus request, concluding that a remand would be more prudent because the mandamus issue was never specifically addressed below.

Family Law

Verbines v. Hickey (In re Marriage of Verbines), 2018 IL App (2d) 17103

HOLDINGS: [1] In granting a petition to modify a father's child support obligations, a trial court erred by failing to include deferred compensation as income under 750 ILCS 5/505(a)(3); [2] Noting a split in the case law, the court held that the trial court also erred by failing to require the father, who bore the burden of proof at trial, to show why certain portions of his IRA withdrawal were not § 505 income and by failing to otherwise account for the withdrawal; [3] Evidence did not support a finding that the father suffered a substantial change in his financial resources that decreased his ability to satisfy the full support amount; [4] Generous, but comparatively modest, child support obligation should not have been reduced in favor of the father's truly lavish and entirely optional personal expenditures.

In re Marriage of Walther, 2018 IL App (3d) 170289

HOLDINGS: [1] In a termination of spousal support case, the evidence clearly showed that, contrary to the trial court's finding, the former wife was in a *de facto* husband and wife relationship with a third party, for purposes of 750 ILCS 5/510(c) (2014). The evidence established that her relationship with a third party lasted for two years and included nearly a year of cohabitation, that they spent a substantial amount of time together, which included preparing meals and sharing a bedroom, that they spent holidays and vacations together, and that her daughter lived with them; the fact that the relationship ended did not refute the evidence of cohabitation.

In re Marriage of Kane, 2018 IL App (2d) 180195

The attorney was not a party to the underlying dissolution action, so the husband had no statutory right to seek fees from him under the Illinois Marriage and Dissolution of Marriage Act.

In re Milne, 2018 IL App (2d) 180091

HOLDINGS: [1] It was no error to find Illinois was children's UCCJEA home state because the parties' consent order memorialized their intent that their Canadian residence was temporary, nothing showed their intent changed, their three-year absence from Illinois was not too long to be a temporary absence, and no evidentiary hearing was required; [2] Respondent husband showed no due process violation because the court made no substantive custody determinations and

only maintained the status quo; [3] The trial court reasonably declined to invoke the clean-hands doctrine when petitioner wife relocated to Illinois because the court could have found she asserted a potentially valid reason for returning to Illinois.

In re Mayes, 2018 IL App (4th) 180149

HOLDINGS: [1] The evidence showed the father responded to heated situations by using profanity, speaking poorly of the children's mother and her parenting abilities, and threatening dangerous punishment, and the court's finding that the father had an inability to control his anger and responded inappropriately to heated situations was not against the manifest weight of the evidence; [2] Based on the mother's testimony as well as the testimony concerning the children's reactions to their father's inappropriate behavior, the court's determination that the father's conduct placed a significant emotional and mental toll on the children was proper; [3] The court could find the serious-endangerment standard was met; [4] The father's history would have been an appropriate consideration in determining whether his later conduct placed a significant emotional and mental toll on the children.

Kranzler v. Kranzler, 2018 IL App (1st) 171169

HOLDINGS: [1] Despite the wife's voluntary dismissal of her petition for dissolution, the trial court had subject matter jurisdiction to consider the husband's motion for declaratory judgment because an actual controversy existed regarding the validity and enforceability of the prenuptial agreement at the time the trial court made the pertinent rulings and a ruling on the motion for declaratory judgment would terminate some part of the parties' controversy; [2] The trial court properly applied the common law in assessing the validity of the parties' prenuptial agreement; [3] At the time the parties entered into the agreement it did not created an unforeseen condition of penury and was reasonable given the parties' age difference, the maintenance provision, the estate provision, and the fact that they may have contemplated a short marriage.

Freedom of Information Act

Chicago Tribune Co. v. Cook County Assessor's Office, 2018 IL App (1st) 170455

HOLDING: [1] The court properly held that the requested information from the county assessor's office was subject to disclosure under Illinois' Freedom of Information Act, 5 ILCS 140/1.1 et seq. (2016), and not subject to any exemptions, because the information that was taken into account was all public and gleaned from public records, and the analysis proceeded by examining those purely factual characteristics which lead the assessor's office to produce another piece of factual data: the property's taxable market value; the analysis started with characteristics such as location, square footage, the number of bedrooms, the number of bathrooms – purely factual property characteristics.

About the Editor

David Schaffer. A Fellow of both the American and International Academies of Matrimonial Lawyers, David concentrates in domestic and international matrimonial and child custody cases. His firm, Schaffer Law, Ltd., is located in Naperville. In addition to the DCBA Editorial Board, he is a former Chair of the ISBA Family Law Section Council and served as its newsletter editor. David currently sits on the ISBA's International and Immigration Law Committee.

Labor Law

Department of Central Management Services v. Illinois Labor Rels. Board, 2018 IL App (4th) 160827

HOLDINGS: [1] While the parties were moving slowly toward an agreement, progress was still being made in other areas of the negotiation, and the negotiation process had to be considered in its entirety where the parties started slowly and were in substantial disagreement from the outset; [2] The record did not adequately support a finding of impasse; [3] The memo to agency directors was a matter of either a misunderstanding or clarification and was not indicative of any effort on the part of the State to bypass the union, and the employee survey was not an effort to either gain the support of the union members or serve as some sort of threat of reprisal; [4] The ALJ was deprived of the opportunity to assess the credibility of the witnesses during direct examination where the union was limited to questioning the affiants based only on the contents of their affidavits. □

Welcome

Welcome to the new DCBA members.

Attorney Members: Nicholas M. Carrescia, Giamanco Law Partners, Ltd; Kevin J. Todd, Hoogendoorn & Talbot LLP; Linda Kim, McNees & Associates, LLC; John S. Pearman, Delos Communications; Jessica Pardo; Katherine Fisk; Christopher L. Hendrix, Law Office of Ronald Hendrix, P.C.; John Paul Hough, The Law Offices of Fedor Kozlov, P.C.; Michael Norton, O'Connell Tivin Griffin & Burns, LLC; Amar K Moolayil; Shahina Khan; Natalie M. Tomes, Keough & Moody, P.C.; Nicholas Delaney; Sarah Bahn; Gran McKerlie; Shahina Kahn; Joshua J. Turner; Alaa Alchamaa; Michael Huddleston; Katherine Welz Herr, Schiller DuCanto & Fleck LLP; Wendy Ramirez, Law Offices of Scott E. Bellgrau, P.C.; Erum Raza Rizvi.

Legal Community: Tammy Doody, Blacha Law Office LLC; Katrina Brown, Katrina Notary Services.

Students: Emma Ray; Alison Rose Gnesda; Steven Zhang; Jacquelyn Marie Escobar; Laura Brendemuhl; Jana Chomycia.

News & Events

Jessica Defino of Kollias & Giese with their firm's coat drive contributions.

InBrief

By Terrence Benshoof

Good-bye to 2018. That was one bizarre year!

The DCBA did manage a load of fond memories, with holiday season parties hosted by the Justinians, DAWL, the Criminal Defense Lawyers Association, and, of course, the DCBA. DCBA President **Matt Pfeiffer,** fully recovered from the Spinning Teacups at Walt Disney World, played Santa for the group at Danada House, where the Bar and Bench exchanged greetings, and brought toys to be distributed to those children of the county who could use a bit more holiday cheer.

The Bar Foundation's breakfast raised funds for that important organization, while skipping visions of sugarplums, and munching them instead. *InBrief* is pleased to report that all calories had, as in past years, been surgically removed from the tons of goodies at this festive event.

Christmas Eve and New Year's Eve were big celebrations for everyone! Well, except maybe *InBrief*, because those two days were deadline dates for filing tax appeals.

And looking forward to 2019, there aren't any national elections!

People, Places

Something appealing; something appalling. Something for everyone! Judges' Nite producer **Christina Morrison**, and Director **Nick Nelson**, promise a new spectacular event for March 1 at the MAC. Come one, come all, and join the cast, or assist the crew with costumes, decorations, makeup and stage work. Singing and acting talent are strictly forbidden, but it's possible they'll make an exception or two.

Teresa Dettloff joined the downtown crowd as an associate with the healthcare and litigation firm of Brennan Burtker LLC.

The College of DuPage Paralegal Studies Program received its latest ABA reapproval recently. Program coordinator **Sally Fairbank** is a DCBA member.

Traub & Associates has added a new aspect to its family law practice, welcoming **Breanna Traub**, LCSW, as their staff clinical social worker.

Sullivan Taylor Gumina & Palmer welcomed **Anique Drouin, Laura Baldwin**, and **Mike Hudzik** as partners.

At the annual Lawyers Assistance Program awards ceremony, **Natasha Dorsey** was presented the President's Award for her work in the Illinois and Florida Bar programs.

David Schaffer has been elected as an at-large member of the ABA House of Delegates, representing the ISBA.

Special Note

Paul Brinkman, who served as President of the DCBA for the bar year 1994-1995, has been struggling with some significant health issues. Those of you who remember Paul might want to cheer him up with a card, a letter or an email. The address is 413 Birch Drive, Wheaton, Illinois, 60187 or by email to pgbrinkman@gmail.com. Paul would love to hear from you. Perhaps you could send him a funny story from back in the day when we were all young! □

Legal Aid Update

New Year Update

By Cecilia Najera

The new year brings a time of reflection: the things and people we are grateful for as well as some of the new things happening in our office and things to look forward to. I have always been very inspired by the attorneys that help Legal Aid and our clients. From all of the volunteer *pro bono* attorneys to those on our Board and our staff. Legal Aid is also very grateful for our donors. This year one of our largest donors, Lawyer's Trust Fund, increased the award they granted us to allow Legal Aid to make our part time attorney a full time staff attorney! Please welcome our not so new full time Staff Attorney, **Robin Slattery!** She will be working full time, continuing to take care of all our Order of Protection cases as well as taking on more divorce and parentage cases. Robin formerly worked at Fortunato, Farrell, Davenport and Arnold from 1995 to 2000, and before that was an Extern with Chicago Volunteer Legal Services before taking a hiatus to raise her children. She graduated from Indiana University, and went on to graduate from DePaul University College of Law where she was a participant in the National Moot Court Society and Siegel Moot Court Competition. Legal Aid is very fortunate to have Robin come work with us full time.

Legal Aid also hired **Melissa Chandler** as a part time administrative assistant to help with the overflow of support staff work. Melissa has her undergraduate degree from Roosevelt University in Interdisciplinary Studies and completed Roosevelt University's Paralegal Studies Program in December. She realized her heart belonged to public interest law when she interned at World Relief last summer. Prior to her internship, she was a Legal Assistant and Office Manager in Miami, Florida.

Just a reminder to those that have been bestowed with a *pro bono* GAL assignment, please make sure to let our office know if you have been assigned as a *pro bono* GAL in a divorce, parentage, or guardianship matter. Legal Aid can help you keep track of your *pro bono* hours and the hours reported also help us with our grants. Your service makes our community stronger and exemplifies to the public just how noble our profession is.

Judges' Nite preparation is now well underway and the cast, band, and crew have begun rehearsing! Legal Aid is very lucky to be the recipient of the efforts that go into this production. We began our fundraising efforts in October this year, hoping to really make the event special. There are already some restaurant gift cards and other really great items: Two "Dear Evan Hansen" tickets for March 3, 2019, donated by DuPage Legal Assistance Foundation; golf foursomes from Prairie Landing, Top Golf, and Klein Creek; a weekend stay at Eagle Ridge in Galena donated by Eagle Ridge; and even a full page ad in the *DCBA Brief* and an event ticket donated by the DCBA! Every year I am floored and humbled by the generosity that surrounds Judges' Nite and Legal Aid. Don't miss out on all the fun. Save the date and make sure to attend Judges' Nite 2019 on March 1, 2019 at the MAC of COD. Also, if you would like to donate event tickets, goods, or services to Judges' Nite, please contact me or **Lisa Giese**. Our Silent Auction will once again be online, which makes auction items and donors very visible to the public, and donating could be a great way to showcase your generosity. The online auction will open prior to the show date, allowing those who can't attend to participate and win some great items. Watch for details. □

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.

DCBA Update

With a New Year, What's New?

By Robert Rupp

One of the highlights of my holidays is the annual luncheon of the DCBA Past Presidents. I have told many friends and colleagues that I can think of no other event that better serves as a time capsule of all that has made the DCBA the premier Bar Association that it has indeed become. While enjoying the company of so many great former leaders and having a front row seat to the "real" stories of our legal community's history is reward enough, the conversation is a great annual reminder of all those things that were once new, and inspiration to think about what is to come.

Some of the historic firsts that struck me were the stories of when the bar's offices where new (twice!); all of the work that went into securing and outfitting a new Attorney Resource Center; the issuance of new security passes; a new social called Judges' Nite; a new paid staff attorney for DuPage Legal Aid; a new assistant state's attorney in 1952 whom we all now just call Judge Bauer; and an innumerable legion of new friends made over the years, some still here and some gone.

I look at these stories not as just an enjoyable afternoon of history, but rather as a challenge for the future. We have all been entrusted with this legacy and it falls to us to make the most of the foundation provided by these projects; once new and now just part of what we do.

This January, I hope that you all will join me in making the most of the annual renewal of court ID's. When you come in to renew your ID take a moment to get re-acquainted with member benefits that may be new to you like free, live and online CLE, monthly networking happy hours, and volunteer opportunities at courthouse help desks. While we issue 4,000 of these IDs each year, only half of those go to current DCBA members. So I would ask that you also keep an eye for that unfamiliar face and see if you can be the one that turns a long time pass-holder into a newly minted member.

I also hope that you will consider participating in our freshly rebooted Basic Skills Seminar, scheduled for an all-day format on January 21st. Whether you are a newly minted lawyer looking to start an office or a veteran practitioner looking to do things better, there will be something in this program for you.

Another new program launching in February will be the Inaugural Joseph F. Mirabella Jr. Family Law Trial Advocacy Program in February/March 2019. Please review the full coverage of the event in this issue of *DCBA Brief*. This program will join the Keith E. Roberts, Sr. Civil Law Trial Advocacy Program in a biennial rotation; providing four weeks of intensive training on trial skills from senior DCBA attorneys and the judges of the 18th Judicial Circuit.

In the vein of taking a new path, these two programs mark a departure from the

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.

long time tradition of the DCBA Mega Meeting. With the DCBA desiring to pursue new programs, DCBA Sections planning over 120 free CLE programs and facing the reality of declining attendance and mounting financial loss from the Mega-Meeting, the Officers and Directors made the tough decision to take a year off from hosting a Mega Meeting. For all of you who were loyal Mega Meeting attendees, I would encourage you to try our many other CLE opportunities. If it's a visit with vendors and sponsors you seek, come meet them at any monthly Happy Hour or join us at the second DCBA@TECH SHOW February 28th.

I wrap up this list of all that is new by welcoming our two new staff members, **Jackie Bradley** and **Emlyn Bertsche**. Jackie is our afternoon receptionist and office assistant over at the Bar Center. Emlyn is our new Assistant Executive Director and will be responsible for keeping us all on task with regard to membership growth and fundraising. Take a moment to meet them when you have the chance. Happy 2019 to you all! □

Please save the following dates and join your friends and colleagues.

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

Jan. 5—Judges' Nite Kickoff/Auditions, Bar Center, Board Room.

Jan. 17—New Lawyer MCLE meeting, Elmhurst Wintrust offices

Jan. 17—Happy Hour, Oak Brook Maggiano's

Jan. 24—Ask a Lawyer Help Desk Volunteers Needed

Jan. 21—Basic Skills Bar Center, Classroom

Feb. 8—Mar. 1—Joseph Mirabella Jr., Domestic Relations Trial Advocacy Program—4 Successive Fridays

Feb. 28—Ask a Lawyer Help Desk Volunteers Needed

ISBA Update

Preparing for the 2018 ISBA Mid-Year Meeting

By Kent A. Gaertner

The ISBA leadership including all Section Councils and Committees met for the 2018 Mid-Year Meeting held from December 6th through 8th at the Palmer House Hilton in Chicago. The Board of Governors met on October 19th and again on November 15th to formalize its agenda presented to the Assembly on Saturday December 8th. (At the time of this writing the meeting had not yet taken place.)

Among the issues presented to the Assembly were the following:

Complimentary Membership For New Admittees

The Board has approved a resolution to extend complimentary dues for new admittees by means of adjusting the dues cycle so that the first invoice they receive for dues will occur in June. This matches up with the receipt of invoices for all ISBA members. It would end the old practice of sending a six-month invoice in January of the year following the end of the old 13-month complimentary period, followed by a 12-month invoice in June of that year. This will provide new admittees with a longer complimentary period which the Board hopes will be useful in getting them involved with ISBA activities.

Report of Special Committee on Election Procedures

President **James McCluskey** appointed a special committee to review the current ISBA election procedures to determine if they need any modifications as far as advertising; length of campaign; campaign cost restrictions; timing of candidacy announcements; the length of the campaign season; amount of campaign email; the length of the voting period; remedies for campaign violations; enforcement of campaign restrictions; contribution disclosures; a greater and uniform Association role in hosting campaign activities; 3rd party email providers; efforts to increase voter participation; and restrictions on judicial involvement in leadership. No final report has yet been made by the committee.

Civics Award

The Board has passed a resolution creating an ISBA Civics Award for up to three members each year to recognize members' contributions in the area of public civics education. The goal is to raise the memberships' consciousness about, and increasing lawyer participation in, civics education.

Stand Alone Awards Presentations

Over the past years, awards given by the ISBA were generally presented at the awards luncheon at the Annual Meeting, given at Section Council meetings or given at meetings of the ISBA Assembly. All these formats had various problems that took away from the honor being given to the recipient. Recently, a special luncheon was held strictly for the purpose of presenting awards. This format was highly successful and resulted in a larger turnout to honor the recipients, including attendance by more friends and families of the recipients. Based upon this success, it has been determined that ISBA will be following this format in future years with the luncheon moving locations between Chicago and the collar counties.

Legislative Proposals

The Assembly will be asked to endorse the ISBA Legislative Package consisting of proposals for legislation addressing:

1. Allowing examination of a respondent for civil commitment by electronic means due to lack of readily available on-site psychiatric physicians.
2. Making some technical changes to the Limited Liability Company Act, Section 10-10 and 15-5.
3. Making certain revisions in the Probate Act in the area of disabled adult guardianships.

Resolution in Support of an Independent Judiciary in Poland

The Board heard a presentation from a representative of the Chief Judge's Office of Cook County requesting a resolution from the ISBA supporting an independent judiciary in Poland. If you have been following this story, Polish leadership has been forcing the retirement of Judges in Poland and replacing them with judges hand-picked by the Polish President without any confirmation procedures. The Chief Judge's representative argued that "the international community has criticized Poland for recently enacting a law which criminalizes certain speech concerning the Holocaust. While the so-called "Holocaust Law" clearly warrants attention, it is symptomatic of a larger problem, namely politicization of the judiciary. Failure to address the underlying cause will enable the adoption and implementation of laws that could undermine respect for human rights. Independence of the judiciary, a necessary check and balance that protects democracies from authoritarian impulses, is under sustained threat in Poland.

The ruling Law and Justice (PiS) party began its most recent tenure by delegitimizing the Constitutional Tribunal through disregarding binding decisions and illegally swapping judges appointed to the bench with individuals sympathetic to the Party's views. This has permitted the Party to enact laws and then dictate which ones should be enforced without substantive constitutional review. Polish President Andrzej Duda has now referred the parts of the "Holocaust Law" that have been the target of negative international attention to the Constitutional Tribunal for review. Even if the Tribunal strikes down these sections of the law, it will be a hollow victory so long as the Party can determine which court judgments to enforce. What Poland needs is to restore judicial independence, so that laws unduly restricting freedom of expression and other fundamental rights will be rejected no matter which party is in power."

Following the presentation, the Board voted to propose a resolution of the ISBA in favor of an independent Polish Judiciary.

Upcoming Elections for ISBA Leadership Positions

Anyone interested in running for a leadership position with the ISBA should check out the ISBA website to get nominating petitions and an election packet. For members in the 18th Judicial Circuit, the following offices are open and available to run for:

1. Third Vice President
2. Board of Governors Under Age 37-Outside of Cook County. (The current holder of that position cannot run again due to term limits).
3. Sixteen seats on the Assembly allotted to the 18th Judicial Circuit. (Six of the sixteen incumbents cannot run again due to term limits).

The ISBA generally covers your lodging and transportation to meetings that you must attend as part of the job. The Assembly meets twice a year, at the annual and the mid-year meetings. The Board meets five to six times a year at various locations around the State. Running for the Assembly is a great way to get involved with ISBA leadership without a significant outlay of time. Being appointed to a Section Counsel or Committee is also a great way to get involved. Self-nominations are strongly encouraged. The nominating form can also be found on the ISBA website. □

About the Author

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

Basic Skills 2019,
Not Just for New Admittees

The Basic Skills Seminar is scheduled for a full day of 6 hours of PRMCLE credit to be held on court holiday, Monday, January 21 from 8:30 a.m. – 4:45 p.m. in the Bar Center Classroom at 126 S. County Farm Road in Wheaton. The program is open to all attorneys and will cover a variety of topics.

Newly Admitted Attorneys are required to attend the full program and/or participate in the Lawyer to Lawyer Mentoring Program to fulfill their first-year requirement. Others may register for individual one-hour sessions or the entire program. The DCBA course has been approved by the MCLE Board and Illinois Supreme Court Commission on Professionalism.

Pricing
The full, 6-session program is priced at $50 for New Admittees/$100 DCBA Members/$200 Non-Members. Individual sessions will cost $10 for New Admittees/$20 for DCBA Members/$40 for Non-Members. Lunch is included for all full day attendees.

For a finalized list of topics and speakers, check the weekly Docket e-newsletter and the dcba.org calendar pages. You may register at dcba.org for the full program or individual sessions. Be sure to login to receive DCBA member pricing. Registration is limited to classroom capacity, so register early!

Please note: Seminar Materials will only be available via an electronic link upon registering. It is suggested that materials be downloaded to your laptop or tablet prior to the seminar to avoid classroom WIFI overload issues. ☐

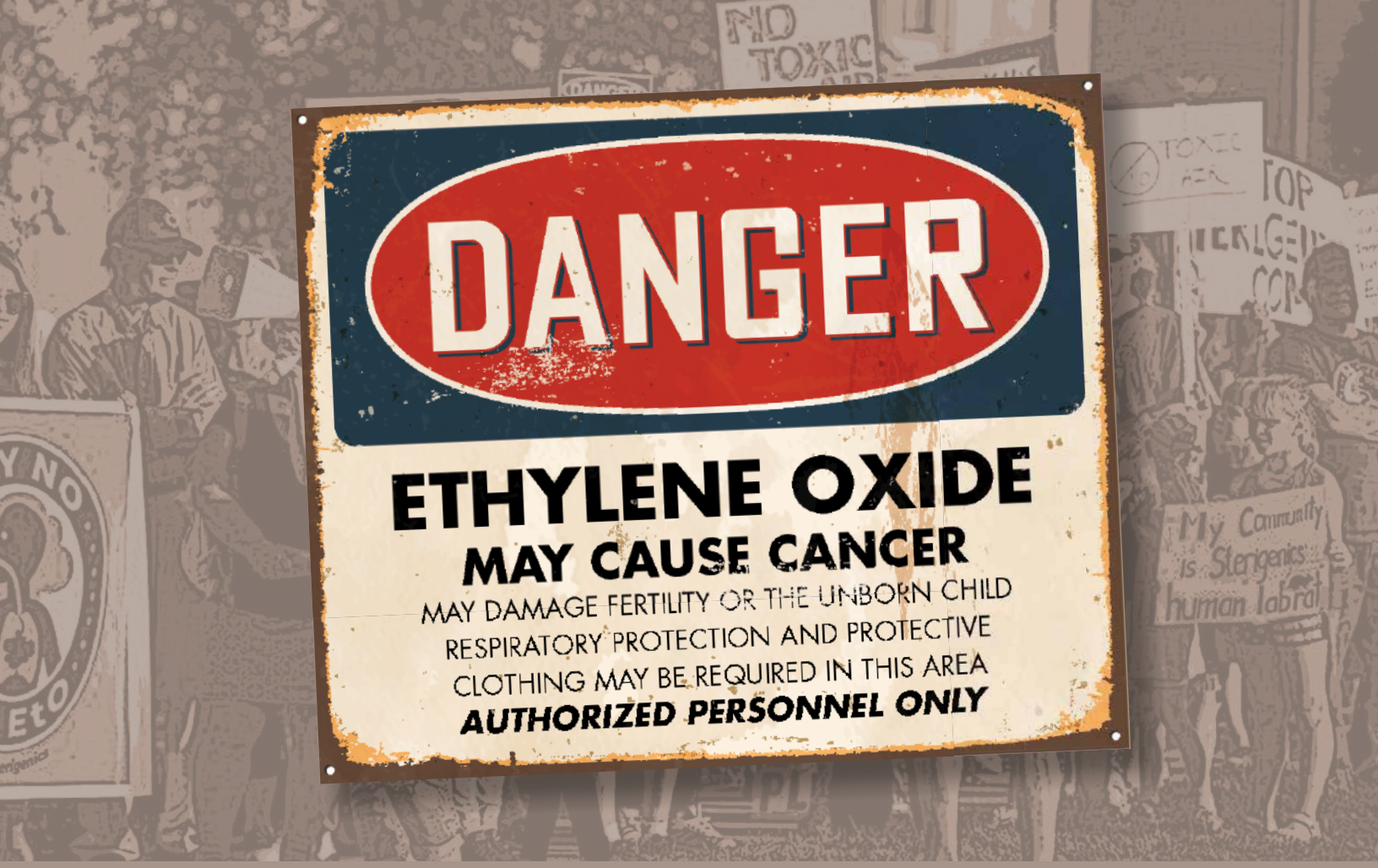
LRS Stats
11/1/2018 – 11/30/2018

The Lawyer Referral & Mediation Service received a total of **974 referrals, including 57 in Spanish** (861 by telephone, 95 online referrals and 18 walk-ins) for the month of November.

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, please call **Barb Mendralla** at (630) 653-7779 or email bmendralla@dcba.org.

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

Administrative	4
Animal Laws	1
Appeals	4
Bankruptcy/Credit Law	44
Business Law	18
Collection	50
Consumer Protection	7
Contract Law	1
Criminal	299
Elder Law	17
Employment Law	29
Estate Law	60
Family Law	196
Federal Court	0
Government Benefits	2
Immigration	3
Insurance	17
Intellectual Property	2
Mediation	0
Military Law	0
Personal Injury	98
Real Estate	99
School Law	6
Social Security	13
Tax Law	1
Workers' Compensation	3



Do you have a Sterigenics case to refer?

Salvi, Schostok & Pritchard is prosecuting Sterigenics related claims. A strong connection has been established between the emission of ethylene oxide and numerous cancers and fertility issues.

If you have a Sterigenics case to refer, please call Jeffrey Kroll at 312-372-1227 or email jkroll@salvilaw.com.

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MEDICAL MALPRACTICE ■ PERSONAL INJURY ■ WRONGFUL DEATH

Attorney Wellness and the ARDC

By Christine P. Anderson

Did you know that lawyers suffer from anxiety, stress, depression, substance abuse and suicide in numbers far greater than that of the general population?

To be a good lawyer, one has to be a healthy lawyer. Our profession, however, is failing when it comes to lawyer well-being. Studies have found that substance abuse, suicide, depression and other mental health disorders, are at astonishingly high rates in the legal profession. These findings raise troubling implications for lawyers' basic judgment and competence to practice law.

Many lawyers' mental health and substance abuse issues can be traced to law school. It is in law school that these lawyers began to experience the intense stress that can lead to anxiety, depression, substance abuse and other mental illnesses. While students entering law school suffer from clinical stress and depression at a rate that mirrors the national average, that rate sharply increases during the first year of law school. Through the duration of their legal education, the rates of law students struggling with substance abuse and mental health problems increase dramatically. If unrecognized and untreated, these issues will carry from law school into these students' legal careers.

The mission of the ARDC is to promote and protect the integrity of the legal profession, at the direction of the Illinois Supreme Court, through attorney registration, education, investigation, prosecution and remedial action. Unfortunately, many lawyers only first seek assistance for their substance abuse or mental health issues when they are encouraged or compelled to do so as a result of contact by the disciplinary office. In furtherance of the goals of education and remedial action, the Court and the ARDC have implemented several new rules and procedures, in addition to the Proactive Management-Based Regulation (PMBR), with a focus on lawyer well-being.

One of the modules developed for the PMBR self-assessment course, and important to the mission of the Illinois Lawyers' Assistance Program (LAP), is on the topic of attorney wellness. In the attorney wellness module, lawyers are informed that in order to fulfill their ethical obligations to clients and others, they should learn and practice wellness strategies. In the Attorney Wellness PMBR module, lawyers learn about attorney wellness and the help that is available for attorneys struggling with wellness issues; the ethics rules related to attorney wellness; and steps lawyers can take if they or a colleague need assistance.

In April of 2017, the Illinois Supreme Court amended Supreme Court Rule 794(d) to require lawyers to complete one hour of mental health and substance abuse education as part of their mandatory continuing legal education requirements. In order to assist practitioners in completing this new continuing education requirement, a free, one-hour online CLE on "Attorney Well-Being" is available to all practitioners on the ARDC website. The DCBA also offers free Wellness CLE programs to members regularly.

The ARDC's Attorney Well-Being CLE provides information on various areas of attorney wellness, including the physical, spiritual and emotional realms. In addition, there are self-assessment tools

About the Author

Christine Anderson is a graduate of IIT Chicago-Kent College of Law. She currently holds the position of Director of Probation and Lawyer Deferral Services and Senior Litigation Counsel for the ARDC. Ms. Anderson monitors the attorneys placed on diversion, supervision status by the Inquiry Board and probation and conditional admission by the Supreme Court of Illinois. She is a frequent presenter at continuing legal education programs on topics related to professional responsibility and lawyer regulation.

to assess one's own wellness, as well as hypotheticals and speakers who address various components of attorney wellness and the help that is available to lawyers. The Illinois Supreme Court and the ARDC desire that Illinois lawyers be successful in their law practices. The PMBR program and other new programs developed by the ARDC, are designed to help lawyers succeed by providing them with the resources needed for them to be effective and successful in their profession.

LAP also offers free courses to complete your one (1) Mental Health/Substance Abuse credit anytime, streaming 24/7, total of eleven (11) free CLE credits available. Offerings include, Practicing Wellness: Skills Beyond the Status Quo, Resiliency in the Face of Adversity, Your Best Thinking in the Worst Situations: Improving Decision Making Under Stress, and much more available here: https://illinoislap.org/online-cle-2/

For more information, visit the LAP website at www.illinoislap.org, or contact the Chicago LAP office at 20 South Clark St, Suite 450, 312-726-6607 or 800-527-1233. You may also send a totally confidential email to gethelp@illinoislap.org. No problem or concern is too big or too small. You have the ability to affect the future of our profession for the better. □

DCBA Affinity Discount Programs

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

Books for Bars

Special Discount on ABA Book Orders for DCBA members
Whether giving the gift of a great read or purchasing books for your practice, receive 15% off of any book order at www.shopaba.org when you enter promotional code **READDCBA** at checkout. In addition to hundreds of titles addressing all aspects of legal practice, the Ankerwycke line of titles published by ABA offers something for everyone with titles related to legal fiction, true crime, popular legal histories, public policy handbooks, and guides to current legal and business issues. Browse online and take advantage of this new DCBA member benefit.

Nothing Bundt Cakes

Your friends at Nothing Bundt Cakes in Wheaton, Elmhurst, Darien, and Geneva are excited to offer DCBA members a 15% off discount! Nothing Bundt Cakes is the perfect solution for your giving and they deliver throughout Chicagoland! All of their cakes are baked fresh on site daily and crafted by hand for over 40 different occasions. Discount applies only to in-store purchases at these locations. DCBA Members need to inform in-store personnel they are a DCBA Member.

Only valid at 4 locations:
- Wheaton: 421 Town Square, 630-480-7049
- Elmhurst: 355 South IL Route 83, 630-225-8300
- Darien: 7517 Cass Ave, Unit C, 630-541-8725
- Geneva: 1086 Commons Dr., 630-402-0311

Staples Advantage: Office Products and Services

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

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

Lawyers Lending a Hand Coat Drive Results

Once again, the LLH Annual Coat Drive brought in more than 2,000 winter coats and other cold weather clothing items. This year, in addition to the County department competition, three law firms created their own friendly competition, resulting in additional impressive numbers of donations.

This year's county department winner was the DuPage Care Center bringing in an impressive 192 coats followed by Stormwater Management & Public Works; the State's Attorney's Office; Housekeeping; Judges and Staff; Animal Services; the Highway Department; Recorder's Office and Public Defender's Office. Winning the friendly firm competition was Mirabella, Kincaid, Frederick & Mirabella with 95 coats! Other firm participants were Kollias & Giese with 72 and Mulyk & Laho with 26. We hope to have more firms take up the challenge next year!

All donations are greatly appreciated. Among those LLH volunteers who sorted the coats for DuPage organization distribution were: **Eddie Wollenberg, Audriana Anderson, Ruth Walstra, Ken Mueller, Judges Paul Marchese and Peter Dockery, Jane Nagle, Jessica Defino, Melissa Piwowar, Teresa Ellingsen, Danielle Jaeschke, Mary Meyer.** □

From the President *(Continued from page 5)*

George McFly once said, "If you put your mind to it, you can accomplish anything."

For those of you who are intent on making New Year's resolutions as you enter 2019, I wish you good luck in fulfilling them and cheer your effort to improve upon your past year. And for those of you who do not make any resolutions because you've already reached that level of self-fulfillment that a lot of us are still looking for, I wish you well for the New Year too…but slightly less. [*Cue tongue in cheek.]* □

Bonnie Wheaton, Leslie Strauss, Lauren Meachum, Tony Mankus, Ed Tiesenga, Anthony Licata (author), Liz Kreuger, Elizabeth Boddy, Jim Reichardt, Frank Markov, Greg Beggs

Law in Literature

The Law in Literature group met recently with **Anthony R. Licata**, author of the most recently discussed book, *Hannibal's Niece*. The group generally meets monthly over dinner to suggest and decide on which book they will discuss next. The book discussions take place about 2 weeks later at 4 p.m. in the Attorney Resource Center (ARC) in the courthouse. If you are interested in receiving meeting notices for the group, it is open to all comers. Just contact **Maria Pineiro** at mpineiro@dcba.org and she will add the group to your DCBA profile. □

Classifieds

Wheaton

Office for Rent in Wheaton: 10x12 office with large window in suite with two senior attorneys.1776A S. Naperville Road - Conference room, reception area, kitchen. **Call Mike at (630) 384-1280 or mjs@scalzolaw.com**.

Naperville

552 S. Washington Street, Suite 104. Naper Office Plaza. Wonderful space. Large beautiful office space with reception area and lots of parking. Nightly cleaning service included. **Please contact our office at 630-416-7600.**

Naperville

Prime office space for rent. Spacious 12'x14' office in an excellent location for a solo practitioner. Located on Chicago Avenue in Naperville, 1/2 mile East of Downtown. Ideal location for practicing in Du Page County. Exceptional opportunity for Attorney that practices in the areas of Estate Planning, Probate, Real Estate and Tax. Possible opportunity for subcontract work. Rent includes office space, conference room, reception area, lunch room, utilities and ample parking. **For additional details, contact Debbie via phone at (630) 753-8033 or email at Debbie@Lechowiczlaw.com.**

Roselle

Law Office on the second floor of a newly constructed bank. Office space is available for an individual attorney. Office is equipped with cubical for assistant; spacious storage closet; two (2) conference rooms; common kitchen; copiers; internet; ample parking. Location is near 355/290/390 for easy access to all surrounding counties and courthouses. **Call Holly 630.351.4466 or email bgradylaw@yahoo.com.**

Lisle

Momkus LLC is a multi-faceted law firm based in the heart of DuPage County (1001 Warrenville Road, Suite 500, Lisle, IL 60532) with office space available for individual attorneys. The office is equipped with 5 conference rooms, 3 kitchenettes, plus the ability to video conference. It is located 1/4 mile south of I-88 and 1 mile west of I-355, providing easy access to downtown Chicago and all surrounding counties. Lease term can be annual or multi-year. Referral arrangements are available and encouraged in the areas of transactional law, commercial/civil litigation, estate planning, family law, and commercial real estate. **Please contact Jennifer L. Friedland at jfriedland@momkus.com or Leone Pospisek at lpospisek@momkus.com for further inquiry.**

Where to Be
with DCBA

Trial Advocacy Program

The DCBA has expanded its Trial Advocacy Program by adding the Joseph Mirabella Jr. Domestic Relations Trial Advocacy Program. Please join us for a program that is geared toward domestic relations, but will provide every participant with important trial advocacy skills to be used in any area of the law.

The program will have instructors with extensive Domestic Relations trial experience teaching to assist a vast array of students from all different levels of experience. This workshop provides a great primer for all students, from the inexperienced rookie who is nervous about jumping into trial by fire to the wily veteran simply looking to polish his/her skills.

The program offers real life scenarios an attorney can expect during a trial involving many different types of issues that arise during cases. This 4-week program runs every Friday afternoon from 1 p.m. – 4:30 p.m. beginning February 8th. Students can expect to participate in every aspect of a trial concluding with a condensed mock trial on March 1st. Participants will have each part of the trial broken down with hands-on training in small groups which will assuredly make any attorney much better prepared and ready for their next (or very first) trial.

Each week of the program qualifies for 4 hours CLE credit for a total of 16 credits upon completion of the full program. The cost for the full program is **$400** for DCBA members and **$500** for non-members. (Be sure to login to receive the proper member rate.)

The required textbook will be "Trial Techniques and Trials" by Thomas A. Mauet. You may purchase this book on your own through Amazon or another book distributor. A limited number of copies will also be available at the DCBA Office to purchase. Previous editions of this book will work for the program.

The program will meet on the following dates:

- Friday, February 8, "*Orders of Protection*", 1 p.m. – 4:30 p.m.
- Friday, February 15, "*Testimony and Cross Examination of Experts & GALs*", 1 p.m. – 4:30 p.m.
- Friday, February 22, "*Business & Retirement Valuation*", 1 p.m. – 4:30 p.m.
- Friday, March 1, "*Trial - Direct & Cross Examination*", 1 p.m. – 4:30 p.m.

Each session above will include not only instruction on the titled topic, but other everyday issues that practitioners address for their clients on an ongoing basis.

Former students of the Trial Advocacy program had the following to say:

"The DCBA Trial Advocacy Program was a perfect program to update, fill in the gaps, and practice some weaker areas of my trial practices. The program was a great mix of learning on our own, learning in groups, then practical role playing. The fact that it is put on by mentors and coaches that are locally known for their courtroom experience and success is comforting and inspiring. I would certainly suggest this program to any attorney looking to freshen up or take their trial practice to a next level". **– Zach Martel**

"The DCBA Trial Advocacy Program was a great experience. We received thorough instruction from seasoned trial attorneys and judges in the community. By the end of the program, we had learned about every step of the trial process. We even had the opportunity to test our skills with a mini trial. I highly recommend participating in this program!" **– Lindsay Jurgensen Riddle**

"This is a program that is well worth the time and the money. It is a rare opportunity to tap the knowledge, experience and insight from an impressive range of professionals that generously provide important, high quality, relevant training the practitioner will appreciate and value going forward. The staff and instructors gathered for this program are bright, friendly and accomplished and they do an outstanding job. I am comfortable giving it a very high recommendation!" **– David Kozlowski**

"If you are rusty in your trial practice or are looking to feel more comfortable in the courtroom, this is the perfect intensive class for you. Learn proper technique from judges and litigators. Learn what types of presentation work best and what has little impact. If you make the commitment to do the work, your practice will benefit greatly." **– Nina Hennessy-Tamburo**

Space is limited to 32 participants. Walk ins will **NOT** be allowed for this program. If you are interested in more information or participating in this extraordinary program, please contact **Janine Komornick,** DCBA Continuing Education Manager at jkomornick@dcba.org. Once you are registered, further instructions will be emailed to you. □

***Deadline for refunds for this workshop will be Friday, February 1st. No refunds given AFTER this date.*

At Momkus LLC, our business attorneys counsel entities of all sizes. We assist with the preparation and negotiation of legal agreements and advise on complex business transactions.


Edward Momkus


Bret Klemetson


Lauryn Parks


John Killacky


Jason Doran


Ron Nyberg


David Newby


Neil Goltermann


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