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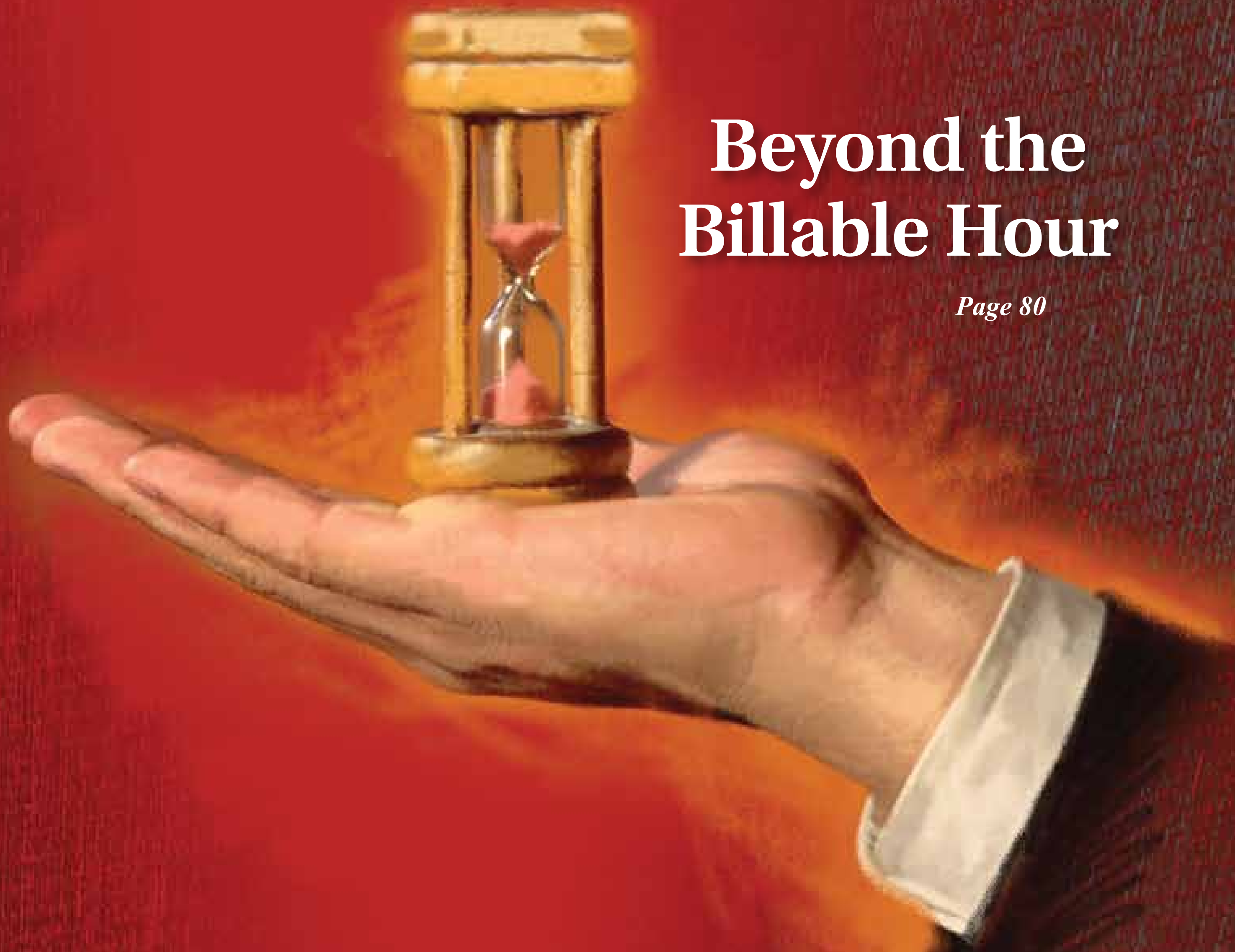

Beyond the Billable Hour

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 By John G. Locallo

ISBA Goes to Cuba

An ISBA delegation visits Cuba to learn about the Cuban legal system and teach about ours.

This past October, a small group of ISBA lawyers had the privilege of traveling to Havana, Cuba to observe the Cuban legal and judicial system. It was a rare opportunity to compare and contrast our approaches. Though just a couple of letters separate ISBA and CUBA, we were worlds apart. Yet after a week of discussions, we learned that we share some of the same goals and interests.

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As soon as we stepped off our airplane, we knew we were in another world. We ran like children on Christmas day to the parking lot to photograph the vintage Fords and Chevys from the 1950s. We witnessed the beauty of Havana, a land where time has stood still but apparently is now on the move.

Yet I experienced an unsettling feeling when I saw the large monuments to Fidel Castro, Che Guevara, and Jose Marti. This is not yet a totally free country. Cellphone reception was nonexistent. Internet usage at our hotel crawled so slowly that we couldn't realistically communicate with the outside world.

But we learned so much. Each morning our daily meetings started at the headquarters of the National Union of Cuban Jurists (UNJC). There we met with law professors, lawyers, judges, and justices and had lively discussions learning about and challenging each other's systems.

The judiciary – not a coequal branch

A fundamental difference between the Cuban legal system and ours is that their judiciary is not an equal third branch of government. Judges do not have the constitutional power to overrule statutes and are subordinate to the executive branch.

Another major difference is that the principle of stare decisis does not exist in Cuba. The courts do not abide by precedent. Rather, they simply apply the applicable statute to the facts presented. In fact, both trial and appellate courts hear each case de novo.

The court system has a wide geographic reach and operates on various government levels. There are three tiers of courts: national, provincial, and municipal. Cuba has 15 provincial and 168 municipal courts. There are six courts of justice: criminal, labor, civil, economic, state security, and military. The courts are subordinate to the National Assembly of People's Power, Cuba's parliament.

A courtroom will generally have three to five judges on the bench depending on the type of case. At least two of these will be "lay judges," persons without a law degree who are elected to five-year terms. There are no juries.

The Cuban Constitution has 15 chapters and 133 articles. The National Assembly of People's Power is the only body invested with "constituent and legislative authority" and holds two regular sessions a year and special sessions under certain circumstances. If statutes are changed, this typically happens at the Assembly meeting. This Assembly elects the Council of the State, which consists of the President of Cuba, six vice presidents, and 23 other members.

Despite the lack of independence by American standards, the Cuban lawyers and judges that I met were proud that they could represent their clients, or rule from the bench, without interference or repercussion from the Cuban government.

A large percentage of the Cuban legal system concerns the day-to-day activity of the Cuban citizens, where crimes are committed, divorces are decreed, people are wronged. To a lesser degree, the courts are involved with commerce. That I am a tax lawyer was a bit foreign to them.

Though just a couple of letters separate ISBA and CUBA, we are worlds apart. Yet we learned that we share some of the same goals and interests.

More economic, personal freedom

With the fall of the Soviet Union, the Cuban economy, always troubled, began to fall apart. Cuba saw the handwriting on the wall. Through adversity, the Cuban government has realized that it must diversify their economy and trade with the rest of the world.

Economic freedom has resulted in more personal freedom. Just recently, Cubans were allowed to own their homes (but not their land). They can now sell their cars and surplus crops at the market. *Paladares*, family-run restaurants, are flourishing – as is, not surprisingly, productivity. The citizens speak of no longer being a communist, but instead a socialist, country.

In conjunction with this, Cuba has been busy creating a legal system that they hope will draw international trade and investment. One theme is the right to private property (the Cuban Constitution says that the expropriation of property during the revolution was a one-time occurrence). We were told that the Cuban government offered reparations for the confiscated property after the Revolution in 1959. I found that hard to believe.

So far, Cuba has been successful in drawing international companies to partner with the Cuban state in establishing industry, similar to the Chinese model. Nonetheless, Cuba's excessive government bureaucracy continues to burden entrepreneurship with heavy regulation and government control. Some of the officials indicated frustration with this.

Given the current U.S. political climate and Florida's large number of electoral votes, don't expect trade relations to be entirely relaxed anytime soon. But I do believe we are at the beginning of that process. I further think this will provide a great trade opportunity for U.S. business, energy, and agriculture. As we have often seen, economic opportunity trumps politics.

The ISBA was fortunate to be in Cuba during this period, and we met many wonderful people. We are at the beginning of dialogue on trade and international law. Both sides realize that there are many historical and political reasons for the falling out between our two countries. We realize that we never had animosity towards the people of either country, just the economic and political systems.

I cannot stop thinking about the parting words of one of our dignitaries when he said to us, "We are neighbors. It should always have been that way." ■

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High court: state must provide videorecordings in DUI misdemeanor cases

Police videorecordings of traffic stops must be made available to DUI defendants even in misdemeanor prosecutions, the Illinois Supreme Court rules.

Videorecording traffic stops was unheard of in 1974, when the Illinois Supreme Court decided *People v Schmidt*, 56 Ill 2d 572, 309 NE2d 557 (1974). At that time, the court addressed the scope of discovery required in misdemeanor cases, which was and remains more narrow than that required in felony matters. Considering the law as well as custom and practice at that time, the court held that the state must provide DUI defendants with breathalyzer test results in addition to a witness list, any confessions, and evidence negating guilt.

Now, observing that "the routine video recording of traffic stops has now become an integral part of those encounters," the court has unanimously held that videorecordings are important and relevant evidence and fall within the scope of materials that it held in *Schmidt* were discoverable in misdemeanor cases. The case is *People v Kladis*, 2011 IL 110920.

The facts of *Kladis*

In May 2008, Marina Kladis was arrested in the village of Northlake and charged with driving under the influence of alcohol. The arresting officer recorded his encounter with Kladis with a camera that was mounted on the windshield of his squad car.

Five days after her arrest and 25 days before her first court date, Kladis filed and hand delivered to the state's attorney's office a petition to rescind her statutory summary license suspension and a notice to produce, among other things, any and all videotapes of her while she was in custody. At the hearing, after verifying that the officer had recorded the stop, the state agreed to produce the requested items, including the videotape. The court continued the hearing on Kladis's petition for two weeks.

At the second hearing, the state advised Kladis and her counsel that the Northlake police department had erased the recording just hours before the first appearance, pursuant to its departmental policy of purging video recordings within 30 days of arrest.

The court continued the hearing on Kladis's motion to permit her to file a motion for sanctions against the state, which the court scheduled for the following week. At that hearing, the court granted the motion. It ruled that the state might not introduce testimony concerning what had been recorded, but that evidence of Kladis's driving and other actions before the time that the video would have begun would be admissible, as would any of her actions after her arrest.

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Immediately after ruling on the sanctions motion, the court heard evidence and argument on the rescission petition. Finding that the officer had no probable cause to stop, detain, or arrest Kladis, it granted her rescission petition and held that the same sanctions would apply in the DUI case.

The state appealed the sanction order. The appellate court upheld the order, and the supreme court granted the state's petition for leave to appeal.

Advancing the purpose of DUI statutes

Since late 2008, the supreme court observed, the State Police Act has required state squad cars to have recording devices installed. The statute also requires officers to record their activities, including all enforcement stops for suspected violations of the Illinois Vehicle Code. Those recordings must be maintained for at least 90 days. 20 ILCS 2610/30(b) and (f). In 2009, the legislature passed PA 96-670, requiring in general that any law enforcement agency that makes a video and audio recording in connection with investigation or law enforcement must retain the recording for at least 90 days. 720 ILCS 5/14-3(h-15).

Although those enactments occurred after Kladis's arrest, the court found the legislative intent behind them significant: "[T]he purpose of recording traffic stops and preserving these recordings for later production is to assist in the truth-seeking process by providing objective evidence of what occurred between the law enforcement officer and the citizen.... [T]he recording assists the trier of fact in seeking the truth and at arriving at a just result." *Kladis* at 7.

In *Schmidt*, the court said, it identified a number of evidentiary items that shared important evidentiary value and are relevant to the defenses that those charged must prepare. "[V]ideo recordings made by in-squad car cameras in misdemeanor DUI cases have become as relevant to the issue of proving or disproving guilt as the materials specifically mentioned in *Schmidt*." *Kladis* at 5.

Making those recordings available, then, benefits prosecutors and defendants alike, the court said. In fact, it reasoned, fewer cases may proceed to trial as a result of their availability, for they may influence pleas that defendants otherwise might not have considered. Additionally, providing video recordings to defendants will advance the ultimate purpose of DUI statutes, ensuring that roads remain safe from impaired drivers.

The court rejected the state's argument that requiring discovery of video recordings in misdemeanor DUI cases would be unduly burdensome or would delay the judicial process, held that the trial court did not abuse its discretion, and remanded the matter for further proceedings in the DUI prosecution. ■

High court overturns default order against dad in neglect proceeding

The supreme court finds that a default order against a father who wasn't served with a petition to terminate his parental rights should be set aside.

Reaffirming that the right of parents to raise their biological children is a fundamental liberty interest, the Illinois Supreme Court has agreed with the Illinois Appellate Court that a default order issued against a father who was never served with a petition to terminate his parental rights in a neglect proceeding should be set aside. The opinion, issued December 1, 2011, is *In re Haley D.*, 2011 IL 110886.

The facts

In addition to his youngest child, Haley D., Ralph L. was the father of six, four of whom, all by his former wife, Patricia D., lived with him and his mother, who helped take care of them. At the time of the trial court proceedings, he had held a full-time job with the same employer for 12 years. The evidence, including testimony from social workers, showed that his house was clean, safe, and child-appropriate, that he managed his money well, and that he was "invested" in the lives of those four children as well as that of his eldest, aged 16, from an earlier relationship.

The record also showed that violent incidents that the court did not describe had taken place in Ralph L.'s home. He and Patricia D. had become estranged during her pregnancy with Haley, who, in April 2007, was born with cocaine in her system. Haley was placed in protective custody in a foster home when she was released from the hospital, and the state filed a petition alleging that she was a neglected minor and asking that she be made a ward of the court.

The court granted the petition and set a permanency goal of returning Haley to her parents within a year. The court and the Department of Children and Family Services scheduled and held the usual events in and out of court in neglect proceedings, including a service plan and parent coaching sessions.

Ralph largely complied with and attended the scheduled events. He did not complete domestic violence or mental health assessments or a substance abuse evaluation, but DCFS reported that his progress was satisfactory overall.

By August 2008, Patricia had essentially dropped out of the proceedings (though she reentered them later), and Ralph had filed for divorce. As a result, the court found that she was no longer making substantial progress toward Haley's return home. Despite Ralph's substantial compliance with the DCFS plan, the court made the same determination with regard to him.

The following month, the foster parents moved to intervene and a social service agency that contracted with DCFS to provide services in the matter filed a report opining that because of his failure to comply with a domestic violence assessment and random drug screens, Ralph had not made Haley's return a priority. The agency recommended that the court change the permanency goal to substitute care pending termination of parental rights.

No longer a party

Ralph appeared pro se and explained to the court that his lack of perfect compliance with the service plan requirements was because he was extremely busy at work and had other children at home to care for. Nevertheless, the court granted the foster parents leave to intervene and the state leave to file a petition to terminate the parental rights of both Ralph and Patricia.

Four months later, the state did so. It never served either Ralph or Patricia personally, and ultimately served Patricia only through publication. Ralph did not appear at the hearing on the petition. The court entered an order finding him in default.

At the following hearing, 28 days later, Ralph appeared with new counsel and requested and was granted additional time in which to file a motion to set aside the default order. He filed that motion within the time allowed together with an affidavit that he had failed to appear at the hearing on the termination petition because he had difficulty making care arrangements for his other four children on that day and had a flat tire on his way to court.

The court found that Ralph had presented no facts to establish either due diligence or a meritorious defense to the termination petition, denied his motion to vacate the default, denied his counsel's request for leave to file an amended motion, and ordered him from the courtroom, saying he was no longer a party and did not have the right to be present. Ralph promptly appealed, and a divided panel of the appellate court reversed. The state petitioned for leave to appeal.

Reversible error

Noting that Ralph had made arguments under both sections 2-1301 and 2-1401 of the Code of Civil Procedure, the supreme court said that because the default order was not a final order disposing of the parties' rights, only section 2-1301(e) was applicable. A default order, the court said, differs from and precedes a default judgment, which requires additional steps. The court's failure to consider Ralph's request under the standards of section 2-1301(e) was reversible error.

Discussing all of the circumstances in detail, including the absence of service of the termination petition and the fundamental liberty interest at stake, the court found that substantial justice required setting aside the default. The court also commented that the trial court was mistaken when it said that Ralph was no longer a party and acted improperly in ordering him from the courtroom. Affirming the appellate court's reversal of the trial court's order, the court remanded the matter for further proceedings.

Justice Theis filed a separate concurrence in which Justice Garman joined. Among other matters, the concurring justices expressed concern over the majority's "blur[ring] the line between the Juvenile Court Act of 1987 and the Adoption Act, creating unnecessary uncertainty in the law." ■

The continuing saga of J.S.A., M.H., and W.C.H.

A long and bitter dispute between two lawyers over the child their relationship produced generates yet another reported opinion.

Even in the age of the 900 series of supreme court rules, proceedings regarding the parentage, custody, and visitation of a child sometimes take years.

The Illinois Appellate Court has filed another installment in the bitter visitation dispute between J.S.A. and his former lover, M.H., and her husband, W.C.H. The order, entered under SCR 23 on December 19, 2011, is *J.S.A. v M.H. and W.C.H.*, 2011 IL App (3d) 0214-U, and is available on the website of the state courts.

The tangled web

J.S.A. and M.H., both lawyers, had an affair that resulted in the birth of T.H. in January of 1996. M.H. was and remains married to W.C.H., who was named as T.H.'s father on the child's birth certificate.

In September 1999, about a year after M.H. ended their affair, J.S.A. filed a petition to determine the existence of a parent-child relationship under the Illinois Parentage Act of 1984.

Prolonged and tortuous litigation ensued. (See J.S.A. – *the supreme court peers into a tangled paternity web*, LawPulse, March 2007 IBJ.) The first hearing on visitation did not take place until November 2010, when T.H. was shortly to turn 15. Throughout the litigation, a protective order barring the parties from publicly discussing the pending matter and prohibiting J.S.A. from contacting T.H. remained in effect.

At the outset of the visitation proceeding, the trial court ruled that the burden would be on M.H. to prove that visitation would cause serious endangerment to T.H., instead of on J.S.A. to prove that it was in T.H.'s best interest to order visitation, describing M.H.'s burden as "onerous, stringent, rigorous, and more stringent than best interest." The parties did not challenge that ruling.

The uncontested evidence showed that T.H. was healthy, academically successful, and socially well adjusted, with many long-term friendships. He lived in an affluent neighborhood, was active in sports, had a good relationship with his family, and attended a religious school.

W.C.H. testified to a very close relationship with T.H., no different from his relationship with his and M.H.'s two older children, who are in their early twenties. W.C.H., M.H., and the two older children all testified that in their opinion, telling T.H. that W.C.H. was not his biological father would be devastating for him, that he was not ready to handle the information, and that it would be much better to wait until T.H. was 18 to give him that information. One of the children testified that, at the age of 23, she was still having a hard time handling her own knowledge of the facts.

M.H. testified that she expected that T.H. would be very angry with her and that his relationship with W.C.H. would suffer, and that she feared T.H. might enter a depression or consider suicide if he learned the truth about his parentage now.

J.S.A. testified that he has four other children ranging from 26 to 31 years of age, that he is a good father to them, and that he would be a good father to T.H. He also testified that his other children all attended college, are successful adults, want to get to know T.H., and that some have children of their own who should know T.H.

M.H. and J.S.A. both presented expert testimony from licensed clinical psychologists, neither of whom had been permitted to interview T.H. M.H.'s expert testified that it would be worse for T.H.'s development to tell him about his biological father now than when he turns 18 because he will have more emotional development and a better sense of identity when he is older.

J.S.A.'s expert testified that he believed that the potential for psychological damage to T.H. was small, depending on how the adults around him managed the disclosure. He opined that it would be better to tell T.H. now than when he turns 18, in part because it would give T.H. a better opportunity to know the love of his biological father and other half-siblings and expand his family.

"Deep and obvious hatred"

The trial court denied visitation. It remarked on the "deep and obvious hatred between the parties" and opined that the adults around T.H. would not manage visitation well for that reason, which would compound, not minimize, the psychological impact on T.H.

Unanimously upholding the trial court, the appellate court panel said that the trial court's finding the mother's expert's testimony more persuasive than the father's was neither contrary to the manifest weight of the evidence presented nor an abuse of discretion.

Waukegan attorney Mark Simons, a member of ISBA's Child Law Section Council, said, "This is a decision that really grabs your emotions and sense of ethics." Noting the speculative nature of the testimony regarding whether T.H. might overreact to the news that J.S.A. is his natural father, Simons wondered how realistic those concerns were. He also questioned whether the weight the court assigned to the feelings and behavior of the adults in the matter might result in T.H.'s "paying the price for his parents' misbehavior."

But Simons also felt "The decision shows the strength of the IMDMA and the Parentage Act. Both were designed to be flexible so as to deal with unusual facts." ■

Federal pilot program puts cameras in northern district courts

Illinois' northern district is one of 14 courts participating in a federal program that allows videorecording of civil cases before district judges if all parties consent.

Cameras in the courts are here.

Historically, state and federal courts have taken a dim view of photographing court proceedings. The website of the United States Courts notes that Federal Rule of Criminal Procedure 53 has prohibited taking photographs in criminal proceedings ever since 1946 and that in 1972, the Judicial Conference of the United States formally prohibited broadcasting, televising, recording, or taking photographs in courtrooms and adjacent areas. In Illinois, SCR 63A(7) prohibits both taking photographs in state courtrooms during court proceedings or recesses and broadcasting or televising court proceedings, except to the extent authorized by the supreme court.

More recently, the courts have begun easing those restrictions. The Illinois Supreme Court has authorized videorecording oral arguments before it and audiorecordings of appellate court arguments and posts those recordings on its website for public viewing. The Judicial Conference of the United States Courts has authorized the courts of appeal to decide for themselves whether to permit audio or video recordings of arguments, and the seventh circuit has chosen to record audio of arguments before it and to post them on its website. The Judicial Conference also authorized a three-year pilot project in the 1990s but, after its conclusion, declined to approve a recommendation of its Committee on Court Administration and Case Management (CACM) to permit camera recordings of proceedings in all federal trial and appellate courts.

Now, the federal Judicial Conference has approved another video recording pilot program, beginning in June 2011. According to the U.S. Courts website, the program's aim is to evaluate the effect of cameras in district court courtrooms, video recordings of proceedings, and the publication of those video recordings. The pilot limits its scope to civil cases before U.S. district judges and conditions recording on the consent of all parties. Fourteen courts are participating, including the district court for the Northern District of Illinois.

As part of its participation in the pilot, the northern district has adopted new policies, which it explains and links to at http://www.ilnd.uscourts.gov/home/CameraInCourt.aspx. New subsection (e) to Local Rule 83.1, which governs court facilities, exempts proceedings that are being recorded as part of the pilot from subsection (c)'s general prohibition of photographing, broadcasting, or taping court proceedings. Only court cameras are permitted to record proceedings, and those recordings must comply with the Judicial Conference's guidelines. The page also contains links to a guide for implementation from CACM dated July 26, 2011, questions and answers from CACM, amended LR 83.1, and a downloadable form response to a request for recording under the pilot project.

Parties, media may request recording

Judge Amy St. Eve of the northern district, who is a CACM committee member, said she's asking lawyers in all civil cases before her whether they will consent to having proceedings recorded. Because "[t]o date every case has had one yes and one no," none of her cases have yet been recorded.

She said she hopes that the district will get samples for the pilot and is optimistic that "[o]nce we get the news out, I'm hopeful that we will." St. Eve noted that one of the pilot's goals is for diverse types of proceedings to be recorded, mentioning *Daubert* and other hearings in addition to trials.

The Judicial Conference is encouraging the participating courts, including the clerks as well as the judges, to initiate requests to record proceedings. The parties to cases may also request that proceedings be recorded, as may the media.

To do so, St. Eve said they may use the form response available on the court's website or may verbally address their requests to the judges presiding. A party may consent to have only part of a proceeding recorded, and the presiding judges may exercise their discretion against recording a proceeding that contains sensitive matter or against publishing a recording of a proceeding.

If a witness objects to having his or her testimony recorded, lawyers are to inform the presiding judge, who will consider whether relief is appropriate. Voir dire of prospective jurors will not be recorded.

Neither the Central nor Southern Districts of Illinois are participating in the pilot. Chief Judge Michael McCuskey of the Central District of Illinois said the judges in his district discussed the pilot project but generally were not interested in participating. McCuskey said that in his view, it makes more sense for the larger courthouses to participate in the pilot program. A spokesman from the Illinois Supreme Court noted that Chief Justice Thomas Kilbride has gone on record as saying that he does not oppose cameras in courtrooms, but said that the court currently has nothing new to report on that matter.

The northern district will post recorded proceedings for public viewing on www.uscourts.gov as well as on its own website within a reasonable period after recording them. You can view proceedings from courts that have implemented the pilot program at http://www.uscourts.gov/multimedia/cameras/player.aspx. ■

Curbing abuse of arrest warrants for debtors

The attorney general's office and a circuit court judge describe steps they're taking to help prevent debtors from being unfairly jailed for failure to pay.

An article appearing in the March 17, 2011, issue of *The Wall Street Journal (WSJ)* has prompted Illinois Attorney General Lisa Madigan to launch an initiative to curb the improper use of arrest warrants in debt collection cases.

As Jessica Silver-Greenberg reported in the *WSJ*, "sloppy, incomplete or even false documentation" has resulted in courts issuing arrest warrants for borrowers who had no notice that debt collectors were suing them. The article referenced cases from Illinois, among other states, citing one payday lender who had obtained arrest warrants against at least four customers, one of whom, the article said, had failed to pay a $275 bill and ended up spending five days in jail.

On reading the article, Madigan's office did some research, said Natalie Bauer, Madigan's communications director. The results indicated that abuses of requests and orders of body attachment were common in several counties in the central and southern parts of the state.

Madigan decided to make curbing those abuses a priority. In November, the *WSJ* reported that she said her office will press state judges to quash requests for arrest warrants by lawyers representing debt collectors and file enforcement actions against companies who abuse their power to seek arrest warrants.

Debtors' prison?

The *WSJ's* report of Madigan's statements provoked a lively discussion on ISBA's general discussion group. Now, Bauer has provided LawPulse with more information about the attorney general's initiative.

"Our office is engaged in ongoing discussions with the Administrative Office of Illinois Courts to determine the most effective approach for working with the court system to put an end to this practice," said Bauer. "We are also exploring additional options for addressing this problem, including working with the general assembly to clarify and strengthen the rights of judgment debtors."

Though Madigan acknowledged that she can't force judges to adopt any particular practices, Bauer said, "Members of the judiciary have been responsive to our outreach efforts and have indicated they take this problem seriously."

She summarized Madigan's objectives: "We are working to improve the uniformity of court procedures to ensure that debtors cannot go to jail for 1) failing to pay a debt that they do not have the ability to pay, and 2) failing to appear at a hearing when there is no proof that they were personally served with the hearing notice."

Some ISBA members expressed concern that articles in, for example, the *WSJ* "make it sound like Illinois has debtors' prison." Bauer emphasized that the attorney general's concern is with improper requests for and the improper issuance of arrest warrants, not with contempt proceedings and prison terms that may result. The facts of the cases described in the *WSJ*, Bauer said, "demonstrate that this issue is absolutely not about the enforcement of court orders or the failure to comply with a rule to show cause that has actually been served."

Contempt – making sure safeguards are followed

But Logan County Resident Circuit Judge Thomas M. Harris Jr. said it's important not only for judges but also for attorneys for both creditors and debtors to make certain all procedural safeguards are followed, whether the proceedings are for the issuance of an arrest warrant or for contempt.

In a contempt proceeding, Harris said, "The court needs to take an active part in the examination of the defendant debtor. If the debtor is unrepresented, I'll do most of the examination so I can make sure I have all the relevant information.

"I make sure in any contempt proceeding that I explain to that individual what must be established before a contempt finding can be made. I find it important for individuals to have an understanding of the framework of the hearing, for that might prompt them to volunteer information that might not be elicited through my questioning or that of the creditor's lawyer.

"Judges may be reluctant to engage in actively questioning an individual, especially when lawyers are involved. But in a contempt proceeding where someone's liberty is at stake, where we're talking about a potential jail sanction for the failure to pay on a debt, the court has to make sure all of the available information is before it for making that decision."

As a resource, Harris recommends *Principles of Contempt*, by Judge John P. Shonkwiler, Chief Judge of Illinois's Sixth Judicial Circuit. He also suggests reading *Turner v Rogers*, 564 US ___ (June 20, 2011). "That case provides best practices guidance to trial courts and a cautionary note that there are certain minimum procedural safeguards that should be followed."

Providing proof that the "cupboard is bare"

ISBA members also weighed in on their procedures in debt collection litigation.

Downers Grove lawyer Dennis Bordyn wrote, "When I am representing a judgment debtor and they get the citation to discover assets, I usually contact the creditor's law firm and ask them if we can provide proof that the 'cupboard is bare' before the appearance date and, if we do so, then strike the appearance.

"They save the few hundred dollars it would take to send an attorney to the courthouse to get the same information and my client can put this behind them and not worry about a body attachment. Besides, the law firm can avoid the cost of going through the process of a rule to show cause and a body attachment.

"If the cupboard is not bare, we can usually agree to a reasonable payment plan that could avoid a bankruptcy filing."

To read more and add your .02, navigate to ISBA's general discussion group (www.isba.org/discussions) and look for the discussion entitled "Madigan pushing to limit debt collectors' use of arrest warrants" dated November 22, 2011. ■

cases

Court upholds parenting order restricting children's exposure to non-custodial parent's religion

***Voris v Voris*, 2011 IL App (1st) 103814**

An order prohibiting a non-custodial parent from exposing his children to Jehovah's Witness beliefs until the child is 13 is valid because those beliefs were being used to alienate the custodial parent, according to the Illinois First District Appellate Court.

Mark and Orla Voris were married in 1995 and had three children together. On November 12, 2009, an order for dissolution of marriage was entered along with a parenting order agreed to by the parties. The order granted Orla custody of the children subject to Mark's weekly visitation rights. It also provided that Mark would refrain from exposing the children to his Jehovah's Witness beliefs until each of the children was 13 years old.

In September 2010, Orla filed a post-dissolution petition seeking for Mark's visitation to be supervised. Orla alleged several instances in which Mark violated the parenting order, claiming his actions undermined her relationship with her children and harmed their well being. The court ordered supervised visitation going forward, not because of the substance of Mark's religious beliefs but, rather, because he was using his religious beliefs to alienate his children from their mother and custodial parent.

Mark appealed, arguing that there was insufficient proof of harm to his children, which he claimed was required for supervised visitation to be ordered, and that the court should not have considered the evidence offered by Orla's psychological expert. Though Mark failed to comply with procedural rules relating to the content and form of his brief, the court found that he had provided sufficient materials for review and attempted to correct the deficiencies. Therefore, the court proceeded to address the merits of his appeal.

The court disagreed with Mark's claim that proof of harm was required in order for the court's order of supervised visitation to be proper. It found that Mark relied upon non-binding case law from jurisdictions outside of Illinois. Furthermore, even if proof of harm were required, Orla presented sufficient evidence to meet that burden, showing that the children suffered emotionally and mentally from Mark using his religion to alienate them from their mother.

The court also addressed Mark's argument that the psychologist's report should not have been considered because it was inconsistent and unconstitutional. Finding that Mark failed to cite to the record, did not prove that there was an inconsistency, and that the order did not prohibit Mark from practicing his religion, the court found Mark's second argument to be without merit.

For the reasons above, the court upheld the order restricting Mark from exposing his children to his religion and ordered supervised visitation.

Offer of tender must include post-judgment interest

***Poliszczuk v Winkler*, 2011 IL App (1st) 101847**

An offer of tender that does not include payment of accrued post-judgment interest is not sufficient and, therefore, does not stop the accrual of additional post-judgment interest according to the Illinois First District Appellate Court.

On December 9, 2011, the court reversed and remanded an order instructing defendant Kathryn Winkler (Winkler) to pay partial post-judgment interest to plaintiffs Joseph and Charles Poliszczuk (Poliszczuk). The court held that Winkler did not make a sufficient offer of tender to Poliszczuk because she did not propose to pay post-judgment interest; therefore, the offer of tender was not effective to stop the accrual of post-judgment interest under 735 ILCS 5/2-1303. In 2006, Poliszczuk obtained a money judgment against Winkler in a personal injury suit. In February 2007, Winkler wrote a letter to Poliszczuk offering to pay the money judgment and related court costs. Poliszczuk did not respond to the letter. While Poliszczuk appealed the judgment, Winkler sent two additional letters expressing her willingness to pay the judgment and court costs; neither letter received a response. In September 2009, Winkler proffered payment of the original judgment and court costs, and Poliszczuk filed a motion for post-judgment interest. The trial court ruled that Winkler's February 2007 letter constituted a sufficient offer of tender to Poliszczuk, which terminated the accrual of post-judgment interest, and, therefore, defendant was obligated to pay interest only for the period prior to the letter. Poliszczuk timely appealed.

The appellate court first clarified the appropriate standard of review, finding that while §2-1303 plainly required the addition of 9% post-judgment interest to the original judgment, the court retained authority to determine if and when a sufficient offer of tender was made. Section 2-1303 was intended to provide the judgment debtor relief from the general post-judgment interest rule if s/he tenders payment or makes an offer of tender. An offer of tender must be sufficient to be effective. Alternatively, a judgment debtor is immune from paying post-judgment interest if the judgment creditor rejects its offer of tender, assuming the offer of tender was sufficient when made.

Accordingly, the central issue was whether Winkler's letter was a sufficient offer of tender. After reviewing the Illinois Supreme Court's decision in *Yassin v Certified Grocers of Illinois, Inc*, 133 Ill 2d 458, 551 NE2d 1319 (1990) and first district precedent, the court found that an offer of tender is sufficient to terminate the accrual of post-judgment interest only when it proposes to pay all that is owed, including the money judgment, court costs, and post-judgment interest. Consequently, Winkler's letter was not a sufficient offer of tender because it did not signal a willingness to pay post-judgment interest. An offer of tender must be explicit; Winkler's persistent letters alone were not evidence that she was prepared to pay the post-judgment interest. Since Winkler's offer of tender was not legally sufficient, the issue of whether Poliszczuk's failure to respond to her letters amounted to a refusal of an offer of tender was moot. The court remanded the case to determine the proper amount of interest owed.

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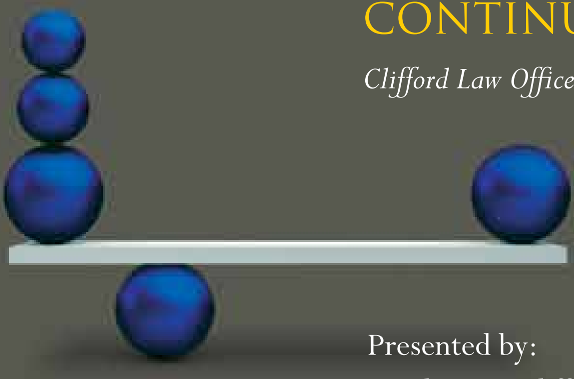

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- Professor Katheryn M. Dutenhaver, Director, DePaul University College of Law Center for Dispute Resolution
- The Honorable Stuart Nudelman, retired Judge of the Cook County Circuit Court and certified mediator with ADR Systems

Clifford Law Offices is sponsoring a ***free*** two-hour continuing legal education program on the ethics of settlement, negotiation and mediation in the fifth annual Clifford Law Offices Continuing Legal Education Series. The two-hour program will include an examination of various hypotheticals involving negotiation, settlement and mediation. These can be effective ways to advocate for your client, but when an outside person comes on the scene to help the parties come to a resolution, various ethical issues can arise. What are some of the questions that lawyers need to look for when trying to resolve their cases out of court? Inadvertent disclosure of confidential information, possible coercion of parties to an agreement, unrepresented third parties, and selection of an impartial mediator and the necessary disclosures before choosing one are some of the issues that will be discussed in an interactive program with people in the audience as well as those attending via the Internet. Various Illinois Rules of Professional Conduct, Illinois State Bar Association advisory opinions and Model Standards of Conduct for Mediators adopted by the American Arbitration Association, the American Bar Association and the Association for Conflict Resolution will be discussed as the panelists explore this area that is becoming more and more common to resolve conflicts, simple and complex.

Date: Thursday, February 16, 2012

Time: 2:30-4:30 pm CST

Place: Broadcast live via the internet from the DePaul Center, Room 8005
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legislation

New procedure for authorizing the release of a deceased patient's health care records. PA 097-0623

(Effective 11/23/11)

The Code of Civil Procedure has been amended to introduce a new procedure for authorizing the release of a deceased patient's records (735 ILCS 5/8-2001.5 new). The executor or administrator of the deceased person's estate, or an agent under a power of attorney for health care, may authorize the release of a deceased person's health care records upon written request. In the absence of an executor, administrator, or agent, and where the deceased did not object to the disclosure of his or her records in writing, then the following persons may submit the written request: 1) the deceased person's surviving spouse, or 2) in the absence of a surviving spouse: an adult child, parent, or adult sibling of the deceased.

The amendment also provides an "Authorized Relative Certification" form for submission to health care facilities and practitioners. The form verifies that the named person is authorized to receive such records. Health care facilities and practitioners become authorized to release a deceased patient's records upon payment of the statutory fee and receipt of a signed Authorized Relative Certification. A person will be immune from criminal and civil liability when he or she, in good faith, relies on a copy of an Authorized Relative Certification. The immunities are the same as those surrounding the reliance upon a power of attorney for health care under Illinois law. Upon request for records of a deceased patient, an authorized relative must provide a facility or practitioner with a certified copy of the death certificate in addition to the signed Authorized Relative Certification.

A "green light" for Illinois motorcyclists. PA 097-0627

(Effective 1/1/12)

Illinois lawmakers have amended the Illinois Vehicle Code to better accommodate motorcyclists (625 ILCS 5/11-208.6 and 11-306). Counties or municipalities with fewer than two million inhabitants may not use an automated traffic law enforcement system to issue violations in instances where a motorcyclist enters an intersection against a red signal indication when the red signal fails to change to a green signal within a reasonable period of time because of a signal malfunction or because the signal has failed to detect the arrival of the motorcycle due to the motorcycle's size or weight. (625 ILCS 5/11-208.6).

In addition, motorcyclists and bicyclists in municipalities with fewer than two million inhabitants now have a right to proceed through a red light in instances involving signal failure. After making a proper stop, a motorcycle or bicycle rider may enter an intersection when a red light fails to change to green within a reasonable period of time, or when the signal fails to detect the arrival of the vehicle due to its size or weight. A motorcycle or bicycle rider must yield the right of way to oncoming traffic facing a green light before he or she has the right to proceed (625 ILCS 5/11-306).

The Uniform Foreign-Country Money Judgments Act enacted. PA 097-0140

(Effective 1/1/12)

Illinois lawmakers have enacted the Uniform Foreign-Country Money Judgments Recognition Act. (735 ILCS 5/12-661 - 672 new) The act applies to foreign-country judgments that grant or deny recovery of money and are "final, conclusive, and enforceable" under the law of the foreign country. However, the act does not apply to judgments for taxes, fines or other penalties, or domestic relations related judgments. The party that seeks recognition of a foreign-country judgment has the burden to establish that this act applies to the judgment.

Illinois courts must recognize all foreign-country judgments that are subject to this act, unless an exception applies. An Illinois court may not recognize a foreign-country judgment if: 1) the judgment was rendered under a judicial system that does not offer impartial tribunals or does not comply with due process of law; 2) the foreign court lacked personal jurisdiction over the defendant; or 3) the foreign court lacked subject matter jurisdiction.

An Illinois court may choose not to recognize a foreign-country judgment if: 1) the defendant did not receive notice in sufficient time for a defense; 2) fraud was involved in the judgment so as to deprive the losing party of sufficient opportunity to present its case; 3) the judgment or the cause of action is repugnant to public policy; 4) the judgment conflicts with another final judgment; 5) the foreign proceeding did not follow an agreement between the parties to use another proceeding to determine the dispute; 6) the foreign court was a seriously inconvenient forum and jurisdiction was based only on personal service; 7) circumstances under which the judgment was granted raises substantial doubt about the integrity of the foreign court; or 8) the proceeding did not comply with due process of law. The party opposing recognition of a judgment has the burden to establish the ground for non-recognition.

A court may not refuse recognition of a foreign-country judgment for lack of personal jurisdiction if the defendant: 1) was served personally in the foreign country; 2) voluntarily appeared in court for reasons other than protecting seized property or property threatened with seizure or challenging personal jurisdiction; 3) had already agreed to submit to the jurisdiction of the court with respect to the subject matter of the proceeding; 4) was living in the foreign country at the time of the proceeding; 5) is a business organization that had its principle place of business in, or organized under the laws of, the foreign country; 6) has a business office in the foreign country and the cause of action of the proceeding arose out of business done through that office; or 7) the cause of action arose out of the defendant operating a motor vehicle or airplane in the foreign country. The list above is not exclusive, and Illinois courts may recognize other bases for personal jurisdiction.

A party seeking recognition of a foreign-country judgment as an original matter must file an action seeking recognition. In the case of a pending action, a party may file a counterclaim, cross-claim, or affirmative defense.

A foreign-country judgment that is recognized under this act is conclusive and is enforceable just as a judgment rendered in Illinois. An Illinois court may stay proceedings related to a foreign-country judgment if a party establishes that an appeal is pending or will be taken in the foreign country. The statute of limitations for seeking recognition of a foreign-country judgment is the earlier of 15 years from the effective date of the foreign judgment or the time period during which the foreign judgment is effective in the foreign country. This act does not prevent recognition of foreign-country judgments not covered by this act.

administrative agencies

Changes in the tourism attraction signing program

Department of Transportation

The Illinois Department of Transportation recently amended the provisions of the Tourism Attraction Signing Program. 92 Ill Adm Code 543. Although the regulations should be consulted in their entirety to see all the changes, this article will highlight the most important revisions. The amendments went into effect on October 26, 2011.

First, the amended rules now allow for a second tourism attraction panel for each direction in advance of an interchange. 92 Ill Adm Code 543.300. Previously, only one tourism attraction panel was allowed but now a second will be allowed to accommodate "additional tourism attraction sign space beyond the maximum space allowed on an existing tourism attraction panel." Id. Tourism attraction panels and tourism attraction signs may be installed under the standards of Chapter 2J of the Manual on Uniform Traffic Control Devices, which is published by the United States Department of Transportation's Federal Highway Administration. 92 Ill Adm Code 543.300. The department will "take into consideration the number of other services available at the interchange, the interests expressed by those qualified businesses, and the anticipated future development of the area" when considering a request for a second tourism attraction panel. Id.

There are also some changes with regard to tourism attraction panel placement and logo requirements. First, "[e]ach tourism attraction panel along the freeway will also be installed at least 500 feet from the preceding entrance ramp stub." 92 Ill Adm Code 543.300(b)(1). Additionally, "[a]ny tourism attraction that has its logo displayed on a freeway panel will not be required to display its logo on an exit ramp panel at a double-exit interchange." 92 Ill Adm Code 543.300(d). Tourism attractions that have their logos displayed on a freeway panel at a double-exit interchange that is reconstructed to a single-exit interchange must have their logo displayed on ramp panels in accordance with the relevant rules. 92 Ill Adm Code 543.300(c)-(d).

There are also some new categories of attractions that may be considered for tourism attraction signs: agri-tourism sites, defined as "an established area where consumers can interact with Illinois agricultural products for the purpose of tours, education or other rural recreational experiences" or to purchase produce directly from the producer; breweries; marinas; and unique attractions, which are "areas of special interest that have a minimal annual attendance of 5,000" such as ATV parks, comedy clubs, disc golf, rock climbing, and sport shooting clubs. 92 Ill Adm Code 543.400. Additionally, the rules create a new category of "ineligible attractions," which are "attractions not normally associated with tourism" such as furniture and clothing stores, automotive dealerships, garages, movie theaters, department stores, schools, and houses of worship. Id.

Finally the amendments change the rule governing what happens when an attraction sign is "so deteriorated, damaged or vandalized that it needs replacement." 92 Ill Adm Code 543.700. The department "reserves the right to make the final determination of whether an attraction sign needs to be replaced" and will now "notify the attraction to resubmit a logo design within 30 days after notification." Id. The rest of the section describes the time frame, fees, and penalties involved with replacing these signs. Id.

Implementation of new procedures for the Internet Voters' Guide

State Board of Elections

The State Board of Elections established new procedures to be used by the board to publish the Internet Voters Guide as provided by Article 12A of the Election Code [10 ILCS 5/12A]. 26 Ill Adm Code 207. The most significant additions will be discussed in this article, but the entire section should be consulted to see all of the current rules. The amended rules became effective on November 15, 2011.

The board shall publish an internet voters' guide. 26 Ill Adm Code 207.180(a). This guide will include candidate statements in which candidates can include information that might be of interest to voters, such as photographs of themselves, resume information, voting history, or other information of interest to voters. Id. This guide shall be published no later than the 45th day before a general election in which a statewide candidate appears on the ballot. Id.

The board shall issue a notification that an internet voters' guide will be published "to all candidates who have been certified by the State Board of Elections to appear on the general election ballot." 26 Ill Adm Code 207.180(b). The board shall issue the notification by "telephone, electronic mail, facsimile machine, and/or United States Postal Service." 26 Ill Adm Code 207.180(c). Please see the *2012 Candidate's Guide* on the board's website, www.elections.il.gov, for further information regarding the certification process.

Once a candidate has been certified by the board, the board "will issue the notification not later than five business days after certification." 26 Ill Adm Code 207.180(d). However, candidates must meet a deadline provided in the new rules. No statements or photographs will be accepted for inclusion in the voters' guide after 5:00 p.m. on the 50th day before the general election. 26 Ill Adm Code 207.180(e).

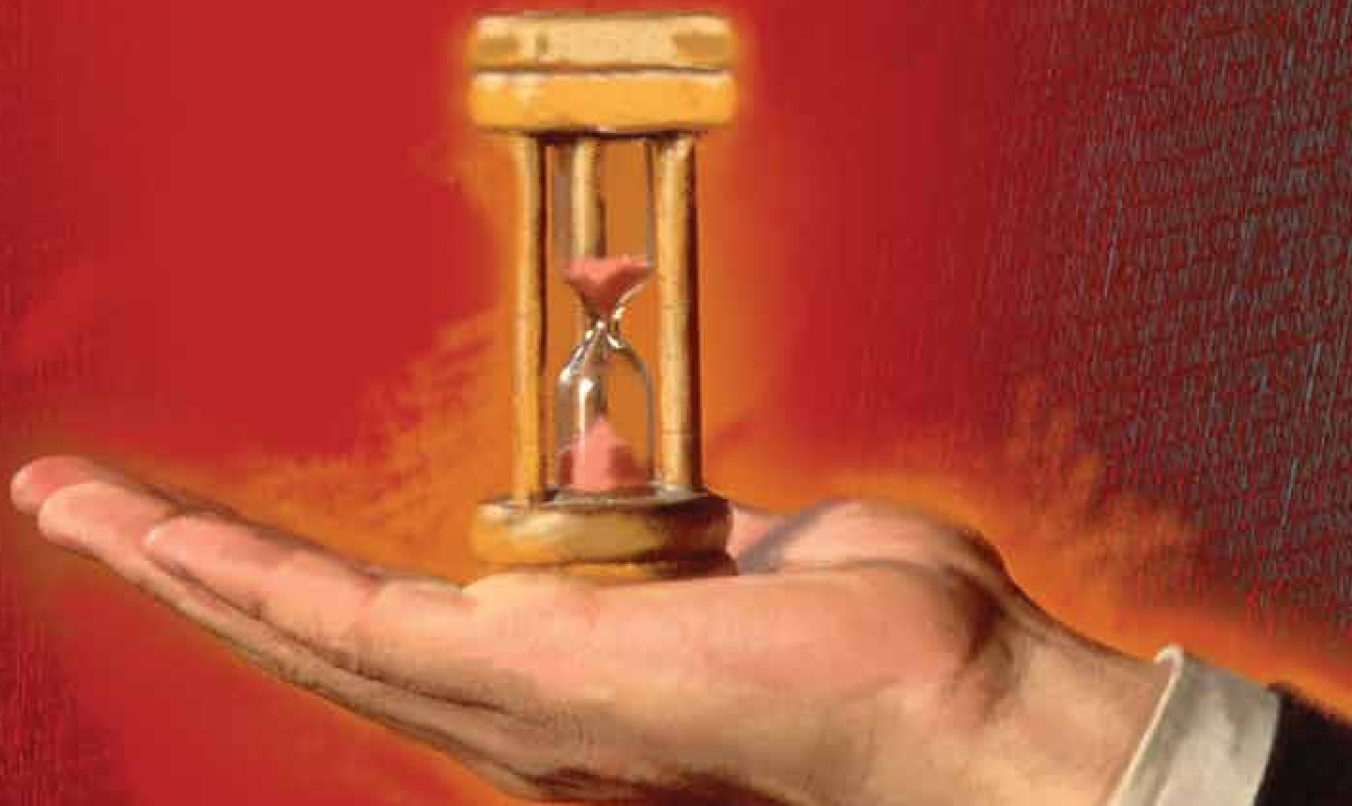
The new procedures also provide an opportunity for notification of a new candidate. In the event "that an amended certification has been issued by the board adding a candidate's name to the ballot and the new certification is issued no later than 55 days prior to the general election, the five business day notice shall be provided to the new candidate as well." 26 Ill Adm Code 207.180(d).

Finally, the new procedures provide that candidates will be notified of the removal of their name within five days regardless of when the removal occurs in relation to the general election. Specifically, if a previously notified candidate "has been removed from the ballot pursuant to an amended certification, that candidate will be notified, within five business days after the issuance of the amended certification, regardless of when the amended certification was issued, that his or her name will not be included in the guide." Id. ■

Beyond the Billable Hour

More and more clients – and lawyers for that matter – are looking for value-based alternatives to the billable hour. The good news? They can be a win-win for attorney and client.

By Helen W. Gunnarsson



As all Illinois lawyers since Abraham Lincoln have recognized, their time (and advice) is their stock in trade. And lawyers frequently refer to Lincoln's famous quotation as a rationale for billing their clients by the hour.

But Ungaretti and Harris partners Michael Philippi and Ethan Trull note that the billable hour was not customary in Lincoln's day. Before 1958, in the usual course of events, "The client would come to the lawyer and say, 'I have a problem that I need you to solve. What is it going to cost?' At the end of the day, they had a negotiated fee for the matter," says Trull.

That's how lawyers from all cultures had always charged, adds Philippi. "Since ancient Roman times, in medieval times, in the colonies and early America, lawyers typically charged by the case or capped their fees, according to standard historical reports."

But in 1958, Philippi says, bar leaders recognized that lawyers could and should sell a product. That product was the billable hour.

Helen W. Gunnarsson is an associate counsel at the American Bar Association's Center for Professional Responsibility in Chicago. As the IBJ's first contributing writer, she wrote the LawPulse feature since its inception in 2001 and most of the cover stories from 2004 through this issue in 2012. She can be reached at Helen.Gunnarsson@americanbar.org.

Misaligned incentives

The idea of the billable hour caught on, and by now is accepted as the standard for lawyer billing in most types of private practices. How much time will a matter require to bring it to a conclusion? How much time for investigation, how much time for researching the law, how much time for drafting pleadings or transactional documents, how much time for negotiating the deal or trying the case? Answering these questions in terms of the billable hour provides a convenient framework for lawyers to advise their clients whether and how to proceed and an equally convenient way to charge them.

But billing clients by the hour has built-in problems. As Philippi points out, the more hours lawyers bill, the more money they make, without regard to the quality of their work, their efficiency, or the result. For some, he says, "that can lead to a tug-of-war with the client. The incentives aren't correctly aligned."

In the 1950s and through the 1970s, the lawyers say, that misalignment seemed unlikely to cause many problems. Back then, lawyers billed around 1,300 hours per year at modest rates, Philippi says. "Nobody dreamed that a number of national law firms in the AmLaw 100 would be billing 2,000 hours plus per year at in excess of $1,000 per hour – or even $500 per hour."

Being an "ingenious bunch," as Philippi puts it, "lawyers found more ways to work and sell hours." Law firms began expanding to unforeseen size and scope, and partners started expecting higher and higher profits.

But, as Trull points out, "To increase your numbers, you need more and more people at the bottom." Those would be the associates, recently out of law school. With the expansion of discovery, says Philippi, "Associates are expected to bill well over 2,000 hours a year. Thirteen hundred hour associates don't last too long in big firms."

Now, some view lawyers as charging whatever hourly rate they think they can get away with and performing whatever tasks they think they can justify. Press reports of lawyers in bankruptcy workouts charging in excess of $900 per hour haven't helped. Comments one government lawyer: "No wonder their clients are in bankruptcy."

In the 21st Century, the world has changed again. "In-house corporate counsel are a very savvy lot," Philippi says. They're saying, 'Enough–this is ridiculous.' They're increasingly unwilling to pay associates $250 an hour to go through tons and tons of work that may not be necessary. They're asking, and should be asking, 'Why are you taking that discovery? How can I pay you so as to align your interest with my interest?'" And they're reviewing every task on their outside lawyers' bills, questioning every tenth of an hour, and often disapproving payment.

A 12-year in-house veteran of overseeing litigation in a Fortune 500 company, Trull says, "There's a lot of frustration on the part of in-house counsel about the inability to predict cost to their client, and about outside counsel's ability to estimate risk. In-house counsel are hungry for a change. They want to be able to predict cost and evaluate risk, early, often, and accurately. The outside law firm who can do that, gets an edge" in getting corporate business.

Law firms are responding to the pushback from their clients by developing new billing models, often known as "value-based billing" or "alternative fee arrangements." Philippi explains the concept in terms of two components: aligning incentives for lawyer and client and creating incentives for law firms to reduce costs and achieve solutions. Put another way, in an alternative fee arrangement, the lawyer takes on some of the risk of a less than ideal result for the client and rewards are for value, not necessarily for hours logged.

Lower costs, not lower profits

Alternative fee arrangements may be as simple as the flat fee or the contingent fee. Trull says he's partial to flat fees because, counterintuitively, "you can still be creative and flexible. You can have a flat fee for a phase of a case, for an entire case, or for a portfolio of recurring cases."

As an example, he suggests considering clients who are involved in, say, asbestos litigation. "You might charge one of those clients a flat fee to handle all of its asbestos cases. Imagine the certainty and the efficiency of that arrangement from the perspective of both client and law firm."

For single-plaintiff employment cases, Philippi suggests that a company might figure out how many such claims it receives, on average, in the course of a year. Large companies might further break down the matters into type: sexual harassment, Americans with Disabilities Act, race, and so on. The company can also determine its average annual cost for that litigation. "With that information, you can come up with a number for a flat fee per case in exchange for the company's giving you the entire portfolio of those cases to handle."

Trull explains what the risk is to the lawyer and how such an arrangement aligns the incentives of lawyer and client.

The whole notion of efficiency is something the defense lawyer is borrowing from what the plaintiffs' bar has been doing for years.

"If I take a matter on for $50,000, I have to monitor it effectively so as not to lose my shirt on it. I have to evaluate the case early on to identify the key issues and what we have to do. I have to sit down with the client and ask 'What would you consider a successful outcome?' The client should be concerned with how much the whole episode is going to cost, whether that cost is paid out to the lawyers, the court reporter, or the opponent. The client's goal should be to make this bad situation go away for fewer dollars rather than more dollars. If the attorney has an incentive to help the client with that goal, the cases tend to go away more quickly, not always for less money, but overall for fewer transactional costs."

Taking on that sort of risk isn't something that comes naturally to defense lawyers of his generation. But the concept, Philippi says, is the same as the risk with which the plaintiffs' bar is intimately familiar.

"Most good plaintiffs' lawyers do not do unnecessary things. They take a two-hour deposition, they're out, they're done. Most defense lawyers take two-day depositions. Do the details of the deponent's first job out of high school really matter to the case? The whole notion of efficiency is something the defense lawyer is borrowing from what the plaintiffs' bar has been doing for years. And they make a ton of money. Ask [a prominent Chicago plaintiffs' attorney] whether he's made any money on alternative fee structures."

Indeed, both attorneys are quick to note that alternative billing arrangements are not designed to lower the profitability of lawyers' work. Says Philippi, "I'm talking about lowering cost, not profit. If a law firm can have a higher level of profitability at a lower cost structure, that's a win-win" for lawyer and client alike.

Value-based billing discourages inefficiency and aligns the interests of attorney and client.

Aligning the interests of lawyer and client

Alternative fee structures can be far more complex than plain flat or contingent fees, depending on the nature of the matter or portfolio of matters and the client's needs. The billable hour may even be a component of an alternative fee structure. To illustrate, Trull says his firm sometimes uses different billing structures for different phases of litigation.

"In larger, more complex cases we may work with our clients early and often during the first 60 or 90 days to figure out what the dispute is about and what the parties' expectations are. We might bill at a greatly reduced rate for that phase."

Going forward, the firm might agree to cap their hourly fee, bill at a lower rate, or agree to a reasonably modest flat fee until the end of the litigation. "But we keep track of our time, as any lawyer would, so we know what we're spending. We refer to that as our virtual bank. At the end of the litigation, we look at that and talk to the client about what we'd agreed up front. Depending on the outcome, we get paid either all of the bank, some of the bank, or, if there's an exceptionally good outcome, a multiple of the bank." Or, if the outcome is poor, "we might get paid none of it."

For lawyers, sharing some of the risk of litigation with their clients puts them back squarely in their clients' corners, Trull says. "If the case turns out to be a disaster and the client is unhappy, the law firm is also unhappy, because it gets paid nothing. But if the outcome is so good that it is unexpected, the client may pay an additional fee with a smile on its face because it got exactly what it wanted, if not more."

Trull provides an example from his own practice. "I've litigated two cases in the past couple of years where my client was the defendant and the claims were very, very substantial. We not only achieved a zero liability result but got the plaintiffs to pay money to our clients."

Under the fee agreement, the clients had to pay Trull and his firm a bonus. "Were they unhappy? No! They were thrilled. They achieved a knock-it-out-of-the-park result. In one of those cases, our client actually recovered millions of dollars in fees that it had already paid."

Such arrangements, Philippi warns, make a very clear, written fee agreement absolutely essential. He further cautions that, though they frequently masquerade as alternative fee structures, neither blended rates nor discounted rates qualify.

"Think about it: lawyers who offer a crazy low blended or discounted rate, are still billing hourly, and their incentive is still to bill as many hours as they possibly can. It doesn't really matter what the hourly rates are if the monthly bill is $100,000 either way. A lot of clients get confused and think that those arrangements are value-based billing, but those systems encourage inefficiency and don't save clients money."

Trull sums up: "Value-based billing discourages inefficiency and aligns the interests of attorney and client. If what's being proposed doesn't do those two things, it isn't value-based billing."

Be flexible, willing to take risk

Jason Maxwell, vice president and associate general counsel for litigation at a Fortune 25 company, says he's pleased to count Philippi and Trull among his stable of outside counsel. Confirming their explanation of alternative fee arrangements, Maxwell also emphasizes that the right alternative fee structure for a matter needs to fit the best interests of both

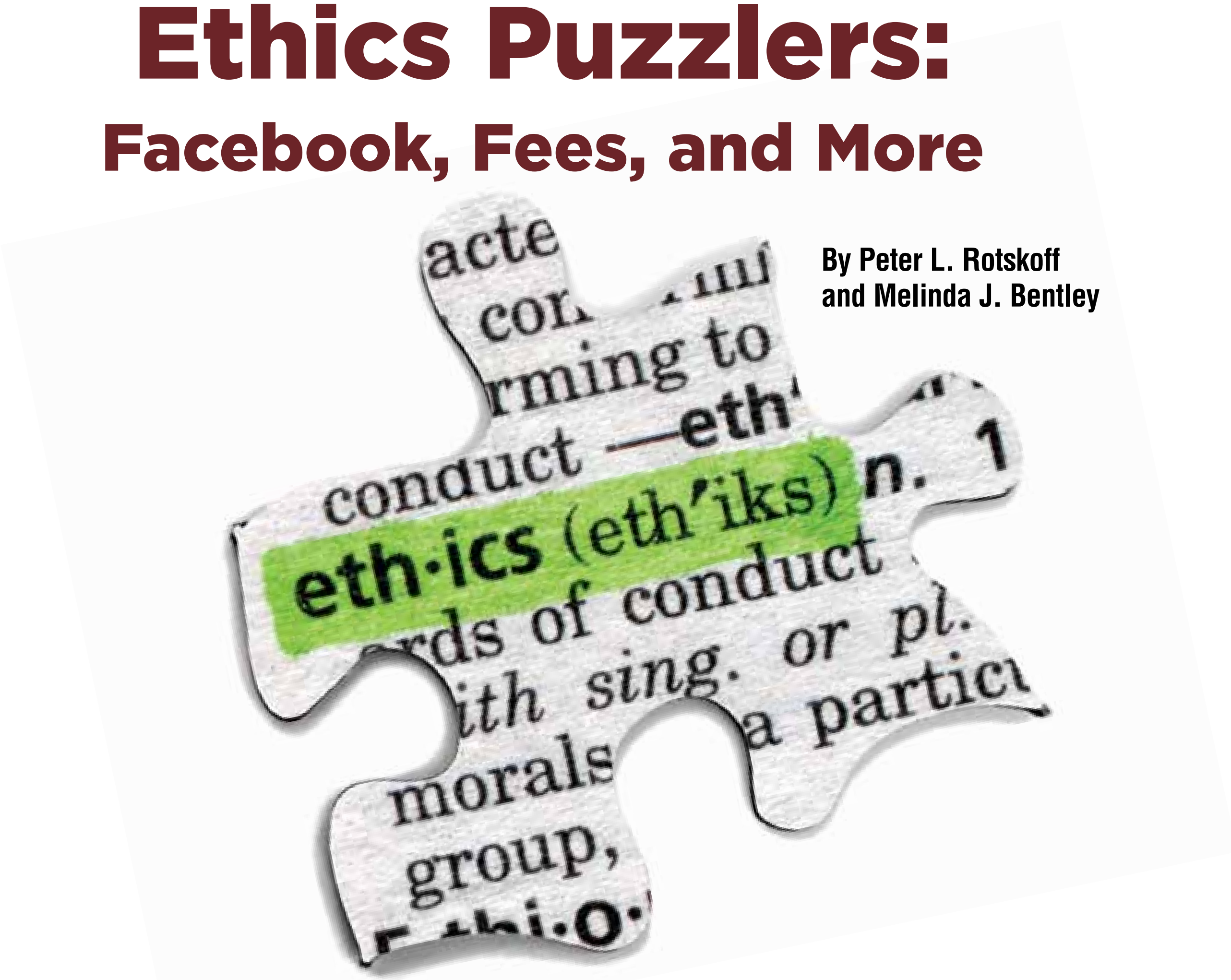
(Continued on page 112)

More about alternative billing

- Boston lawyer, writer, and consultant Jay Shepherd provides a memorable "Coffee Parable" to illustrate the problems with billing by the hour at http://www.clientrevolution.com/2009/01/a-coffee-parable.html.
- *'Billable Hour' Under Attack: In Recession, Companies Push Law Firms for Flat-Fee Contracts,* by Nathan Koppel and Ashby Jones, appeared in the August 24, 2009, issue of The Wall Street Journal and is available at http://www.carrollpc.com/resources/corpgen-news/wsj-billable-hour-under-attack/.
- Aon Corporation's Mark Herrmann, Vice-President and Chief Counsel – Litigation, writes a column for the Above The Law blog. His December 15, 2011, post, *Inside Straight: Inflating Your Own Outside Legal Spend*, addresses alternative fee arrangements.
- Canadian lawyer Jordan Furlong's post, *The Best Pricing Advice Ever,* is available at http://www.attorneyatwork.com/the-best-pricing-advice-ever/.
- Oklahoma lawyer Jim Calloway, director of the Oklahoma Bar Association's Management Assistance Program, posts on alternative billing on his blog at http://jimcalloway.typepad.com/lawpracticetips/alternative_billing/.
- Matt Homann, a lawyer formerly based in Illinois, dedicates his blog, "The [non]billable hour," to making law practice more effective: http://www.nonbillablehour.com/.

Ethics Puzzlers:

Facebook, Fees, and More



By Peter L. Rotskoff
and Melinda J. Bentley

Can your firm's secretary notarize blank documents for completion later? What if opposing counsel wins a continuance to go to a funeral but takes an island vacation instead (and posts photos on Facebook)? Ethics authorities explore these and other hypotheticals.

Can your firm's secretary notarize blank documents for completion later? If you think a witness might lie can you (must you) allow her to testify? Can you tell your paralegal to "friend" a witness on Facebook to get information from him? What if opposing counsel wins a continuance to go to a funeral but takes an island vacation instead? Can you list clients on your firm's website without their consent? Can you specify in your fee agreement that fees are nonrefundable?

The following Q&A explores these and other questions.

Secretary Simple: Notarizing blank documents

Q. You work in a mid-sized firm and you share a secretary, Sally Simple, with your supervisor, Ina Inyourface. One day, Sally tells you "in confidence" that whenever Ina receives written interrogatories in a case, she tells Sally to notarize the

Peter L. Rotskoff, chief of litigation for the Illinois Attorney Registration and Disciplinary Commission, prepared the hypotheticals. Melinda J. Bentley, ISBA first assistant counsel and assistant director of legislative affairs, drafted the answers. The ARDC makes no statement as to the accuracy of the answers. As always, readers are encouraged to review other applicable Rules of Professional Conduct and their comments, as well as any applicable case law or disciplinary decisions.

document in blank and Ina later signs the client's name to the document as a "convenience" to the client. You are troubled by this, so you speak with James Jeppers, the firm's managing partner. Jeppers said he will look into the matter.

A few weeks later, you learn from Sally that Ina hasn't stopped. You reiterate your complaint to Jeppers, who again assures you that he will have a talk with Ina but tells you this is something that doesn't concern you. What do you do?

A. If what Sally has told you is true, you should likely be troubled by the conduct of both Ina and Jeppers. Ina's conduct may be fraudulent by signing the name of her client to a document, thereby creating a possible violation of Rule of Professional Conduct (RPC) 8.4(c). Ina should not instruct Sally, her secretary, to notarize a blank document, not only because of the possible fraud, but also because she is asking Sally to engage in conduct that Ina could not do as a lawyer, a possible violation of RPC 5.3(c). Additionally, Ina may be asking Sally to engage in conduct that violates the Illinois Notary Public Act, 5 ILCS 312/6-104(c).

As a subordinate lawyer, RPC 5.2 outlines standards for your own conduct and provides that you are responsible for your own duties under the Rules. Unless you are confronted with a question of professional duty, you cannot rely upon the direction of your supervisors to satisfy those professional obligations for you. Comment [1] to RPC 5.2 notes that if you have knowledge of misconduct, you may be liable under the Rules, so you have to think for yourself and act accordingly.

The conduct of Jeppers also may constitute an ethics violation under RPC 5.1, which outlines the responsibilities of partners, managers, and supervisory lawyers. Lawyers in these positions of authority within law firms are required under paragraph (a) to ensure that the firm and the lawyers in the firm conform their conduct to the Rules of Professional Conduct. Additionally, Jeppers may be liable for Ina's conduct under paragraph (c) if he has knowledge of the conduct and fails to take action to avoid it.

If Ina's conduct is in fact fraudulent, you may also have a duty to report it to the Attorney Registration and Disciplinary Commission (ARDC). (See RPC 8.3(a) and its Comments [1] & [3]; RPC 8.4(c); *In re Himmel*, 125 Ill 2d 531, 533 NE2d 790 (1988); and *Skolnick v Altheimer & Gray,* 191 Ill 2d 214, 730 NE2d 4 (2000).

The lying witness

Q. Your client wants you to call a witness on her behalf. Although you believe the witnesses' testimony would be helpful to your case, you think he may testify falsely. What do you do? Does it matter whether the case is civil or criminal?

You decide to put the witness on. Later in the trial, you discover a document that proves that the witness did testify falsely. What, if anything, must you do?

A. This is always a delicate situation for a lawyer to navigate: the potential for false witness testimony. RPC 3.3, dealing with candor toward the tribunal, provides in paragraph (a)(1) that you, as a lawyer, shall not knowingly make a false statement of fact or law to a tribunal.

"Knowledge" is a defined term under RPC 1.0(f) to mean actual knowledge. It provides that knowledge may be inferred under the circumstances. So, under RPC 3.3, unless you have actual knowledge that the witness will testify falsely, you probably need to go ahead and have the witness testify, especially if it is a criminal case where the accused has a right to call witnesses to testify on her behalf. (See also RPC 3.3 Comment [8]).

If you learn that the witness has provided false testimony, RPC 3.3 (a)(3) requires you to take reasonable remedial measures. These measures should include seeking the cooperation of the witness in correcting the false testimony, and, if necessary, disclosure to the tribunal.

You would probably not be permitted to friend a witness on Facebook to see if she might be lying, or direct your employees to do so, without running afoul of the Rules.

Friending the enemy

Q. You represent the defendant in a civil matter. An important witness gives a deposition and you believe she might be lying. You want one of your employees to go on Facebook and "friend" the witness to try to discover impeaching information. You instruct the employee to do so but not disclose that he works for you or is trying to get information related to the lawsuit. Can you do this?

A. Under RPC 5.3 (c), you, as a lawyer, are responsible for the conduct of nonlawyer assistants that would be a violation of the RPCs if you engaged in the conduct. RPC 4.3 provides that you cannot state or imply that you are disinterested in a matter where you are dealing with an unrepresented person, and RPC 4.1 requires you to be truthful in your statements to others.

You would most likely not be permitted to contact the witness on Facebook by "friending" her because it would be done to try to see if she might be lying, so you are not disinterested, and failure to disclose the purpose of the "friending" may demonstrate a lack of truthfulness. Based on 5.3(c), your employee would also probably not be able to "friend" the witness without making you run afoul of the Rules.

Also, under RPC 8.4(c), you are prohibited from engaging in conduct that involves dishonesty, fraud, deceit or misrepresentation. It is not clear from the facts if the proposed conduct would rise to this level, but you should be mindful of this provision and conduct yourself accordingly.

While Illinois does not have any decisions or ethics advisory opinions on this emerging issue of lawyer ethics relating to social media, two jurisdictions do.

The New York State Bar Association Committee on Professional Ethics, Opinion 843, indicates that a lawyer may ethically view and access online profiles of a party other than the lawyer's client in litigation so long as information is available publicly, much like a public website, and no "friend" or other request has to be made.

The Philadelphia Bar Association's Professional Guidance Committee, Opinion 2009-02, discussed a question that involved a lawyer asking a third person whose name the opposing party's witness would not recognize to "friend" a witness to gain potentially adverse information. That committee indicated that the conduct would be impermissible based on Pennsylvania Rules of Professional Conduct 5.3, 4.1, and 8.4(c).

You cannot list the names of clients or former clients on your website without their consent.

The funereal phony

Q. The plaintiff's attorney requests a continuance of his client's trial due to a death in the family. You agree to the request and it is granted. You later check the attorney's Facebook page. Although there was a funeral, you see that the attorney did not attend and instead took an island vacation. His Facebook page shows posts about his drinking mojitos and riding motorbikes. What, if anything, do you do?

A. You certainly have cause in this situation to question whether the plaintiff's attorney has engaged in misconduct under RPC 3.3 by misrepresenting to the court that the reason for the request for a continuance was a vacation, not a funeral. You may want to confront him about his misrepresentation, raise it with the judge, or report possible misconduct to the ARDC under RPC 8.4(c), especially if this is not the first time the plaintiff's counsel has misrepresented his whereabouts in order to gain a continuance.

Listing clients on your website without their consent

Q. Your firm's marketing consultant wants to list representative clients on the firm's website. Can you do so without client consent? What about former clients?

A. You cannot list the names of clients or former clients on your website without their consent. RPC 1.6 provides that you shall not reveal information relating to the representation of a client unless the client gives informed consent. This includes the fact that the client is being represented by a lawyer.

On the issue of protecting client identity, Comment [4] indicates that you may only use hypotheticals to discuss issues related to the representation so long as there is no reasonable likelihood that the identity of the client or situation may be able to be ascertained, thereby highlighting the importance of keeping confidential the identity of your clients. Comment [18] provides that the duty of confidentiality applies after the termination of the client-lawyer relationship, so you would have to get the permission of the former clients to list them on your firm's website. (See also ISBA Ethics Advisory Opinions 97-01 and 93-04.)

Driving too hard a bargain: misrepresenting value

Q. You represent the seller of used medical testing devices in negotiations with counsel for the buyer. Your client has obtained an appraisal of the devices valuing them at $1 million. You tell opposing counsel during the negotiations that your client has had the devices appraised and wants $2 million for them. Can you?

A. RPC 4.1 prohibits a lawyer from making a false statement of material fact to a third person. Comment [2] provides that estimates of price or value are typically not facts. There is a possible misleading element to the negotiation on your part as seller's counsel by stating that the devices were appraised and the client wants $2 million for them. This statement could lead the opposing party to think the devices appraised at $2 million.

The other way of looking at this scenario is that your client had the devices appraised, and your client's price is simply $2 million. Depending on how you look at this, and in the absences of additional facts, RPC 4.1 dealing with truthfulness in statements to others may be implicated.

Would it be different if you told opposing counsel that you have an appraisal for $2 million, but don't rely on our appraisal, get your own?

In this scenario, there is clearly a misrepresentation on your part as seller's counsel, stating that the appraisal was for $2 million instead of $1 million. A misrepresentation like this under RPC 4.1 may require a lawyer who knows of your misconduct to report it to the ARDC pursuant to RPC 8.4(c), as it probably rises to the level of fraud, deceit, or misrepresentation.

Fee not-so-simple 1: "nonrefundable" fees

Q. You are a criminal defense attorney in private practice. After attending a continuing legal education seminar, you decide that you should have written fee agreements with all clients. In a highlighted and prominent paragraph in the written fee contract you draft, you insert the following language: "Client expressly agrees that the fee paid is non-refundable and that no refunds will be given for any reason." The written fee agreement also contains the following language: "All expenses will be paid by the client at a rate to be determined by the law firm." Is the contract valid?

A. It depends. As to the first question, RPC 1.5(a) prohibits you, as a lawyer, from making agreements for fees that are unreasonable and provides eight factors for determining what a reasonable fee may be. If the fee is reasonable for the work performed, there will be no need for refund, and a "non-refundable agreement" may be proper. If the fee is not reasonable, contract language providing that the fee is "non-refundable" is likely unenforceable and a refund may be required by the Rules. (See also ISBA Ethics Advisory Opinion 722.)

As to the second question about expenses being determined by the law firm, again, RPC 1.5(a) provides that you may not charge an unreasonable amount for expenses. If the expenses are reasonable, they will be upheld. Comment [1] notes that this will be based on an agreement with the client in advance, or the actual cost incurred by the lawyer.

Fee not-so-simple 2: security, advance payment retainers

Q. You agree to represent Cindy Client in pursuing a breach of contract action against Donald Defendant. Cindy pays you a $50,000 fee. There is no written fee agreement. Do you put the $50,000 fee in a client trust account?

A. Yes, the $50,000 should be put in a client trust account. Comment [3B] to RPC 1.15 provides that where the intent of the parties is not evident, as in this scenario, the agreement is construed as a security retainer. Security retainers are payments for future services and expenses and have to be deposited into a client trust account until applied for services rendered and expenses incurred. Unapplied funds are returned to the client. (See also RPC 1.15 (c) and *Dowling v Chicago Options Associates, Inc,* 226 Ill 2d 277, 875 NE2d 1012 (2007)).

Assume that when Cindy pays the $50,000 fee, she tells you that there are a number of outstanding judgments against her and she is worried that judgment creditors may attempt to make claims on the $50,000. What are Cindy's options?

Cindy may want to opt for an advance payment retainer with you. Under *Dowling* and RPC 1.15(c), an advance payment retainer may be used for a special purpose that cannot be accomplished by a security retainer so long as the provisions of the Rule are followed. Comment [3c] notes that advance payment retainers are fees immediately owned by the lawyer for the commitment to provide future legal services. As the fees are owned by the lawyer, they are deposited into the lawyer's business account where they are protected from Cindy's creditors.

Comment [3c] cautions that advance payment retainers should be used sparingly, and a number of specific requirements must be satisfied to establish a proper advance payment retainer. Any portion of the advance payment retainer that is not earned must be returned to the client. By using an advance payment retainer, Cindy could pay for her legal fees up front before the judgment creditors are able to make claims on the fees.

Holding client funds, disputed or otherwise

Q. You represent Carol Client in a personal injury action against Daryl Defendant. During the pendency of the case, Dr. Oscar Orthopod and Hilltop Hospital filed liens with Defendant's insurer, Friendly Insurance, and with you for medical services provided to Carol Client related to the accident. The parties have agreed to settle for $100,000. When you receive the settlement draft, may you sign for Carol Client or the lienholders, Oscar Orthopod or Hilltop Hospital?

A. You should not sign the name of your client or any of the lienholders without the client's specific authority.

Q. Should you deposit the settlement draft in an IOLTA account?

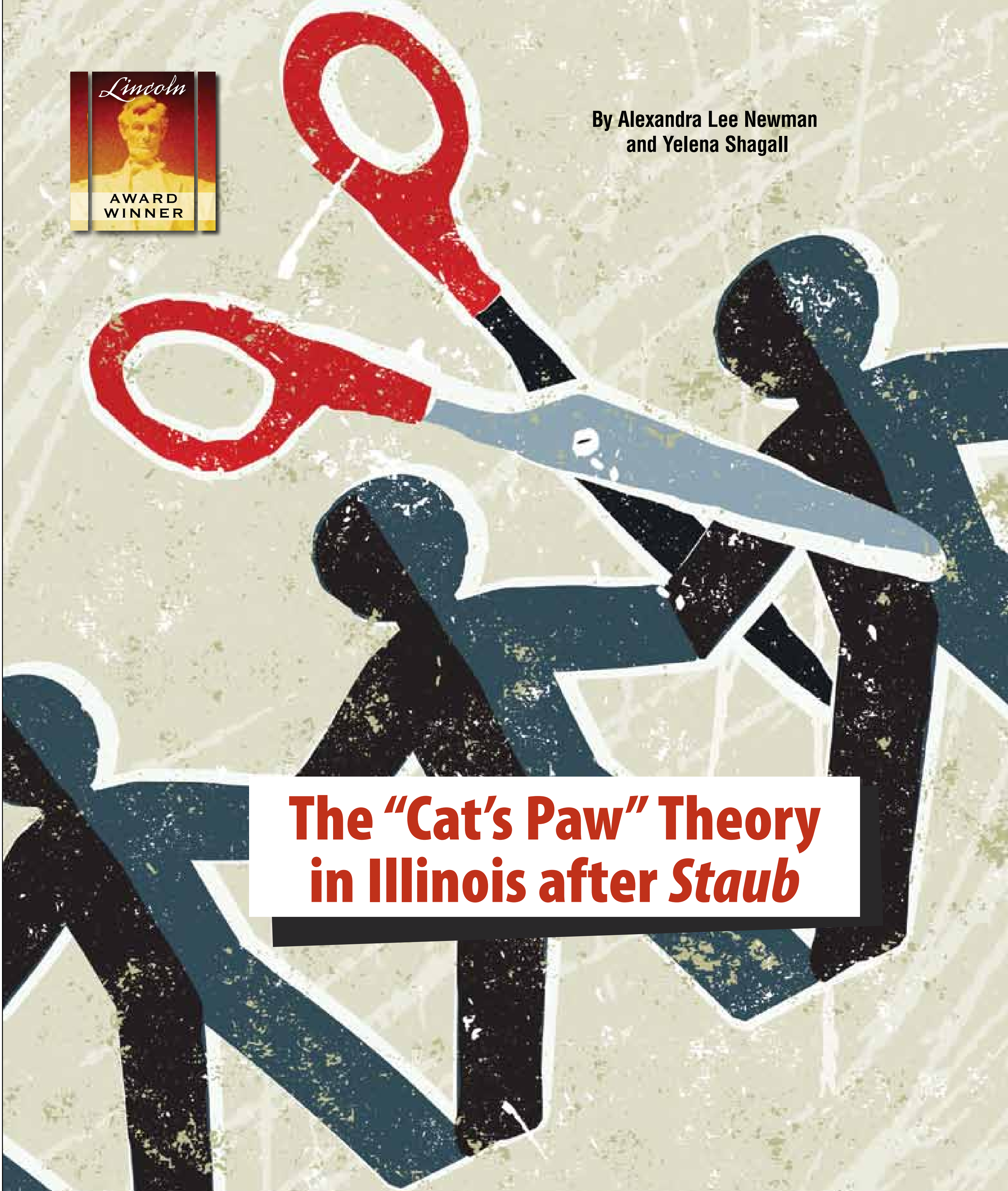
A. An IOLTA account may not be the best choice for disputed funds. RPC 1.15(f) & (g) outlines factors in determining which type of account is best for you to hold the funds of a client or third person depending on the situation. As outlined in the *ARDC Client Trust Account Handbook*, July 2011 edition (https://www.iardc.org/toc_main.html), Section IV(A) notes that IOLTA accounts are best suited to nominal or short-term funds. It indicates that a separate trust account for the client or matter may be more appropriate for larger sums of money that will be held for a long period of time. Since there is an on-going dispute over these funds, and it is a large sum, you may want to look to a separate trust account for this issue. Note that RPC 1.15 was amended effective September 1, 2010, to require all client or third person funds be held in interest or dividend bearing accounts at an eligible financial institution. See RPC 1.15(a) and the ARDC's website at https://www.iardc.org/NewRule%201.15.html.

Q. How long do you need to keep records related to client trust funds and accounting?

A. RPC 1.15 (a) and Supreme Court Rule 769 provide that records of accounts must be preserved for a period of seven years after the termination of the representation of the client. Note that RPC 1.15(a)(1-8) provides for the types of records that lawyers must maintain relating to client trust accounts.

Q. Before you receive the settlement check, Friendly Insurance calls to tell you that an additional lienholder, Chris Chiropractor, also has a lien, and Friendly requests that you pay Chris. Can you? You call Carol who says Chris "didn't do anything" for her and she directs you not to pay Chris. What do you do?

A. RPC 1.15(e) provides that if you are in possession of property in which two or more persons claim an interest, the property must be kept separate until the dispute can be resolved. (See Also ISBA Ethics Advisory Opinions 93-03 and 01-04; RPC 1.15 Comment [4].) As for Carol's direction not to pay Chris, if you have knowledge of Chris' lien you should put the funds in a separate place until the dispute can be resolved. ■



By Alexandra Lee Newman
and Yelena Shagall

The "Cat's Paw" Theory in Illinois after *Staub*

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In its 2011 *Staub v Proctor Hospital* decision, the United States Supreme Court expanded the "cat's paw" theory, which holds that an unbiased decisionmaker can nonetheless be liable for employment discrimination if he or she is impermissibly influenced by a biased non-decisionmaker. The authors examine the new pro-plaintiff reach of the theory and offers tips for counsel on either side.

In its March 2011 decision *Staub v Proctor Hospital*,[1] the United States Supreme Court extended the reach of "cat's paw" liability in an employment discrimination case brought under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).[2]

Reversing the court of appeals for the seventh circuit,[3] the Supreme Court held that a supervisor's antimilitary bias against an employee may form the basis of employer liability under the USERRA for a discriminatory employment decision, even if the actual decisionmaker does not rely solely on the supervisor's assessment of the employee in making the adverse decision. Liability attaches, the Supreme Court explained, if (1) the employee's supervisor is motivated by antimilitary animus, (2) the supervisor performs an act intended to cause an adverse action against the employee, and (3) that act is a proximate cause of the decisionmaker's adverse employment action against the employee.[4]

Since this decision, federal courts in Illinois and elsewhere have applied the requirements of the Supreme Court's new "cat's paw" rule, revealing unresolved issues about which Illinois employment lawyers and their clients must be aware.

Pre-*Staub* "cat's paw" liability in the seventh circuit

Judge Richard Posner of the seventh circuit introduced the theory of "cat's paw" employer liability in his 1990 opinion in *Shager v Upjohn*.[5] The term "cat's paw" derives from a fable in which a monkey convinces a cat to reach into a fire to extract roasting chestnuts; the cat burns its paws and loses all of the chestnuts to the monkey, who escapes unscathed with the bounty.[6]

In *Shager,* Judge Posner explained that the decisionmaker for the employer ("the cat") can be liable to an employee for employment discrimination where the decisionmaker relies on advice colored by the discriminatory animus of a supervisor ("the monkey") in making an adverse employment decision; if the decisionmaker was the "conduit" of the supervisor's prejudice ("the cat's paw"), the decisionmaker's own lack of animus "would not spare the company from liability."[7]

Although *Shager* suggested that an employer could be liable under the "cat's paw" theory so long as any "taint" or "influence" by a biased supervisor made the decisionmaker a "conduit" of the supervisor's prejudice,[8] the seventh circuit later embraced a stricter approach in applying the theory. By the time it decided *Staub*, the seventh circuit required a biased supervisor to exert a "singular influence" over the decisionmaker's employment decision against the employee in order for the employer to be liable for the supervisor's bias.[9] Because of a split within and outside of the seventh circuit over the degree of influence that the supervisor must wield over the decisionmaker for "cat's paw" employer liability to apply,[10] the Supreme Court granted certiorari in *Staub.*[11]

The background of *Staub*

Staub, a radiologist and member of the U.S. Army Reserves, sued Proctor Hospital, his employer, alleging that his supervisors filed a false disciplinary report against him in which they wrongly accused him of violating a hospital policy.[12] The supervisors did this, he alleged, because they harbored hostility toward his military obligations and consequent

1. 131 S Ct 1186 (2011).
2. 38 USC § 4311 (forbidding an employer to deny "employment, reemployment, retention in employment, promotion, or any benefit of employment" based on a person's "membership" or "obligation" to participate in uniformed services and establishing employer liability "if the person's membership…is a motivating factor in the employer's action").
3. 560 F3d 647 (7th Cir 2009).
4. *Staub*, 131 S Ct at 1194.
5. 913 F2d 398, 405 (7th Cir 1990).
6. *Staub*, 131 S Ct at 1190 FN 1.
7. *Shager*, 913 F2d at 405.
8. Id.
9. *Staub*, 560 F3d at 659; see *Brewer v Bd of Tr of the Univ of Illinois*, 479 F3d 908, 917–18 (7th Cir 2007) (suggesting that the "cat's paw" theory of liability applies only where a "decision maker is…wholly dependent on a single source of information").
10. *Long v Teachers' Retirement System of Illinois*, 585 F3d 344, 351–52 (7th Cir 2009) (noting inconsistent treatment of the "cat's paw" theory of liability within seventh circuit case law). See generally Hanna Banks, S. Ct. Case Commentary, Staub v Proctor Hospital: *Cleaning up the Cat's Paw*, 6 Duke J of Const L & Pub Policy Sidebar 71, 78–80 (2011) (identifying variations of "cat's paw" liability theory among federal courts of appeal).
11. *Staub v Proctor Hospital*, 130 S Ct 2089 (2010) (mem).
12. *Staub*, 131 S Ct at 1189–90.

absences from work, as evidenced by derogatory comments the supervisors had made about his service.[13] The supervisors did not have the decision-making authority to fire Staub, but the Vice President of Human Resources fired him after reviewing the supervisors' disciplinary report, examining his personnel record, and speaking with his co-worker about his absences.[14]

A jury concluded that the hospital was liable for discrimination under the USERRA and awarded damages of $57,640 to Staub because his military status was "a motivating factor" in the vice president's decision to fire him.[15] The seventh circuit reversed the judgment, concluding that the hospital was entitled to judgment as a matter of law.[16]

Because Staub had alleged a "cat's paw" theory of liability, the seventh circuit reasoned, he was required to show that the biased supervisors had exerted a "singular influence" over the ultimate decisionmaker (the vice president).[17] The seventh circuit determined that the hospital was immune from liability because of undisputed evidence that, in deciding to fire Staub, the vice president had relied upon personnel records and a co-worker interview in addition to the supervisors' disciplinary report.[18]

The Supreme Court's decision

Reversing the seventh circuit, the Supreme Court rejected the requirement that the supervisor exert a "singular influence" over the decisionmaker in order to establish employer liability under the "cat's paw" theory.[19] The Supreme Court imported principles of tort and agency law to explain that, where the decisionmaker's independent investigation into the employee's performance relies in part on facts provided by the biased supervisor, the supervisor's actions and discriminatory animus remain a "proximate cause" of the adverse employment decision.[20]

Proximate cause, the Court explained, requires only "some direct relation" between alleged injurious conduct and the employee's injury, and it is possible for an injury to have several proximate causes.[21] Therefore, the Court reasoned, both the supervisor's actions and animus *and* the decisionmaker's exercise of judgment following an independent investigation made in reliance on the supervisor's facts may constitute proximate causes of an adverse employment decision.[22]

The court explained that the approach advocated by the hospital would be inconsistent with laws designed to prevent employer discrimination. That approach would immunize an employer as long as the employer "isolates a personnel official from an employee's supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee's personnel file," even though the file is composed of recommendations by biased supervisors.[23] The Court concluded, "[I]f a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."[24]

In reversing and remanding the case, the Supreme Court instructed the seventh circuit to consider whether to reinstate the jury verdict or to mandate a new trial in light of the new "cat's paw" rule.[25] Noting distinctions between the new "cat's paw" formulation and the standard presented to the jury, the seventh circuit concluded that the variance warranted a new trial.[26]

Practitioner tips: Post-*Staub* "cat's paw" liability within the seventh circuit

The scope of liability. Given the novelty of the Supreme Court's decision, the seventh circuit has had few opportunities beyond the remand proceedings to apply *Staub* and define its full sweep as a basis of liability. On the one hand, the seventh circuit has suggested that the newly articulated "cat's paw" theory extends beyond cases brought under the USERRA and would apply to discrimination claims brought under the Americans with Disabilities Act.[27]

On the other hand, in a nonprecedential order, the seventh circuit noted the tension between the tort principles of causation incorporated in *Staub*'s "cat's paw" theory and the heightened causation standard in the Age Discrimination in Employment Act of 1967 (ADEA).[28] In that order, the court explained that

After *Staub*, an employer must first investigate evidence of supervisor bias against an employee and then determine whether there's an independent basis for the adverse action.

2012 Lincoln Award Winners

First place winners are **Alexandra Lee Newman** and **Yelena Shagall**, Chicago, whose entry appears here.

Second place winner is **Nicholas P. Cholis**, Chicago, who wrote *After* Ervin*: How Combined Actions Will Impact Wage and Hour Class Litigation in Illinois*.

Third place goes to **Anne M. Skrodzki**, Burr Ridge, for *Voluntary Dismissal in Multi-Count Complaints: Application of the* Hudson *Decision Remains Difficult for Courts and Practitioners*.

The Lincoln Award Contest is open to ISBA Young Lawyers Division members. Contest judging is blind and conducted by a different panel of lawyers and judges each year. Watch the ISBA Web site and ISBA publications beginning in May for information about the 2013 contest.

13. Id.
14. Id.
15. Id at 1190.
16. Id.
17. Id.
18. Id.
19. Id at 1194.
20. Id at 1192.
21. Id.
22. Id.
23. Id at 1192–93.
24. Id at 1194 (emphasis in original).
25. Id.
26. *Staub v Proctor Hospital*, 421 F Appx 647, 649 (7th Cir 2001).
27. *Dickerson v Bd of Tr of Community College Dist No 522*, 657 F3d 595, 602 (7th Cir 2011).
28. *Wojtanek v Dist No 8, Intl Assn of Machinists and Aerospace Workers, AFL-CIO*, 435 F Appx 545, 549 (7th Cir 2011). See also *Simmons v Sykes Enterprises, Inc*, 647 F3d 943, 949–50 (10th Cir 2011) (discussing the application of *Staub* to the ADEA).

even if the plaintiff bringing suit under the ADEA could make out a claim under *Staub*, "this showing would still be unlikely to satisfy the ADEA, which imposes a higher burden on plaintiffs than either Title VII or the statute at issue in *Staub*."[29]

But while the seventh circuit has not addressed the full extent to which *Staub*'s newly articulated "cat's paw" theory applies to discrimination claims, proceedings at the district court level in Illinois (and elsewhere within the circuit) suggest that the theory will be recognized as a basis of liability in a plethora of discrimination suits outside of the military-bias context. In the months since *Staub* was decided (before this article went to press), district courts have applied *Staub*'s analysis to retaliation claims under the Illinois Workers' Compensation Act[30] and the Family and Medical Leave Act,[31] as well as to retaliation and discrimination claims under Title VII of the Civil Rights Act of 1964.[32]

The plaintiff must prove three elements. On remand in *Staub*, the seventh circuit articulated the three elements that the plaintiff must prove to prevail under the "cat's paw" theory of employer liability: an employer is liable if (1) its agents performed "a specific act due to animus;" (2) those agents intended that act "to cause an adverse employment action;" and (3) that act was the proximate cause of the adverse employment decision.[33] Significantly, district courts in Illinois have suggested that the plaintiff cannot prove the third element unless he shows that the ultimate decisionmaker was *aware* of, and not just unwittingly influenced by, the supervisor's bias.[34]

Beyond proving those elements, it is of critical importance for the plaintiff to assert the "cat's paw" theory of liability at some point before trial (for example, in a pretrial filing, in proposed jury instructions, or at a pre-trial or trial conference).[35] And the ultimate burden to prove these elements rests with the plaintiff.[36]

The plaintiff should cast a wide net. One district court in Illinois recently observed the plaintiff-friendly nature of the new "cat's paw" theory of liability: "[F]or a successful cat's paw case, plaintiff must prove that the non-decisionmaker with discriminatory animus performs an act that is *a* proximate cause of the decision to take adverse employment action against the plaintiff, but it need not be *the* proximate cause."[37] To take advantage of the flexibility of the rule, the plaintiff should broadly consider *all* potential adverse actions (for example, termination or transfer) when developing his theory of proximate cause under the "cat's paw" theory of liability.[38]

Moreover, the plaintiff should consider *all* potential non-decisionmakers (for example, supervisors or co-workers) when developing his "cat's paw" theory.[39] The Supreme Court in *Staub* "express[ed] no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision."[40] Until the Supreme Court explicitly decides to exclude co-worker influence (as opposed to supervisor influence) from the "cat's paw" framework, the plaintiff should pursue a co-worker theory if doing so would support the finding of proximate

A plaintiff must assert the "cat's paw" theory at some point before trial (for example, in a pretrial filing, in proposed jury instructions, or at a pre-trial or trial conference).

29. *Wojtanek*, 435 F Appx at 549.
30. See *Keefer v Olin Corp*, 2011 WL 4474966 *3 (SD Ill 2011); *McDougler v Olin Corp*, 2011 WL 1102801 *5 (SD Ill 2011).
31. See *Ley v Wisconsin Bell, Inc*, 2011 WL 2671245 *1 (ED Wis 2011).
32. See *Palermo v Clinton*, 2011 WL 1261118 *7 (ND Ill 2011) (retaliation); *Cornejo v Chicago Transit Authority*, 2011 WL 3628853 *5 (ND Ill 2011) (discrimination); *Stratigos v American Airlines, Inc*, 2011 WL 1792713 *6 (ND Ill 2011) (discrimination); *Rosich v Sur-Townsend Pontiac, Inc*, 2011 WL 3163250 (ND Ind 2011) (discrimination). See also *Staub*, 131 S Ct at 1192 (noting that the USERRA is "very similar to Title VII").
33. *Staub*, 421 F Appx at 648; see *Rosich*, 2011 WL 3163250 *5.
34. See *Cornejo*, 2011 WL 3628853 *5; *Stratigos*, 2011 WL 1792713 *6 (finding no proximate cause where no reference to the plaintiff's national origin was mentioned during the termination proceeding and the plaintiff did not present any evidence that the decision maker was aware of derogatory comments made to the plaintiff).
35. *Cook v IPC Intl Corp*, 2011 WL 2173719 *5 (SD Ill 2011).
36. See *Keefer*, 2011 WL 4474966 *3.
37. See *Cook*, 2011 WL 2173719 *5 (emphasis in original).
38. Id.
39. Id.
40. *Staub*, 131 S Ct at 1194 FN 4.

2012 Contest Judges

Justice Mary McDade has been a justice of the Illinois Appellate Court (Third District) since December 2000. In 1981, at the age of 41, she enrolled in the University of Illinois College of Law, earning her J.D. in 1984. After completing a clerkship with U.S. District Court Judge Michael M. Mihm, she joined the firm of Quinn, Johnston, Henderson & Pretorius in Peoria where she litigated cases in both state and federal courts. She has been an active member of the Illinois State Bar Association, serving on numerous committees and section councils and as an editor of *Trial Briefs* for seven years.

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cause needed for employer liability.

Notably, in articulating its pre-*Staub* theory of "cat's paw" liability, the seventh circuit had explained that "a link between an employment decision made by an unbiased individual and the impermissible bias of a non-decisionmaking *co-worker* has become known in this circuit as the 'cat's paw' theory."[41] By including co-workers in its previous articulation of the "cat's paw" doctrine, the seventh circuit seems open to the possibility that a co-worker's influence could form the basis of liability if that influence proximately causes the adverse employment action; the logic of *Staub* does not appear to deny that possibility.

The plaintiff should exhaust the internal employee grievance process. In *Staub*, the plaintiff initially challenged his termination through Proctor's internal grievance process. He sued Proctor in federal court only after he exhausted that process and the employer adhered to its adverse employment decision.[42] In reaching its decision, the Supreme Court declined to rule on whether Proctor would have had an affirmative defense to liability under the "cat's paw" theory if the employee had not first exhausted the company's internal grievance process.[43]

The seventh circuit has yet to rule on whether such an affirmative defense would be available to the employer where the employee has failed to exhaust an internal grievance process. The seventh circuit, however, frequently enforces exhaustion requirements in a variety of administrative contexts based on the logic that an agency should have the opportunity to resolve claims without litigation.[44] Cautious plaintiffs, therefore, should exploit fully the available internal grievance processes within their companies before filing federal suits under the "cat's paw" theory of liability.

Extent of employer's investigation. One of *Staub*'s primary lessons is that "an independent review by the ultimate decisionmaker does not necessarily resolve the causation issue in the employer's favor."[45] After *Staub*, an employer must first investigate whether there is any evidence of bias by a supervisor against an employee and then determine whether there is an independent basis to support the adverse action.

As case law develops in the federal courts, employers may acquire a clearer understanding of their role in avoiding liability under the "cat's paw" theory. In the meantime, employers should consider taking the following steps:

- Implement clear antidiscrimination workplace polices.
- Train all employees on the scope of those policies.
- Identify who in the company is making ultimate employment decisions.
- Establish transparent internal procedures for employees to report discrimination and inform employees of those procedures.
- Apply policies consistently.
- Ensure that the human resources department has adequate levels of staff trained to conduct investigations.
- Investigate complaints of discrimination, reviewing all sides of the story and conflicting evidence or alternative theories, before taking an adverse employment action against an employee.
- Interview the affected employee and review personnel files and paper documents, but also interview witnesses and gather corroborating materials.
- Ensure that objective, verifiable facts underlie an adverse employment action.
- Investigate the relationship and any past complaints between the employee and the supervisor.
- Identify corroborating evidence for the rationale underlying an adverse employment action.
- Document all steps in the investigation.
- Consult outside counsel when appropriate.

Conclusion

While the Supreme Court in *Staub* settled the open question about the degree of influence that a supervisor must wield over the decisionmaker for "cat's paw" employer liability to apply, the Court deliberately left other questions unresolved. District courts within the seventh circuit and elsewhere continue to grapple with questions about the scope and elements of liability, affirmative defenses, best practices for employer investigations, and other issues.

In light of this evolving landscape, employment lawyers and their clients should be prepared to adjust their litigation strategies and remain alert for new cases in which the courts clarify this body of law. ■

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41. *Schandelmeier-Bartels v Chicago Park District*, 634 F3d 372, 380 (7th Cir 2011) (emphasis added).
42. *Staub*, 131 S Ct at 1190.
43. Id at 1194 FN 4.
44. See, for example, *Conyers v Abitz,* 416 F3d 580, 584 (7th Cir 2005) (analyzing the requirement of administrative exhaustion under the Prison Litigation Reform Act); *Pozo v McCaughtry,* 286 F3d 1022,1025 (7th Cir 2002) (same); *Volovsek v Wisconsin Dept of Agriculture, Trade and Consumer Protection,* 344 F3d 680, 687 (7th Cir 2003) (analyzing the requirement of administrative exhaustion under Title VII of the Civil Rights Act of 1964); *Gibson v West,* 201 F3d 990, 993–94 (7th Cir 2000) (same); *Charlie F. v Bd of Ed of Skokie School Dist 68,* 98 F3d 989, 991 (7th Cir 1996) (analyzing the requirement of administrative exhaustion under the Individuals with Disabilities Education Act).
45. *Diaz v Tyson Fresh Meats, Inc*, 643 F3d 1149, 1152 (8th Cir 2011), citing *Staub*, 131 S Ct at 1193.

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From the Archives

The ISBA's Lincoln Award Legal Writing Contest has been an important source of IBJ manuscripts for decades. The contest is open to young lawyers and sponsored by the ISBA YLD. Here is one of the first Lincoln Award ads, a photo of a past award ceremony (first, second, and third place winners now earn $2,000, $1,000, and $500 dollars), and a list of first place winners.

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3. Authors will be allowed to write on a topic of their own choosing.
4. Five copies of the manuscript shall be filed with the Publications Department of the Illinois State Bar Association by no later than December 15, 1959. Late manuscripts will not be considered eligible.
5. Manuscripts shall be limited to twenty (20) 8½ by 11 inch double-spaced typewritten pages. Entrants' names shall not appear on the manuscripts, but shall appear on a separate title page to be removed when numbers are assigned the entries.
6. Manuscripts will be judged on timeliness, practicality, originality and clarity of style, with special consideration given to the practical value the entry will

From June 1959, Vol. 47, No. 10, pg. 833

From March 1972, Vol. 60, No. 7, pg. 578

One of the principal events of the Lawyers' Luncheon was the awarding of prizes by ISBA President Morton John Barnard for the 1972 Lincoln Award legal writing contest. Shown (left to right) are Clarence O. Redman, Chicago, Chairman of the Younger Members Conference's Lincoln Awards Committee; Malcolm S. Kamin, Chicago, first place Lincoln Award winner; Barnard; Captain Benjamin G. Wells, Fort Knox, Ky., second place winner, and Calvin Bellamy, Hammond, Ind., third place winner. Kamin received $500, Wells $400, and Bellamy $300. All received Lincoln Award plaques. Lawrence E. Rothstein, Amherst, Mass., who was not present, received an Honorable Mention plaque.

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1962 – Tie – Theodore W. Grippo and Harold L. Ward
1961 – Robert C. Strodel
1960 – Clarence W. DeMoss

The Revestment Doctrine: Alive and Well or On Its Last Legs?

Under the revestment doctrine, litigants can "revest" the trial court with otherwise-expired jurisdiction by participating in a case without objection more than 30 days after entry of the final order. But recent rulings draw the viability of the doctrine into question, and practitioners should proceed with caution.

By Kristopher N. Classen

Normally, without any action from the court or the parties, a circuit court loses subject matter jurisdiction over a case 30 days after its entry of a final order.[1] Because a court has no authority to enter orders beyond its subject matter jurisdiction, any orders a circuit court enters after that are void.[2] Further, even if a circuit court mistakenly enters a void order after its jurisdiction has expired, the void order will not toll the time for filing a notice of appeal.[3]

The revestment doctrine can change all this. As the Illinois Supreme Court explained in *People v Kaeding*, "[u]nder the narrow terms of that well-established rule, litigants may revest a court...with both personal and subject matter jurisdiction over the particular cause after the 30-day period following final judgment."[4]

How does that happen? For the doctrine to apply, "the parties must actively participate without objection in proceedings which are inconsistent with the merits of the prior judgment" after the 30-day period has run.[5] The rule, which applies to civil and crimi-

1. *People v Flaugher*, 396 Ill App 3d 673, 680, 920 NE2d 1262, 1269 (4th D 2009) ("A trial court normally loses subject-matter jurisdiction 30 days after a sentence is imposed."); *In re Marriage of Orlando*, 218 Ill App 3d 312, 324, 577 NE2d 1334, 1344 (1st D 1991).
2. *Millenium Park Joint Venture, LLC v Houlihan*, 393 Ill App 3d 13, 20, 911 NE2d 517, 524 (1st D 2009).
3. See *Lowenthal v McDonald*, 367 Ill App 3d 919, 856 NE2d 1118 (2d D 2006).
4. 98 Ill 2d 237, 240, 456 NE2d 11, 14 (1983).
5. Id at 241, 456 NE2d at 14.

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nal cases alike,[6] has been explained as a product of the participating parties' ignoring the judgment and starting to retry the case, consenting to have the prior ruling set aside, or waiving the right to question the court's jurisdiction.[7]

It may be true that dealing with the law on jurisdiction is "akin to strolling through a minefield,"[8] but, even at that, the revestment doctrine presents a particularly cruel hazard: it is that rare rule that penalizes a party for arguing the merits of its case. Yet until recently, the revestment doctrine has stood basically unchallenged.[9] Several court decisions from the last 10 years, however, have begun to bring the rule's viability into question. This article looks at the decisions and what they mean and considers the practical implications of the doctrine.

The start of trouble: *Flowers* and *Price*

The first strike against the revestment doctrine came from the Illinois Supreme Court's 2004 decision in *People v Flowers*.[10] The defendant in *Flowers* filed a motion to reconsider her sentence over one year after the trial court had announced it, and, shortly after the trial court rejected the motion, she filed a notice of appeal.

The supreme court noted "[t]hat the trial court['s] [lack of jurisdiction] to consider Flowers' overdue… motion was not raised by the State."[11] The court reasoned that "[t]he absence of such an objection, however, did not give the trial court the authority to proceed."[12] "Lack of subject matter jurisdiction," the court explained, "is not subject to waiver…and cannot be cured through consent of the parties."[13]

The tension between the *Flowers* decision and the revestment doctrine went unnoticed for three years, until the Illinois Appellate Court's decision in *People v Price*.[14] In *Price*, the defendant filed a motion to withdraw his guilty plea 36 days after his sentence had been imposed, and, without any argument from the state, the trial court dismissed the motion for lack of jurisdiction.[15]

On appeal, the defendant argued that the trial court had been revested with jurisdiction due to the state's failure to raise a jurisdictional objection.[16] After observing the consent- and waiver-based rationales offered to justify the revestment doctrine, the appellate court in *Price* questioned whether the supreme court had abrogated the doctrine in *Flowers*, by rejecting the argument that a lack of jurisdiction to consider an untimely motion could be cured by waiver or consent.[17]

The *Price* court also noted that the decision that originated the revestment doctrine, the supreme court's 1874 opinion in *Herrington v McCollum*,[18] seemed to apply the doctrine to cure a defect in personal jurisdiction, not subject matter jurisdiction.[19] Because objections to personal jurisdiction, unlike problems with subject matter jurisdiction, may be waived by the parties, the court in *Price* implied that the revestment doctrine should have no effect on subject matter jurisdiction if the doctrine is based on parties' consent.[20] The court stopped short of resolving this dispute, however, because the facts of the case – the state had not actively participated in arguing the merits of the defendant's motion – did not require a definitive assessment of the revestment doctrine's viability.[21]

For the party that would challenge that order, the best approach is to do so by filing a motion within the 30-day deadline or by filing a timely notice of appeal.

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6. See *Sears v Sears*, 85 Ill 2d 253, 260, 422 NE2d 610 (1981) (citing *Ridgely v Central Pipe Line Co*, 409 Ill 46, 97 NE2d 817 (1951)); *People v Bannister*, 236 Ill 2d 1, 10, 923 NE2d 244 (2010).
7. *People v Price*, 364 Ill App 3d 543, 546, 846 NE2d 1003, 1006 (2d D 2006), citing *Wilkins v Dellenback*, 149 Ill App 3d 549, 555, 500 NE2d 692, 696 (2d D 1986); *Sears v Sears*, 85 Ill 2d 253, 422 NE2d 610 (1981); and *Ridgely v Central Pipe Line Co*, 409 Ill 46, 50, 97 NE2d 817, 821 (1951)).
8. *Physicians Ins Exchange v Jennings*, 316 Ill App 3d 443, 446, 736 NE2d 179, 182 (1st D 2000) (discussing appellate jurisdiction).
9. See *Kaeding* at 240-41, 456 NE2d at 14 (listing decisions applying the rule).
10. 208 Ill 2d 291, 802 NE2d 1174 (2004).
11. Id at 303, 802 NE2d at 1182.
12. Id.
13. Id.
14. *Price* at 546, 846 NE2d at 1006.
15. Id at 544-45, 846 NE2d at 1004-05.
16. Id at 546, 846 NE2d at 1006.
17. Id at 546-47, 846 NE2d at 1006-07.
18. 73 Ill 476 (1874).
19. *Price* at 547, 846 NE2d at 1007, citing *Grand Pacific Hotel Co v Pinkerton*, 217 Ill 61, 84, 75 NE 427 (1905), quoting *Herrington*, 73 Ill at 479 ("The court, unquestionably, had jurisdiction of the subject matter…and it has never been questioned that parties may…control jurisdiction over their own persons.").
20. *Price* at 547, 846 NE2d at 1007 ("This [formulation limiting revestment to issues of personal jurisdiction]…is consistent with the maxim that a party may not waive an objection to subject matter jurisdiction.").
21. Id.

Reaction: *Minniti* and *Montiel*

As quickly as *Flowers* and *Price* conspired to cast doubt on the revestment doctrine,[22] two later appellate court opinions, *People v Montiel*[23] and *People v Minniti*,[24] combined to defend the rule. In *Montiel*, the first of these decisions, the defendant filed a motion attacking his sentence over two months after it had been announced, but, after conferring, the state agreed to have the court consider his motion.[25] The state also raised no concern when the trial court asked both parties for objections to its considering the motion under the revestment principles.[26]

A party may avoid the doctrine easily: before responding on the merits to a motion challenging a judgment, raise any objections based on the expiration of the circuit court's jurisdiction.

On appeal, the state argued that *Flowers* had abrogated the revestment doctrine. Without mentioning *Price*, the appellate court rejected the state's argument.

The court first noted that the principle stated in *Flowers*, that parties cannot waive objections to subject matter jurisdiction, had been in place long before the supreme court's most recent application of the revestment doctrine.[27] Just after taking this position, however, the *Montiel* court abandoned it, by acknowledging that decisions accepting the revestment doctrine were "admittedly in tension with *Flowers*."[28] The court then reconciled the cases on the basis that "it is not *consent* but *active participation* that revests jurisdiction," and *Montiel*, unlike *Flowers*, involved active participation.[29]

Montiel did not explain exactly how consent would differ from active participation,[30] or why parties' active participation could cure a problem with subject matter jurisdiction without violating *Flowers* if consent could not. That is, even if its consent-participation dichotomy distinguished *Montiel*'s facts with those of *Flowers*, the dichotomy did nothing to reconcile *Montiel*'s result with the legal principle articulated in *Flowers*. Nonetheless, *Montiel*'s pronouncement that revestment remained alive and well sustained the doctrine in the eyes of most observers.[31]

One year later, in *Minniti*, the appellate court took a more thorough look at revestment. In that case, the defendant was sentenced on November 30, 2004, but he waited until January 7, 2005, to file a motion to reconsider the sentence.[32] The state indicated that it did not object to the trial court's considering the late filing, and it argued the motion on the merits.[33] When the trial court denied the motion to reconsider, the defendant filed an immediate notice of appeal.[34]

On appeal, the state argued that the defendant's notice of appeal was untimely, because the late motion to reconsider sentence did not toll the time for seeking an appeal from the original sentencing order; the defendant responded by arguing that the trial court had been revested with jurisdiction.[35]

This time, the appellate court acknowledged both *Flowers* and *Price*, and it responded to the two major challenges *Price* had raised to the reverstment doctrine. *Minniti* identified the first challenge as *Price*'s observation that the popular understanding of revestment – that it allows the parties to waive problems with a court's subject matter jurisdiction – conflicts with the rule from *Flowers* that lack of subject matter jurisdiction is not subject to waiver and cannot be cured by consent.[36]

To this point, the court in *Minniti* repeated *Montiel*'s rationale that the supreme court had employed the revestment doctrine even after stating the rule articulated in *Flowers*. The *Minniti* court did not repeat *Montiel*'s acknowledgement that, even if revestment and the *Flowers* rule coexisted, they were "admittedly" in conflict.

Minniti identified the second challenge to revestment as *Price*'s observation that the Illinois Supreme Court decision on which the doctrine seems to be based actually applied it only to personal, not subject matter, jurisdiction.[37] To this point, the *Minniti* court responded that, since that original case, revestment "has repeatedly been interpreted" to repair problems with subject matter jurisdiction as well as personal jurisdiction.[38]

Since *Price* seemed to assume as much when it argued that revestment may have been misinterpreted to apply to subject matter jurisdiction, it is not clear how *Minniti*'s point is at all responsive. Nonetheless, *Minniti* followed the *Montiel* decision exactly, and it restated *Montiel*'s conclusion that revestment could be reconciled with *Flowers* "because 'it is not *consent* but *active participation* that revests jurisdiction.'"[39]

Minniti's defense of the revestment doctrine was not particularly persuasive, both because it did not give any rationale for its consent-participation dichotomy and because it did not respond directly to the questions *Flowers* and *Price* had raised. Although some appellate court decisions have since followed *Minniti*'s reasoning on revestment,[40] others have questioned or declined to fol-

22. See Laura Mruk, *Supreme Court Decision Throws Viability [of] Doctrine of Revestment Into Question*, 19 DCBA Brief 16 (2007) (summarizing *Flowers* and *Price*).
23. 365 Ill App 3d 601, 851 NE2d 725 (2d D 2006).
24. 373 Ill App 3d 55, 867 NE2d 1237 (2d D 2007).
25. *Montiel* at 603-04, 851 NE2d at 726-27.
26. Id.
27. Id at 604-05, 851 NE2d at 727, citing *Toman v Park Castles Apartment Building Corp*, 375 Ill 293, 302, 31 NE2d 299, 304 (1940) (stating the rule regarding subject matter jurisdiction), and *Kaeding* at 241, 456 NE2d at 14.
28. *Montiel* at 605, 851 NE2d at 728.
29. Id (emphasis in original).
30. See Mruk, 19 DCBA Brief at 19 (cited in note 22) (criticizing *Montiel*'s consent-participation dichotomy as difficult to apply in practice).
31. Id at 16 (noting later decisions relying on *Montiel* to say that the revestment doctrine remained intact) (citing *Lowenthal* and *People v Gargani*, 371 Ill App 3d 729, 863 NE2d 762 (2d D 2007)).
32. *Minniti* at 64, 867 NE2d at 1245.
33. Id.
34. Id.
35. Id at 64-65, 867 NE2d at 1246.
36. Id at 65-66, 867 NE2d at 1247 (discussing *Price*).
37. Id at 65, 867 NE2d at 1247, discussing *Price* at 546-47, 846 NE2d at 1007 (citing *Pinkerton*, 217 Ill at 84, quoting *Herrington*, 73 Ill at 479).
38. *Minniti* at 66, 867 NE2d at 1247.
39. Id, quoting *Montiel* at 605, 851 NE2d at 728 (emphasis in original).
40. See, for example, *People v Lane*, 404 Ill App 3d 254, 258-59, 935 NE2d 578, 582 (3d D 2010); *People v Gibson*, 403 Ill App 3d 942, 948, 934 NE2d 611, 616 (2d D 2010); *People v Gutman*, 401 Ill App 3d 199, 210-11, 928 NE2d 61, 72 (1st D 2010), *affirmed in part, reversed in part* by *People v Gutman*, 2011 IL 110338; *People v Lindmark*, 381 Ill App 3d 638, 652, 887 NE2d 606, 618 (4th D 2008); *People v Zoph*, 381 Ill App 3d 435, 449-50, 886 NE2d 425, 438 (2d D 2009) (noting *Price* but following *Minniti* as the established law of the appellate court).

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low it.[41] With no explanation for how the revestment doctrine can survive in light of *Flowers* and *Price*, the continued viability of the doctrine remains an open question.

A Possible Solution: Justice Kapala's *Minniti* Dissent

In his interesting dissent from the *Minniti* decision, Justice Frederick Kapala proposed a plausible solution to this open question, a solution that reconciles the problems *Montiel* and the *Minniti* majority could not.[42]

Justice Kapala began his dissent by recognizing as "unsound" the line of cases setting out, "with little or no analysis," the revestment doctrine as a device for extending the jurisdiction of a circuit court.[43] From there, he suggested that the revestment doctrine could work not as a rule that allows parties to alter a court's subject matter jurisdiction, but instead as "a practical device that allows the trial court to vacate its final judgment after it loses jurisdiction."[44]

Under Justice Kapala's theory, a court would consider both parties' active participation in the lawsuit as their agreement that the prior judgment was improper; thus, the court would consider the parties' actions as an agreed "motion attacking" the prior judgment.[45] Pursuant to this agreed motion to vacate, Justice Kapala explained, the prior judgment would be vacated, and "a new final judgment [would] ultimately be entered."[46]

This new judgment would be appealable as normal. Thus, Justice Kapala concluded, "the doctrine of revestment offers a chance at another final appealable order; it does not allow an untimely postjudgment motion to extend the time to appeal the original final judgment."[47]

Justice Kapala's approach has considerable practical merit. By reshaping revestment as a device (perhaps akin to a motion brought under section 2-1401 of the Code of Civil Procedure[48]) for beginning a new proceeding, rather than altering the circuit court's jurisdiction over a previous proceeding, it would preserve the revestment doctrine while avoiding the problems identified in *Flowers* and *Price*.

His argument is also not entirely without support from the Illinois Supreme Court. Although the revestment doctrine has been described predominantly as a function of parties' consent to subject matter jurisdiction, the supreme court has at least once equated the revestment doctrine with an agreed motion to vacate a previous order.[49]

Justice Kapala's solution also explains what *Montiel* and the *Minniti* majority could not: the rationale for a distinction akin to the consent-participation dichotomy *Montiel* proposed. It stands to reason that, if a court is to infer a party's agreement to vacate a prior judgment, then the conduct supporting the inference must very strongly demonstrate the party's intent. That is, a court cannot interpret from a party's mere acquiescence that the party actively seeks to vacate a prior judgment in its favor; the court must wait for some stronger indication. Active participation in the proceedings, or informed consent to revisiting the proceedings, should suffice as such an indication.

Accordingly, although it might modify the consent-participation dichotomy slightly to allow informed consent to trigger revestment, Justice Kapala's formulation of the revestment doctrine would leave the current implementation largely intact, albeit with a clearer supporting rationale.

Despite its virtues, however, Justice Kapala's dissent in *Minniti* has received no attention in subsequent case law. Thus, Illinois law has yet to reconcile the revestment doctrine with *Flowers* and *Price*.

The supreme court steps in: *Bannister*

As the revestment conflict continues to fester, the Illinois Supreme Court has stepped tentatively toward resolving the confusion.

In *People v Bannister,* issued in January 2010, a four-justice majority of the Illinois Supreme Court devoted a single sentence to a discussion of revestment that reaffirmed the doctrine by citing *Minniti*, without mentioning any of the problems surrounding the rule.[50] In dissent, the three remaining justices cited *Flowers* and *Price*, stated plainly that *Flowers* was "contrary to the revestment doctrine," and bewailed the majority's failure to address the problems surrounding revestment.[51]

All three dissenting justices remain members of the supreme court, while the *Bannister* majority retains only three of its four members. After the *Bannister* decision, the revestment doctrine remains a part of Illinois law, but the doctrine is hardly entrenched. The supreme court could at any time revisit the issue, and clarify whether, and in what form, the revestment doctrine survived *Flowers*.

Practical implications

Until the supreme court revisits revestment, litigants should assume that the doctrine retains its full force. Fortunately, although the doctrine's status and rationale are murky, the way practitioners should deal with it is clear.

Normally, if an appeal is not perfected and no further motions are filed, a circuit court loses subject matter jurisdiction over a case 30 days after entry of the final order in the case. For the party that would challenge that order, the best approach is to do so by filing a motion within that 30 days, or by filing a timely notice of appeal. If the party fails to take either action, however, the revestment doctrine may provide it one last chance. If it files an untimely motion challenging the order, and if the opposing party responds on the merits without raising a jurisdictional objection, the trial court may be revested with jurisdiction. At this point, the proceedings will reopen, and the clock will reset for new motions or notices of appeal.

For the party that would defend the court's order, the best course is to avoid the doctrine at all costs. A party may avoid the doctrine quite easily: before responding on the merits to a motion challenging a judgment, the party should raise any objections based on the expiration of the circuit court's jurisdiction. ■

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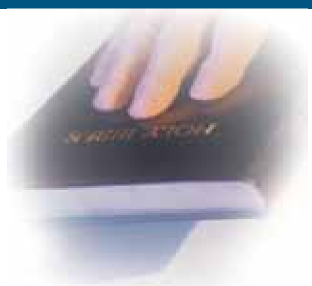
41. See, for example, *People v Haldorson*, 395 Ill App 3d 980, 983-84, 918 NE2d 1280, 1283 (4th D 2009) (questioning *Montiel* based on a procedural aspect of the type of motion at issue, and also discrediting *Montiel*'s proposed consent-participation dichotomy).
42. See *Minniti* at 74-77, 867 NE2d at 1254-56 (Kapala dissenting).
43. Id at 75, 867 NE2d at 1254-55.
44. Id at 75-76, 867 NE2d at 1255.
45. Id at 76, 867 NE2d at 1255.
46. Id.
47. Id.
48. 735 ILCS 5/2-1401.
49. See *Brown v Miner*, 408 Ill 123, 126-27, 95 NE2d 530, 531 (1951) ("Under such circumstances the vacation of an order after more than thirty days is not objectionable, and the voluntary appearance of the parties may revest the court with jurisdiction over their persons and the subject matter. [Citations]. And further, the vacation of a judgment has been upheld where it appears that all parties consented thereto after the time when the court would otherwise lose jurisdiction to vacate.")
50. See *Bannister*, 236 Ill 2d at 10, 923 NE2d 244 at 249.
51. Id at 23-24, 923 NE2d at 257 (Freeman dissenting, joined by Kilbride and Burke).



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The Dodd-Frank Act's Impact on Consumer Litigation

The Dodd-Frank Act is the most comprehensive overhaul of the financial services industry in recent history. As with all financial services legislation, it is fraught with pitfalls for businesses and a potential boon for consumer finance litigators.

By Donna M. Goelz and Timothy J. Howard

The Dodd-Frank Wall Street Reform and Consumer Protection Act[1] (the "act"), signed into law by President Obama on July 21, 2010, gave consumer finance litigators a potential windfall of private causes of action and defenses.

The 2,000 plus pages of the act are divided into 16 separate titles, each addressing a specific area of financial reform. The act constitutes one of the most significant efforts in recent history to overhaul the financial services industry and affects not only banks but thousands of non-depository entities not previously subject to federal agency regulation.

While certain provisions of the act took effect immediately, many have delayed effective dates and their implementation will require the issuance of numerous new regulations.

Although the primary focus of the act is the safety and soundness of the financial system, which is beyond the scope of this article, the act affects many other financial transactions, products and services and makes important changes to existing consumer laws, including the Truth in Lending Act ("TILA"), Real Estate Settlement Procedures Act of 1974 ("RESPA"), the Fair Debt Collection Practices Act ("FDCPA"), and the Fair Credit Reporting Act of 1970 ("FCRA").

The complete impact of the act is unknown because many of the substantive requirements will be contained in the regulations that are still yet to be drafted; however, consumers clearly have an arsenal of potential causes of action and defenses to levy against businesses.

This article discusses some of the act's consumer causes of action, consumer defenses, and increased penalties that will affect consumer finance litigation for the foreseeable future, as well as new whistleblowing protections for those providing information about violations of consumer financial protection laws.

Consumer Financial Protection Act

Bureau of Consumer Financial Protection. Pursuant to Title X of the act, there is a new regulator in town, the Bureau of Consumer Financial Protection (the "bureau").[2] The bureau is an independent entity within the Federal Reserve System. Its primary purpose is to implement and enforce "Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and

1. Pub L No 111-203, 124 Stat 1376 (July 21, 2010) [hereinafter Dodd-Frank], available at http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf.
2. Dodd-Frank § 1011.

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services and that markets for consumer financial products and services are fair, transparent, and competitive."[3]

In its regulation of consumer financial products and services, the bureau will have expansive supervisory, rulemaking, investigative and enforcement authority. On January 4, 2012, President Obama used a recess appointment to install former Ohio Attorney General Richard Cordray as director through the end of 2013.

The bureau will have primary or secondary consumer examination and supervisory authority over depository institutions depending on their size. In addition, it will have supervisory authority over certain non-depository entities that offer consumer financial products and services that have not been supervised by federal agencies, including finance companies, debt collectors, money transmitters, consumer reporting agencies and private educational lenders. On June 23, 2011, the bureau issued a notice and request for comment on defining nonbank entities that will be subject to bureau supervision as "larger participants" in consumer finance products or services markets.

The Dodd-Frank Act gives consumer finance litigators a potential windfall of private causes of action and defenses.

The bureau also has sweeping rulemaking authority. It will implement and enforce existing consumer financial laws and regulations, such as TILA, RESPA, the FDCPA, and the FCRA. It will have the authority to implement rules to protect consumers from unfair, deceptive, or abusive acts or practices (the "consumer protection rules")[4] in connection with a wide variety of consumer financial products and services.

Although the terms "unfair" and "deceptive" have well-established meanings, the new term "abusive" does not. The act provides little guidance as to what constitutes an "abusive" activity.[5] How the term will be developed as a consumer tool is open and could lead to protracted litigation.

This rulemaking authority extends to virtually all financial services institutions including, but not limited to, banks, credit unions, mortgage lenders, credit bureaus, private education lenders, debt collectors and payday lenders.[6] Notably exempt from the bureau's rulemaking authority are merchants, retailers, and other sellers of non-financial goods or services, including motor vehicle dealers, that will remain under the authority of the Federal Trade Commission.[7]

The bureau also has broad enforcement power. It will oversee established consumer finance laws and have the authority to declare that an act or practice is unfair, deceptive, or abusive under federal law.

If it determines that an institution has engaged in such unlawful activity, the bureau has the power to issue a cease and desist order or pursue a civil action in a federal district court or a state court. It may seek rescission or reformation, refund of moneys or return of property, restitution, disgorgement, damages, public notification of violation, and civil money penalties.[8]

The bureau is also specifically authorized to establish a Consumer Financial Protection Civil Penalty Fund for civil penalties it collects.[9] These funds are to be used to pay victims of consumer financial law violations. If victims cannot be found or such a payment would be impractical, the funds may be used to pay for consumer education and financial literacy programs.

To enforce the consumer protection provisions of the act and the implementing regulations, states' attorneys general are empowered to bring civil actions in federal district or state courts. However, national banks and federal savings associations may be sued by state attorneys general only to enforce the new regulations, not the underlying act itself. Other state regulators may also enforce Title X of the act and its implementing regulations against state-chartered, incorporated, or licensed entities.[10]

While the act does not provide consumers a private cause of action for violations of the consumer protection rules, the bureau has rulemaking authority under existing consumer statutes that do provide consumers private causes of action, including TILA. The act amends many of these consumer statutes. In addition, it may be possible for consumers to use the causes of action available under the Unfair or Deceptive Acts or Practices Act.[11]

Although Title X of the act does not specifically authorize a private right of action for consumers, the act does not preclude plaintiffs' attorneys from using a violation of the act or its regulations as a basis for supporting claims under a state's unfair and deceptive practice statutes, such as the Illinois Consumer Fraud Act. Moreover, the act makes it unlawful "to offer or provide to a consumer any financial product or service not in conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a Federal consumer financial law; or….to engage in any unfair, deceptive, or abusive act or practice."[12] Such a broad prohibition could be put to use by consumer finance litigators.

Whistleblower protections. The act also restricts the ability of persons subject to the bureau's authority to terminate or otherwise punish "covered employees" who furnish information to specified persons or entities. "Covered employees" are those who perform tasks related to offering or providing a consumer financial product or service (i.e., those primarily for personal, family or household purposes).

Generally, a covered employee cannot be punished for: (a) providing information to an employer, the bureau, or any state, local or federal government authority or law enforcement agency about violations of the consumer financial protection laws or any rule or other prohibition prescribed by the bureau; (b) testifying in any proceeding resulting from the administration or enforcement of the act or implementing regulation; (c) personally filing any proceeding under any federal consumer financial law; or (d) objecting to or refusing to participate in

3. Dodd-Frank § 1021(a).
4. Dodd-Frank § 1031.
5. Dodd-Frank § 1031(d).
6. Dodd-Frank § 1024.
7. Dodd-Frank §§ 1027(a), 1029.
8. Dodd-Frank § 1055(a).
9. Dodd-Frank § 1017(d).
10. Dodd-Frank § 1042.
11. FTC Act §§ 5(a)(1), 15 USC § 45(a)(1).
12. Dodd-Frank § 1036(a)(1)(A)

any activity or practice that is reasonably believed to be in violation of consumer financial protection laws.[13]

It does not appear that the act will protect covered employees who provide information to the media or to private persons pursuing litigation against an employer, or to employees who testify in private civil actions against employers.[14]

A covered employee who believes he or she has been terminated or punished in violation of the act has 180 days to file a complaint with the Secretary of Labor. If he or she is successful in the claim, the Labor Department can order: (a) affirmative action to abate the violation; (b) complete reinstatement, including back pay; (c) compensatory damages; and (d) reasonable attorneys' fees and costs of bringing the action, including expert witness fees.[15]

In these whistleblower provisions, the burden of proof is favorable to the covered employee. He or she needs to establish, by a preponderance of the evidence, that his or her protected activity was a "contributing factor" in the adverse employment action. If this burden is met, the employer must show, by clear and convincing evidence, that it would have taken the same action if the employee had not engaged in the protected conduct.[16]

If an employer successfully defends against a complaint and it is decided that the complaint was brought in bad faith or was frivolous, the covered employee can be ordered to pay the employer's attorney fees, up to a maximum possible award of $1,000.[17]

These protections could create a niche legal market for representing whistleblowers and defending corporations against whistleblowers. These added protections may encourage employees to furnish information regarding marginal violations of consumer protection laws.

To minimize the rise of claims by covered employees, companies should be advised to establish policies and procedures for employees to internally report alleged violations of consumer finance laws and to set forth the steps the corporation will take to investigate them. For recent legislative activity, see the sidebar on page 104.

Mortgage Reform and Anti-Predatory Lending Act

Title XIV of the act (called the Mortgage Reform and Anti-Predatory Lending Act),[18] amends TILA and RESPA as they relate to residential mortgage loans and mortgage origination. It provides for a variety of reforms to consumer mortgage practices, requires accountability for those practices, and sets minimum standards for consumer mortgage loans. These amendments were made to Part B of TILA, violations of which lead to TILA private remedies of actual and statutory damages and attorney fees, in both individual and class actions.

Reasonable ability to repay. Creditors must now make a reasonable and good faith determination, based on verified and documented information, that a consumer has a "reasonable ability" to repay a residential mortgage loan in accordance with its terms, and all applicable taxes, insurance and assessments.[19] The act then provides a list of items that a creditor is to consider in making this determination.

If a creditor violates the provisions concerning a consumer's reasonable ability to repay, it is subject to damages available under TILA. Damages would be an amount equal to the sum of (a) any actual damages sustained by the consumer as a result of the failure; (b) twice the amount of any finance charge in connection with the transaction or, in the case of an individual action relating to a credit transaction not under an open end credit plan secured by real property or a dwelling, not less than $400 or greater than $4,000; and (c) an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.[20]

In a class action, there is no minimum recovery for an individual member of the class and recovery is limited to no more than the lesser of $1 million (the act increased this amount from $500,000) or 1 percent of the net worth of the creditor.[21] The statute of limitations for TILA section 129 violations was also extended from one year from the date of the violation to three years from the occurrence of the violation.[22]

Mortgage origination. Title XIV also significantly amends TILA as it pertains to mortgage origination. A "mortgage originator" is defined generally as any person "'who, for direct or indirect compensation or gain….(i) takes a residential mortgage loan application; (ii) assists a consumer in obtaining or applying to obtain a residential mortgage loan; or (iii) offers or negotiates terms of a residential mortgage loan.'"[23] The act's amendment goes on to impose a new duty of care on and prohibits certain compensation to mortgage originators.

To avoid running afoul of whistleblower protections, companies should establish procedures for employees to internally report alleged violations of consumer finance laws.

Under the new duty of care requirement, mortgage originators must be qualified and, if applicable, registered and licensed in accordance with state and federal law, including the Secure and Fair Enforcement for Mortgage Licensing Act of 2008. In addition, mortgage originators must include on all loan documents the unique identifier provided by the Nationwide Mortgage Licensing System and Registry.[24]

The amendments also restrict the form of compensation for mortgage originators. First, they may not receive steering incentives. This means that a mortgage originator cannot be paid compensation that varies based upon the terms of a loan, other than the amount of the principal.[25]

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13. Dodd-Frank § 1057(a)(1) thru (4).
14. Id.
15. Id at (c)(1)(A) and (c)(4)(B).
16. Id at (c)(3)(C).
17. Id at (c)(4)(C).
18. Dodd-Frank §§ 1400-1498.
19. TILA § 129C(a)(1), as added by Dodd-Frank § 1411.
20. 15 USC § 1640(a).
21. TILA § 130(a), as amended by Dodd-Frank § 1416.
22. TILA § 130(e), as amended by Dodd-Frank § 1416.
23. Dodd-Frank § 1401, quoting new section to be added to TILA § 103.
24. Dodd-Frank § 1402(a)(2).
25. Dodd-Frank § 1403.

In addition, a mortgage originator may not receive from any person other than the consumer an origination fee or charge unless it is a bona fide third party charge not retained by the creditor, mortgage originator, or an affiliate of the creditor or mortgage originator. An exception is permitted if the consumer does not pay any compensation to the mortgage originator directly and the consumer does not make any upfront payment of discount points, origination points, or fees.[26]

As required by the act, the federal reserve prescribed regulations to prohibit mortgage originators from steering any consumer to a residential mortgage loan that the consumer lacks a reasonable ability to repay or that has predatory characteristics or effects (such as equity stripping, excessive fees, or abusive terms). The regulations prohibit mortgage originators from steering any consumer from a "qualified mortgage" to one that is not qualified. A qualified mortgage is defined in an amendment to TILA and generally is a high-quality residential mortgage with certain defined features.

In addition, the regulations are to prohibit "'abusive or unfair lending practices that promote disparities among consumers of equal credit worthiness but of different race, ethnicity, gender, or age.'"[27] As discussed above, the term "abusive" is new and depending on how it is defined and then interpreted through case law could have a far-reaching effect.

A violation of the act's requirements or of the regulations to be implemented provides an individual cause of action to a consumer. A consumer's damages would include

> the greater of actual damages or an amount equal to 3 times the total amount of direct and indirect compensation or gain accruing to the mortgage originator in connection with the residential mortgage loan involved in the violation, plus the costs to the consumer of the action, including a reasonable attorney's fee.[28]

New consumer defenses for foreclosures. The act also provides two new defenses to consumers who are subject to a foreclosure action if the creditor violates the reasonable ability to repay requirements or prohibition on steering incentives to mortgage originators. If a creditor, assignee or other holder of a residential mortgage loan pursues a foreclosure or other action to collect a residential mortgage debt, a consumer with the right to rescind is permitted to assert a violation as a defense by recoupment or set-off.[29] The amount of recoupment or set-off must equal the amount to which the consumer would be entitled under TILA for damages for a valid claim brought in an original action against the creditor, plus the costs to the consumer of the action, including reasonable attorneys' fees.[30]

If the judgment is rendered after the expiration of the time limit on a private action for damages under TILA (one year from the date of violation), the amount of recoupment or set-off may not exceed the amount to which the consumer would have been entitled for damages computed up to the day preceding the expiration of the applicable time limit.[31] Accordingly, the amount of the set-off or recoupment will include the damages described above, plus reasonable attorneys' fees and costs. Notably, if a judgment is rendered after the expiration of the three-year statute of limitations period, the consumer is entitled to the amount of set-off or recoupment up to the day preceding the running of the limitations period.

Amendments to RESPA. The act amended RESPA to prohibit a servicer of a federally related mortgage loan from obtaining force-placed hazard insurance unless the creditor has a reasonable basis to believe the borrower has not complied with the loan's requirement to maintain property insurance.[32] In addition, the act amended RESPA by banning fees for responding to and reducing the amount of time creditors and loan servicers may provide a written response acknowledging receipt of a consumer's valid qualified written request from 20 to five days.[33]

The time to make a correction or conduct an investigation was also reduced from 60 days to 30 days. A servicer must also "'take timely action to respond to a borrower's requests to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer's duties.'"[34] These reduced time periods could subject creditors and loan servicers to an increased potential for litigation.

Damages for violations of RESPA were significantly increased by the act. For an individual action, a consumer is entitled to actual damages and additional damages not to exceed $2,000 (up from $1,000) if a pattern or practice of noncompliance can be established. Consumers in a class action are entitled to actual damages and additional damages not to exceed $2,000 per member of the class, if there is a pattern of noncompliance established. Total recovery is capped at the lesser of $1 million (up from $500,000) or 1 percent of the net worth of the loan servicer.[35]

Conclusion

The full ramifications of the act with respect to a new era of consumer litigation are still unknown. Many regulations still need to be implemented to establish the parameters of these new causes of action. Time will tell whether the act is a boon for consumer finance litigators. ■

Whistleblower Improvement Act of 2011

On December 14, 2011, the Capital Markets Subcommittee of the House Financial Services Committee voted 19-14 to advance the Whistleblower Improvement Act of 2011 (HR 2483). Among other things, the act would oblige whistleblowers to report wrongdoing first to someone within the company and only after that to the Securities and Exchange Commission. All Republicans on the subcommittee supported the measure and all Democrats opposed it. In support of the bill, co-sponser Rep. Michael Grimm, Republican of New York, said "[t]he overreaching provisions in Dodd-Frank make internal [reporting] programs obsolete…."

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26. Id.
27. Id, quoting new section to be added to TILA § 129B.
28. Dodd-Frank § 1404.
29. TILA § 130(k)(l), as added by § 1413 of the Act.
30. TILA § 130(k)(2)(A), as added by § 1413 of the Act.
31. TILA § 130(k)(2)(B), as added by § 1413 of the Act.
32. RESPA § 6, as amended by Dodd-Frank § 1463.
33. Id.
34. Dodd-Frank § 1463, quoting new section to be added to RESPA § 6.
35. RESPA § 6, as amended by Dodd-Frank § 1463.

Lawyers, Doctors and Matryoshka Dolls

Contests over fees for physician testimony reflect the larger antagonism between lawyers and doctors. Isn't it time to find a better, more cooperative way?

Judge Justice was taking a recess during a contested hearing over what a nonparty treating physician should be paid for attending a discovery deposition. The plaintiff's attorney refused to accept the terms demanded by the physician: $1,000 for any portion of an hour, nonrefundable, with two hours payable in advance and the balance due at the conclusion of the deposition.

The attorney argued that the hourly rate should only be $250 based upon the physician's gross income of $500,000 divided by 2,000 hours (50 weeks times 40 hours). He said the fee cannot be payable in advance, there can be no minimum, and if there are fee disputes the physician should appear on the subpoena (and thus get only the statutory witness fee and mileage) and argue the reasonable-compensation issue later.

On the judge's desk was a Russian nesting doll he bought as a surprise for his granddaughter, made up of separate dolls of decreasing size that fit inside each other. Over a cup of coffee, the judge pondered if there would come a day that judges, lawyers, physicians, and the patient/client could all share the same space so comfortably.

While physicians and lawyers can point to each other's faults, one thing is clear –the client/patient is in the middle and entitled to a duty of loyalty by both.

Natural antagonism

Just a few weeks earlier, the judge attended a lecture by a medical school professor who outlined what law related training medical students receive. The professor, a lawyer, described some fundamental differences in the way physicians and lawyers think and how they view each other's profession.

In addition to learning how to diagnose illness and treat patients, doctors learn that the duty of total care includes keeping adequate charts and records and providing testimony when the injury involves a legal claim. However, the intense demands of medical practice leave little time for dealing with patient legal proceedings. In addition, malpractice litigation creates a natural antagonism between the legal and medical professions.

Thinking back to law school, the judge remembered that law students were not trained to interact with medical professionals. Even now there were few opportunities for interaction between the professions outside an adversarial context.

During his legal career, Judge Justice witnessed how lawyers and physicians became necessarily, if reluctantly, codependent in matters of patient/client care. Expert medical testimony is needed to resolve disputes ranging from will contests to murder cases to personal injury suits.

Since the 1980s, this increased professional interaction, along with increased patient demands for medical privacy, has inspired legislative and judicial responses. In 1986, in *Petrillo v Syntex Laboratories, Inc,* 148 Ill App 3d 581, 499 NE2d 952 (1st D 1986), the court found that when a patient files suit, "the physician should be prepared to release those records relevant to the condition placed at issue, be available to give depositions, and be prepared to testify should he be called to do so."

However, *Petrillo* announced the rule that disclosure based upon the physician-patient relationship should only be allowed pursuant to court authorized methods of discovery. Ex parte conferences with defense attorneys are not permitted. This *Petrillo* doctrine has continued to be explained and expanded over the past 25 years. Attorneys are able to use alternate means of gaining the needed information under Illinois Supreme Court Rule (SCR) 201.

In 1982, SCR 212(b) was amended to make evidence depositions of physicians and surgeons admissible at trial, regardless of whether they are otherwise available to testify in court. While physicians can still be subpoenaed for trial (735 ILCS

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5/2-1101), it is now most common to present their testimony through oral or video depositions.

In 1985, SCR 204(c) was amended to allow a "reasonable fee" to physicians attending depositions. Previously physicians only received the statutory witness fee and mileage like all other witnesses (705 ILCS 35/4.3). This amendment clarified the ethical propriety of paying the professional fee some doctors had been requesting. The rule was amended again in 1989 to require payment of a reasonable fee. See Timothy Harris, *Fees For Physician Testimony: What's Reasonable?* 96 Ill Bar J 460 (September 2008). The legislature passed 735 ILCS 5/8-2001 in the early 1980s to regulate the charges for copies of health care records. So far there is no schedule or statute concerning what constitutes a "reasonable fee."

Lawyers have been reluctant to challenge the fees and conditions demanded by physicians, fearing an adverse impact on deposition or trial testimony. However, pressures to contain the cost of litigation and the escalating fees increased friction.

Fee contests: *Montes v May*

A recent example of such a fee contest is *Montes v Mai*, 398 Ill App 3d 424, 925 NE2d 258 (1st D 2010). To appear for a discovery deposition, the treating chiropractor demanded $550 per hour, payable in advance, with a two-hour minimum. A counteroffer of $300 per hour with no minimum or prepayment was rejected. (Note: in *Buckholtz v MacNeal Hospital*, 313 Ill App 3d 521, 729 NE2d 949 (1st D 2000) the court upheld a $300 hourly fee based upon the incomplete record presented.)

In *Montes*, the court reviewed the chiropractor's financial records in camera and ruled that an hourly fee of $66.95 was reasonable, with no minimum or prepayment. After the chiropractor refused to appear for the deposition, the court found him in contempt. The issue was appealed.

After resolving that a chiropractor is a physician under SCR 204(c), the court noted that there are many ways to calculate a reasonable fee but that one approach would be the W-2 income divided by 52 weeks at 40 hours per week. The chiropractor had contended that the clinic generated $1,750 per hour of operation and that was a better measure of lost income.

The court also cited the committee comments to SCR 204(c) to state there is no requirement to pay a two-hour minimum or prepay the fee. Here, the fee would be based on time actually spent testifying, prorated at 15-minute increments. The court did opine that "the best approach is for a physician and the party seeking the deposition to discuss the matter and reach an agreement."

A cooperative approach

While courts can and will adjudicate disputes between the legal and medical professionals, we need an alternative to lengthy and expensive contests. At worst, these disputes add a layer of discovery, trial, and appeal. Physicians do not want their financial records disclosed and all sides resent the delay and expense of contested hearings over fees within the underlying case.

In response, many states have drafted medico-legal guidelines through supreme court committees or joint projects of their bar associations (including plaintiff and defense groups) and the medical societies. Illinois should join the states with such a project. In that way the concerns of both professions can be addressed collaboratively. Creative ideas can be proposed and tested and, if successful, forwarded to the Illinois Supreme Court or legislature for consideration.

Because of strong differences between the plaintiff and defense bar on some of these issues, it may best be dealt with by a supreme court committee with representation from all stakeholders. Reasonable timeframes and guidelines (time, place, cancellation policies, etc.) for scheduling depositions and a range of fees for responding to discovery requests could be established.

A model narrative report or health care provider interrogatories could be adopted that would provide much of the information needed to initially evaluate a case by all sides. That information could be supplemented by a deposition on written questions if needed. Creative applications of remote electronic depositions under SRC 206(h) and remote testimony by streaming video pursuant to new SCR 241 could maximize information while minimizing time and expense. There may be other, better ways to obtain and present medical evidence.

Another innovation that could allow physicians and lawyers to interact in a cooperative environment is the creation of medical-legal partnerships (MLP). These have arisen as medical professionals realized that their patients often needed help to solve legal problems contributing to their poor health conditions. This integration of legal assistance into the medical setting not only provides a more holistic approach to patient/client care, it allows the two professions to see each other on the same team.

Putting clients/patients in the forefront

While physicians and lawyers can each point to the faults of the other's positions, one thing remains clear. The client/patient is in the middle and entitled to a duty of loyalty and honesty by both professions.

The injured person is often in a difficult financial circumstance and struggling to pay medical expenses, deal with loss of income, and adapt to the pain and disability of injury. They understand little about how their physician or lawyer thinks about the situation, but need an economical and just resolution of the case. Only if we can keep the duty to the client/patient paramount while respecting the unique roles of our respective professions can doctors and lawyers serve the needs of society.

Judge Justice placed the nesting dolls back together and captured the mental image of the smallest doll as the client/patient surrounded by his/her physician, lawyer, and the court – all working together beautifully. ■

Raising the Ante(Diluvian)

In a recent column, the estimable Ms. Erger complained about the drawbacks of e-calendars and asked you to weigh in. Here's what you said. And don't let your cell phone distract you while you drive.

Crash on the levee, mama/Water's gonna overflow –
Bob Dylan, "Down in the Flood"

Antediluvian: *1. of or relating to the period before the flood described in the Bible; 2. (a) made, evolved, or developed a long time ago, (b) extremely primitive or outmoded.*[1]

Technophiles, beware: In the following column, I'm going to get all my antediluvian Ya-Yas out and discuss not one but two topics that may cause eye-rolling among e-gadget lovers. In the October column, I complained about the drawbacks of e-calendars and invited readers to comment about their preferences for "paper or plastic" calendars. I'll share some of those responses in this month's column. But first, I might as well let my Luddite flag fly and remind you of a hazard that is greatly exacerbated – if not solely caused by – e-gadgets.

I would call my Analog Calendar Experiment a success, in that I do feel more in control of my time and have a better sense of what I'm supposed to be doing.

Keep your eyes on the road, your hands upon the wheel…

Typically, the risk management tips given in this column are intended to help the reader avoid getting sued for malpractice, stiffed for fees, or beefed to the ARDC. But here, our aim is to keep the reader – and others around him or her – from ending up dead or injured.

Distracted driving is by no means exclusively caused by talking or texting on mobile phones. But for many, the phone poses an irresistible temptation to text, tweet, update Facebook status, or have conversations that monopolize their attention, and those distractions lead to accidents.

Legislative solutions abound – at press time, 35 states banned texting and driving. And in December 2011 the National Transportation Safety Board recommended a ban on use of *all* portable electronic devices while operating a motor vehicle[2] – including hands-free mobile phones.[3] While it's hard to argue with NTSB chair Deborah Hersman's statement that "[n]o call, no text, no update, is worth a human life," it seems unlikely that states will rush to implement NTSB's controversial (and non-binding) recommendation.

And ultimately, it may be controversy, rather than legislation, that changes driver behavior. NTSB members have suggested that wholesale cultural shifts – on the order of society's changed attitudes toward drunken driving or smoking – will be needed to turn the tide.[4] "This is becoming the new DUI," said NTSB member Robert Sumwalt."[5] Chair Hersman summed it up succinctly: "How many more lives will be lost before we, as a society, change our attitudes about the deadliness of distractions?"[6]

Cultural change, of course, starts with each one of us. The next time my mobile phone beckons from the console of my 2-ton SUV, I'm going to imagine that it's a delicious pint of Bass Ale… and leave it right where it is until I get home. Turns out I don't need "one (peek at my phone) for the road."

1. http://www.merriam-webster.com/dictionary/antediluvian.
2. National Highway Transportation Safety Board press release, *No call, no text, no update behind the wheel: NTSB calls for nationwide ban on PEDs while driving*, December 13, 2011, available at http://www.ntsb.gov/news/2011/111213.html.
3. Matt Richtel, *U.S. Safety Board Urges Cellphone Ban for Drivers*, The New York Times, December 13, 2011, available at http://www.nytimes.com/2011/12/14/technology/federal-panel-urges-cellphone-ban-for-drivers.html.
4. Id.
5. Paul Koring, *Are 'digital drivers' the new drunk drivers?*, The Globe and Mail, December 15, 2011, available at http://www.theglobeandmail.com/news/world/worldview/are-digital-drivers-the-new-drunk-drivers/article2272033/.
6. NHTSB press release (cited at note 2).

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“Paper or plastic?” Readers weigh in on calendaring

Thanks to all who communicated with me regarding the Analog Calendar Experiment, in which I abandoned my e-calendar and went back to using a pocket Day-Timer calendar to see if I could get a better handle on my schedule and use time more wisely. Here are just a few of the comments I received.

Paper proponents. It was good to know that I wasn't alone in Analog World; indeed, many readers wrote to say that they never left. Meryl Sosa gave me a warm welcome: “Welcome to the club! I never gave mine up. When electronic calendars first came out my boss had one. One day he wanted to know when a meeting was going to be held. Unfortunately, his electronic device would not open (probably out of juice). So I pulled out my paper calendar and said, ‘Mine still works!’”

Likewise, Patrick Deaton, a 30-year resident of Analogville: “My 2012 appointment calendar arrived today from At-A-Glance. It is spiral bound with pages 8 1/4 in. by 10 7/8 in. When the calendar is open, it shows one week at a time with days divided into 15 min sections (except for Sundays). I have been using this style of calendar for 30 years.…

“Last month I was admiring attorney Alec Solotorovsky's briefcase when he was an overnight guest at my home. I was surprised to see he had a paper calendar like mine in his briefcase. I felt less like a dinosaur because he had recently graduated from a top law school and worked at a prominent Chicago law firm, Kirkland & Ellis, LLP.

“The paper calendar is a wonderful resource. Mine is full of telephone numbers, passwords, names, and Post-its. I use it to record my mileage. I even record my exercise for the day. I learned in college that if I have to keep a record of the hours I study/work on something, I will manage my time better.”

Some of you like to have some fun pointing out the special capabilities of your paper calendars. Bob Geiger does, and he wrote: “I often tease my fellow attorneys as they attempt to set a date on their electronic devices. I point out the speed of my cutting edge calendar system, which can move from month to month in a fraction of a [second]. Occasionally I will praise its indestructibility (dropping it on the floor) and its compact quarter inch height (I have a month at a glance calendar). As far as losing the calendar, I have a duplicate back up paper calendar at the office which is updated 2-3 times per week (the dual calendar system you refer to).”

Digital devotees. On the other hand, quite a few readers stated that the electronic ship has sailed, and they are happy to be on board. As I'd expect from ISBA members, responses were civil, even when readers disagreed with me. Matt Maddox kindly remarked: “Unfortunately I am irretrievably cast into an electronic world. So I cannot join your efforts, but I appreciate fellow Luddites.”

Some readers noted that electronic calendars make easier not just the lives of lawyers, but the other professionals with whom they work. Anita Rogers explains: “As a legal assistant, I have had to deal with both paper and electronic calendars over more years than I care to admit. As you correctly stated, there are advantages and disadvantages to each, and the question of ‘which?’ is highly individual. My boss keeps nearly everything electronically (desktop, laptop, Blackberry, iPad) and we do in fact write extra notes (e.g., pronunciations, as you noted) on entries. With Outlook, we can enter large amounts of text, change views – one day, a week, a month – set reminders, block out time, with ‘real time’ updates.

“One or two attorneys in the firm have resisted that technology and still use paper calendars, making it cumbersome to schedule meetings (especially if his paper calendar is in his briefcase in court, or behind a closed door, when an assistant needs access to it).

“Obviously, an attorney must consider his or her personal preferences in this matter of scheduling, but a wise attorney will also take his or her assistant's preferences into strong consideration.”

I'm especially grateful to Ms. Rogers for raising that last point. As we've noted many times in this column, a wise lawyer does indeed value the contributions of legal assistants, secretaries, and other professionals on their team, and consider their needs and preferences.

Other readers pointed out that the problems of e-calendars – miscalendaring dates is the one that plagued me – are surmountable, and are outweighed by advantages such as the ability to coordinate people's busy schedules.

William Malan has harnessed this power of e-calendars: “Like just about any other tool, the more powerful it is, the easier it is to damage something if you slip up using it. I am thinking chain [saw] here. On a few occasions, I have created a new item, say a case management conference, on the wrong date. The good thing about e-calendars is you can ‘free text’ search for something such as the name of the client, or CMC, etc. Another aspect of e-calendars, which may not apply to everyone, is [their] usefulness in making sure home and work life don't cause conflicts. After much persuasion, I have finally convinced my wife to use an e-calendar. We thus have one color flagged for her work, one for the kids school day closures, another for my personal business, one for her personal business, and yet another for kids sports and yes, another for Sunday school. It sounds more convoluted than it is in practice, but if my wife is with her running club one morning, I know I have to take the kids to school. … Technology is always going to have a learning curve, but once over that hump, it can really speed communication and coordination.”[7]

My experience

I would call my Analog Calendar Experiment a success, in that I do feel more in control of my time and have a better sense of what I'm supposed to be doing not just today, but tomorrow, this week, and months from now. I am slightly obsessed with not losing the calendar – I now wish I'd chosen a brightly colored cover, so the calendar would be reassuringly visible in the dark and gaping maw of my briefcase. I'm tinkering with my “double calendaring” system, to limit my losses if the worst happens.

Drive safely, calendar well, and stay in touch: kerger@lockton.com. ■

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7. http://www.isba.org/ibj/2011/10/whycalendarsmatterandwhyimgoingback.

By David A. Berek

Estate Planning for 2012: Looming Lower Gift Tax Exclusion Limits

Encourage wealthy clients to consider giving tax-avoiding gifts now to avoid lower exclusion limits scheduled for 2013.

Year-end planning is usually a popular topic with clients in November, but in 2012 clients should jump-start their planning rather than waiting until year-end. The most compelling situations apply to those who are interested in lifetime gifting and still have excess gift tax exclusion remaining from the increase under the 2010 Act.[1]

Taking advantage of higher federal thresholds

Prior to January 1, 2011, the applicable exclusion from gift tax for transfers made during lifetime was $1 million. The 2010 Act increased the gift tax limit to $5 million for 2011 and 2012, along with the estate tax exclusion amount and the generation-skipping tax ("GST") exemption amount: all three remain capped through December 31, 2012, at $5 million.

Those thresholds for gift, estate and GST are scheduled to be reduced under the current federal law to $1 million in 2013. Therefore, clients interested in gifting should take advantage of the higher thresholds before December 31, 2012.

> **A client who fails to take advantage of the current $5 million gift exclusion amount will be subject to a $1 million limit in 2013 if nothing changes between now and then.**

Transfer tax increase

For clients with taxable estates and excess wealth, gifting up to $5 million (or gifting the additional $4 million that was added under the 2010 Act) sooner rather than later is advisable. Nothing good can come from waiting until the end of 2012. A client who fails to take advantage of the current $5 million gift exclusion amount in 2012 will be subject to a $1 million limit in 2013 if nothing changes between now and then.

Another factor is the bump up in transfer tax rates in 2013. The unified rate applicable to transfers beyond the $5 million exclusion in 2012 is 35 percent. In 2013 under the current law, that rate will increase to 55 percent as the exclusion decreases to $1 million.

State thresholds are rising

Illinois does not have a gift tax, nor are lifetime gifts made by Illinois residents subject to an additional state gift tax. Accordingly, additional lifetime gifting by Illinois residents coupled with the increased Illinois State Tax Credit for estate and GST tax purposes can provide substantial tax savings to Illinois decedents.

On December 16, 2011, Governor Pat Quinn signed into law Illinois Senate Bill 0397, which increased the Illinois State Tax Credit for estate and GST tax purposes to $3.5 million in 2012 and $4 million in 2013 and thereafter. This increase will provide tax-saving opportunities for some clients.

Planning opportunities with QTIPs

The Illinois legislature introduced the Illinois QTIP to allow practitioners to take advantage of the increased federal exclusion ($3.5 million in 2009) when the Illinois amount was limited to $2 million. A similar approach may be helpful in 2012 when the federal amount remains at $5 million and Illinois is increased to $3.5 million.

In 2013, however, the reverse will apply, where the federal exclusion is reduced to $1 million and the Illinois amount rises to $4 million. Thus, in 2013 it may be advantageous to provide for a $3 million federal QTIP/Illinois family trust equal to the difference between the federal exclusion ($1 million) and the Illinois amount ($4 million).

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1. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010; PL 111-312, 124 Stat 3296.

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Why wait?

One never knows what the future holds, especially when that future is subject to the action of legislators. The current federal increase under the 2010 Act was unexpected, and congress could actually pass or extend new legislation by the end of 2012. Because (1) gridlock in congress is anticipated through 2012 and the exclusion will likely be $1 million in 2013, and (2) the recent estate and GST increases by the Illinois legislature may not last given the state's fiscal situation, it will be important for practitioners to monitor future legislative developments.

Nevertheless, one thing is clear: gifting sooner rather than later for motivated clients is a good idea. ■

Threshold Comparisons*

		2011	2012	2013
Federal	Maximum Estate Tax Rate	35%	35%	55%
	GST Tax Rate	35%	35%	55%
	Maximum Gift Tax Rate	35%	35%	55%
	Estate Tax Exclusion	$5 million	$5,120,000	$1 million
	Gift Tax Exclusion	$5 million	$5,120,000	$1 million
	GST Exemption	$5 million	$5,120,000	$1 million**
	Annual Exclusion	$13,000	$13,000	$13,000**
Illinois	Estate Tax Exclusion	$2 million	$3.5 million	$4 million

* This chart prepared by the ISBA Trusts and Estates Section Council.
** This amount will be indexed for inflation.

lawyer and client.

"It has to be a marriage between the law firm and the client. You don't want either the law firm or the company to get the short end of the stick in a matter, unless you have a longer-term relationship and you know it's going to be made up in the long run. I want something that's fair, not an arrangement where I'm getting the best of the law firm or they're getting the best of me. That makes for a short relationship."

Maxwell says it can be very difficult to say what a case should be worth when initially hiring counsel. "When you get sued, you sometimes have very little information at the outset. If all we have is a complaint where someone's making allegations, it can be hard to size it up."

In such cases, he says, he and other companies sometimes engage a firm at a negotiated hourly rate. "Once you learn more down the road, though usually still early on in the matter, you can re-evaluate your billing arrangement."

Maxwell recalls that years ago a matter ended unpleasantly. "I asked for proposals based on the complaint, without much more information. One law firm bid a surprisingly low flat rate. We had no idea what the case would turn into, and neither did they. They ended up with far more work than they had anticipated and lost money on it. Consequently, they didn't put in the work they should have, and we had a very rare dispute with that firm on the competency of their work. It was a relationship killer."

An individual case may be better suited for the now-traditional hourly billing model than for alternative fee structures precisely because of the risk of its ending up as The Case From Hell. Unless a matter is part of a portfolio of cases offered to a law firm, law firm and client must have a relationship of trust so that the lawyers know that the client will make up the shortfall by offering them more business.

"In my experience, the matters that are the easiest fits for alternative fee arrangements are cases of a recurring nature or similar type." They might be sets of litigation, sets of cases, sets of cases in which the company is the plaintiff, or other matters for which the lawyer and client desire more billing certainty. "While they may not be the ideal fit for every case, alternative billing structures certainly help to align incentives between law firm and client. The ultimate objective is to select the fee structure that provides the most value to the company and reduces overall long and short term costs," Maxwell says.

Though his default arrangement with outside counsel remains hourly billing, Maxwell says he and other in-house counsel are increasingly looking for alternative fee structures from their outside attorneys. The certainty of those arrangements benefits companies significantly.

"Publicly traded companies in particular must meet budgets and comply with a variety of accounting rules. If we have a deal that says we'll pay you a million dollars a year [to handle all cases of a certain type], we know there will be no cost overruns and it gives us budgeting certainty."

Asked how lawyers who wish to be considered for more business from companies such as Maxwell's can enhance their chances, he suggests demonstrating a willingness to take on some risk, be flexible, and reach an agreement quickly, without requiring layers of approval. Smaller firms may actually have an edge over larger shops.

"In my experience, the larger national and international law firms tend to be more risk-averse in their willingness to enter into alternative fee structures and require more layers of management approval. Smaller and more local firms tend to have less bureaucracy and to be more willing to take on risk." ■


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