

ILLINOIS BAR

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JOURNAL

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Building the ISBA of the Future

The heat of forward motion is making February a warm month at the Illinois State Bar Association.

The malaise we sometimes experience each February may be evident in other quarters, but not at the ISBA. The heat created by all the activity shuts out the bitter winter and there is no time to notice the ongoing grey days. Things are hopping on several fronts, so let me share some of the activity, and perhaps it may even warm you up a little.

New Lawyer Task Force

I introduced this group in my first column back in July. I was hopeful they would give us some fresh ideas to attract younger members to the ISBA and I have not been disappointed. Marron Mahoney and Brian Monico have led a lively, dedicated, and diligent group of young lawyers who issued two written reports before December. No offense to the rest of us, but when was the last time an ISBA task force delivered two reports in less than five months?

In its October 2013 report, the task force noted: "The overarching observation from the initial research shows that ISBA offers a significant amount of services that young lawyers and law students are looking for – the problem is that this demographic is largely unaware of what the ISBA does and what benefits it can provide to new lawyers."

This New Lawyer Task Force finding confirmed my concern that tried and true marketing efforts of the past may no longer be viable. In July, I noted that ISBA needs to rigorously define our target member market and concentrate our marketing on tangible member benefits like free online CLE, free Fastcase, and free daily legal news and case law updates.

The task force research highlighted the need for redirection and we acted on it. Not only have we turned around the annual membership decline of the recent decade, but our numbers are actually up since last year. Our approach this year is

simple – membership is the job of everyone – officers, staff, and members alike. We each need to be involved, to provide excellent service to our current members, and to create an association attractive to the newest members of our profession.

To do that, the New Lawyers Task Force recommended a renewed investment in technology. They proposed the ISBA take steps to initiate and fund a new, dedicated microsite specifically for new lawyers. Work on that project has already started. They also suggested personalization and customization of the current website and microsite, development of mobile apps or bookmarked pages, and the long-term update of the ISBA website.

The ISBA has great educational programming, but again our young lawyers don't know about it. The task force recommended a rebranding and regrouping of programs to specifically target the needs of today's young lawyers and suggested an encompassing brand like "The ISBA Practice Academy." The courses would include practical content like law firm billing and operations, employment law basics, marketing, trial techniques, public speaking, and short how-to videos on routine matters.

The task force stressed the importance of creating relationships between young lawyers and more senior ISBA members. In their research and surveys, they noted a recurring theme of young lawyers desiring to have greater interaction with more seasoned attorneys and leaders in the legal community.

In November, the ISBA YLD held an informal lunch program featuring three well-known judges who spoke candidly with the young crowd about their personal experiences and expectations for lawyers in their courtrooms. The candor

and accessibility of these veteran jurists was hugely welcomed by our younger members.

The task force also wants to jump on an idea first organized by our Senior Lawyers Section Council to teach computer technology to senior lawyers, perhaps expanding to iPad technology and pairing young lawyers with senior law-

Our approach this year is simple. Membership is the job of everyone – officers, staff, and members alike.

yers in a personalized, hands-on setting. Another idea from the task force – having a "speed networking" event similar to the concept of "speed dating," but for new lawyers to get know their more established peers.

The New Lawyer Task Force also looked to our future and how the ISBA could attract law students to join. It considered four activities including "the traditional approach, a book club, 'law after dark' and a road trip." As a mother, I pretty much vetoed the "road trip" idea, but we are working on the others.

Board of Governors committees

And the young lawyers are not the only ones working hard. The two Board committees I created have also been working overtime.

The governance committee, under the leadership of Third Vice-President Vincent Cornelius and the Hon. Celia Gamrath, is exploring the ISBA structure and looking at the size of our officer group,

Board of Governors, and Assembly – are we the right size to respond to the changing needs of our membership? I have also appointed a collateral Assembly committee to get their perspective on this issue. There are no foregone conclusions, but we need to constantly re-examine ourselves to remain relevant.

The facilities and technology committee has been busy with our continuing efforts to provide the most usable space possible for our membership. They are revamping old offices at the Chicago Regional Office, which we previously used for storage and occasional videotaping. Plans include a member lounge area, CLE overflow rooms, increased technology, and uniform wi-fi service. We expect to finish sometime in March. ISBA Sec-

retary Jim McCluskey, Board member Karen Enright, and a very invested committee are charged with the remodeling.

Administrative structure

ISBA Executive Director Bob Craghead is leading the effort to restructure our staff resources to better align with our value proposition of providing relevant benefits and service to members

within budget. He is working with staff in both Springfield and Chicago, the president, and other officers and board members, as well as gathering data through surveys and one-on-one discussions. We are building the bar association of the future.

As I said, at the ISBA, February is no time to languish. Stay warm my friends. ■

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Some Supreme Court Rule 138 privacy provisions delayed until 2015

Effective last month, the rule keeps personal information like social security numbers out of public civil court files. But a bar on using birthdates and names of minors is put off till next year.

Continuing a process that began more than a year ago, the Illinois Supreme Court has officially implemented an amendment to a rule intended to protect certain privacy interests of civil litigants by prohibiting confidential information from inclusion in public court files.

Under the rule, in civil cases, specified personal identity information is to be excluded from the public court file, including social security and individual taxpayer identification numbers, driver's license numbers, financial account numbers, and debit and credit card numbers.

In addition, the birth dates and names of minors are also to be excluded. But the prohibition of using birthdates and names of minors – one of the issues that raised the most concern – will not take effect until 2015.

Some members of the family bar and family law organizations had taken issue with the rule, which was adopted in October 2012, and had amendments added that were to take effect in July 2013. But the court delayed implementation of the amendments and held a public hearing last October. The result was Amended Rule 138, which took effect on January 1.

Family law practitioners worried that leaving names and birthdates of minors out of the public file would conflict with family-law statutory provisions and complicate the filing of custody, parentage, order of protection, child support enforcement, and other actions.

For example, those against whom an

order of protection is filed need to know the name of the child they are barred from contacting. Employers asked to garnish wages for child support must know the social security numbers of the employee and the person to whom the funds are to be transferred. The initial filing of a divorce case requires that all names of children be identified.

"The purpose of Rule 138 is to address practical considerations associated with the supreme court's goal of protecting against identity theft in the age of electronic records," said Michael Tardy, director of the Administrative Office of the Illinois Courts. "The rule is intended to support the ultimate objectives of e-filing, including remote access to actual documents filed in a case. The amendments filed December 24, 2013 provide clarifications to the process and allow additional time for consideration of the deferred provisions regarding birth dates and minor names, as these identifiers impact high volume calls such as parentage and child support cases."

Under the rule, attorneys may still file public "redacted" documents containing personal identity information, but these filings may only include the last four digits of a social security or individual taxpayer identification number, the last four digits of a drivers license number, and the last four digits of credit and debit card numbers. In addition, beginning in 2015, redacted filings could include an individual's date of birth and a minor's initials, but those provisions do not take effect until 2015.

Tension between statutes and rule

In 2011, the ISBA expressed support for the court's efforts to address the problem of identity theft by way of public documents. But in a letter to the court prior to the public hearing on Rule 138, the ISBA expressed opposition to the non-disclosure of minors' names and birthdates in redacted filings, which are contained in (c)(2) and (c)(3) of Rule 138, on the grounds that they might conflict with other statutes and rules. ISBA suggested language, drafted by the Family Law Section Council, designed to remove that conflict.

While the court did not adopt those suggestions, it did add substantial language to the rule allowing parties to file a "Notice of Confidential Information within Court Filing," which would contain the redacted information and be impounded by the court. The confidential information would be made available to the parties "where it is required by law, ordered by the court, or otherwise necessary to effect a disposition of a matter...."

The confidential information in the impounded document could also be transferred to law enforcement authorities, "guardian *ad litem*, the State Disbursement Unit (SDU), the Secretary of State or other governmental agencies, and legal aid agencies or bar association

Janan Hanna is a Chicago freelance writer and a licensed attorney. A former staff writer for the Chicago Tribune, she writes for numerous news organizations.

pro bono groups.” In other words, when the information is needed and required under the family law statute to effectuate an order, the court will allow the information to be made available.

Gary L. Schlesinger, a Lake County family lawyer who has criticized the rule, complained that it conflicts with many family-law statutory provisions. Acknowledging that the impounded confidential filing solves some of the problems, he complained that having to file yet another formal document and then appear before the judge every time a particular matter arises in which the confidential information is needed will add time and expense for litigants.

“The problem I have is there were no divorce lawyers involved in this. There was nobody to [pose] these questions,” Schlesinger said. “I guess we’re going to struggle with this and try to sort it out. I don’t want to get sued by a client because my notice to withhold income for child support was filed in accordance with this rule” but not in accordance with an Illinois Supreme Court case requiring that employers be provided the full social security numbers for wage garnishment, he said.

Time for ‘creative thinking’?

Others questioned whether the rules of confidentiality would apply to prove-ups, when divorce lawyers as a matter of procedure identify their clients and the names of their children. This information is recorded by a court reporter. “Are we going to have to start speaking in code?” asked Pam Kuzniar, a Chicago family lawyer and chair of the ISBA’s Family Law Section Council.

Kuzniar said she agrees with the need to protect privacy and deter identity theft. She, too, had concerns that some of the provisions in Rule 138 conflict with the family law statutes, including 750 ILCS 5/403 (Pleadings – Commencement – Abolition of Existing Defenses – Procedure), 750 ILCS 5/501 (Temporary Relief), 750 ILCS 5/602 (Best Interests of Child), 750 ILCS 5/607 (Visitation), and 750 ILCS 45/9.1 (Notice to Presumed Father).

The council prepared a memo, which it sent to the Illinois Supreme Court. In addition, council member Michele Jochner testified at the October hearing.

“We agree that identity theft is an issue, but taking a minor’s name out doesn’t solve anything,” she said. In

fact, Kuzniar opposes allowing the last four digits of a social security number to be included in a redacted filing, as the amended rule now permits. “I think the last four digits of anyone’s social is a gift to identity thieves,” she said, adding that the information could easily be used with other information to steal a person’s privacy and identity.

Kuzniar suggested getting creative in thinking of ways to solve the problem. “I understand the dilemma,” she said. “Remember when our insurance cards used to contain our social security numbers, before HIPAA? That’s not the case any-

more.” She said the courts should continue to work with identity-protection experts and perhaps come up with a new identifying number that could be used in place of a social security number and remain in the court record (and recognized by other relevant agencies).

Kuzniar also noted that since most discovery documents are not in the public court filing, there might be another way to start protecting individuals identity: “Go back and seal all the old divorce files that used to contain all discovery.” ■

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IBF, law schools team up to fund public-interest jobs for new grads

The Illinois Bar Foundation will share costs with three Illinois law schools of hiring a recent graduate to work in each school's legal aid clinic.

The Illinois Bar Foundation has launched a fellowship program for new law school graduates, partnering with three law schools to address the growing need for public interest lawyers.

In May, the IBF will begin offering \$25,000 grants to three students, one each from Loyola University Chicago School of Law, Northern Illinois University College of Law, and Southern Illinois University School of Law. The schools, which will match the grant money, will select a graduating student to spend one year working in the public interest sector after they pass the bar.

The law schools will select students based on their participation in public service endeavors, including in-school clinics, other pro bono work, internships, and externships, the school officials said. The foundation will have no role in selecting the grantees.

Dave Anderson, IBF executive director, said he hopes to increase the number of participating law schools – something that will require increased fundraising, he added.

Building skills, improving access to justice

“We hope that the program will grow in the future to serve even more of the community and build students’ ethos of public service, regardless of the professional path they choose,” said NIU Dean Jennifer Rosato. The student selected from NIU will work for one year at Zeke Giorgi Legal Clinic in Rockford.

Instilling in new lawyers the importance of public interest work and helping students find employment is driving the IBF’s efforts. “It’s a terrible economy for new attorneys and there’s a vast unmet need for legal aid, and that’s part of our core mission,” Anderson said. “We want to help further provide education and practical skills for these attorneys that will increase their chances of getting full

time employment.”

Starting a career in public interest will have long-term benefits for the attorney and the profession. “The younger they are when they do this, the more likely they will continue [in public service] during the course of their lives. So, we hope these attorneys raised in legal aid will remember that fondly and understand the importance of providing pro bono work in the future,” Anderson said.

The foundation, funded by lawyer and law firm donations, spends about \$250,000 a year in civil legal aid assistance and donates another \$75,000 to attorneys who have fallen on hard times, Anderson said.

Rosato believes the fellowship program will be money well spent. It achieves an important “trifecta: to build important practice skills, to help our students become more marketable through this ‘bridge’ experience, and – just as importantly – improve access to justice by providing services to those who need it most and by building an ethos of public service in the hearts of the students/young alumni who participate in the program.”

Northern will soon begin publicizing the program so it can receive applications from interested students and begin the selection process.

Law schools are ‘training institutions’

At Loyola, the selected student will be working at the law school’s Community Law Center clinic, which provides legal representation to low-income individuals in a variety of practice areas, said Dean David Yellen. “It will allow us to increase the number of students enrolled in our clinics,” he said.

“This is good for the students, as we increasingly emphasize experiential learning,” Yellen said. “And it is good for the clients who will get legal representation that they would not otherwise. Also, the program will provide the fel-

lows with a great experience in public interest law and teaching.” Yellen said the school administration would select a student who has experience working in one of the school’s clinics or in public interest outside the school.

At SIU, too, the selected student will work at one of the school’s clinics.

The IBF’s decision to partner with law schools stems from a belief the schools are experienced at training students for this type of work, Anderson said. “They are training institutions that have practice clinics to teach their students more. Many of the legal aid organizations want two-year fellowships. So we felt that if we could work with the law schools and they would likely select and give preference to folks who had already worked in the clinics, they’ll already have some experience.”

“This is a critical time for the legal profession and legal education, with many fundamental changes occurring and challenges that need to be addressed,” Rosato said. “Collaborations and partnerships like this one, between lawyers and educators, will help to take on these challenges proactively and powerfully. We can do much more together than we can working separately on pressing issues such as increasing access to justice and reducing student debt.” ■



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High court: ‘sole insured’ can’t be excluded from vehicle liability coverage

The Illinois Supreme Court ruled recently that it violates public policy for an auto insurer to exclude from coverage the owner of the vehicle who is also the only named insured.

In a recent ruling, the Illinois Supreme Court held it was against public policy for an insurance company to contractually exclude from coverage the owner of a car who is listed as the “sole insured.”

The 6-1 ruling has the effect of forbidding insurance companies from writing policies that exclude the only named insured and owner of the insured vehicle from liability coverage. But Justice Kilbride argued in dissent that the decision also could require elderly or disabled car owners who don’t drive – who leave the driving to family members, say – to buy expensive liability insurance on themselves.

‘[F]or the protection of the public’

The case, *American Access Casualty Company v. Anna Reyes*, 2013 IL 115601, centered on an insurance policy contract signed by Reyes and American Access. Reyes, although she was listed as the sole “named insured,” signed a provision of the policy stating that she would not be covered for liability in the event she caused injury or damage to the car while she was driving. Her friend was listed as the second and primary driver. The court held that excluding Reyes was contrary to the law requiring motorists to have insurance, since the law specifies that the sole insured be covered.

In 2007, Reyes was driving the car and was involved in an accident in which a four-year-old boy was killed and his mother injured. The two were pedestrians at the time of the accident.

American Access argued that it was not obliged to defend Reyes in a negligence action brought by the boy’s parents because of the exclusionary clause. State Farm Insurance Company, with whom the parents had an uninsured motorist policy, disagreed, arguing that American Access’ exclusion of Reyes was against public policy.

A trial court in Kane County agreed with American Access and granted sum-

mary judgment in its favor. An appellate court reversed the ruling and the Illinois Supreme Court agreed.

“The issue in this case is whether an automobile liability policy can exclude the *only* named insured and owner of the vehicle without violating public policy,” Justice Burke wrote for the majority. “When a statute exists for the protection of the public, it cannot be overridden through private contractual terms.

“One reason for this rule is that ‘the members of the public to be protected are not and, of course, could not be made parties to any such contract,’” she continued. “Where liability coverage is mandated by statute, a contractual provision in an insurance policy which conflicts with the statute will be deemed void.”

The court noted that it declares contractual provisions void as a matter of public policy “sparingly,” based not only on balancing it against the Constitution, court rulings, and legislative intent, but also on the facts of a particular case. The law requires that liability coverage extend to the person “named therein” and Reyes was so named, the court said. (The Illinois Safety and Family Financial Responsibility Law, (625 ILCS 5/7-601(a), a provision of the Illinois Vehicle Code, which requires that all motor vehicles have liability insurance, states that the sole named insured must have coverage.) Other court decisions have given weight to contractual exclusions, but in those cases, none involved a similar issue: whether the sole named insured can be excluded, the court said.

Dissent: contract ‘not contrary to legislative intent’

Justice Kilbride, the lone dissenter, conducted an extensive analysis of the statute at issue and concluded that the exclusionary policy was not contrary to legislative intent. “This court is and properly should be, reluctant to invalidate a contractual provision because it is contrary to public policy,” Kilbride

wrote. “We may only take that step when the provision is ‘clearly contrary to’ established public policy or ‘manifestly injurious’ to the welfare of the public. Here, the policy provision does not rise to that level.”

Exclusionary policies like the one Reyes signed are sometimes signed by elderly and disabled people who own vehicles but who plan on being driven in them by family members and friends. Kilbride said the affect of the majority’s ruling would be to require those with revoked licenses, the elderly, and the disabled to acquire liability insurance, and that this was not the legislature’s intent when it created classes of insured persons of automobile title holders.

Karen Enright, who practices with the McNabola Law Group and is a member of the ISBA Board of Governors, said it is unusual for the Illinois Supreme Court to decide a case based on public policy.

“The court says it has a high standard to meet to turn this statute around based on public policy,” said Enright, who also serves on the ISBA’s Tort Section Council. “It’s very rare that it will declare a contractual provision void on the grounds of public policy.” The severity of the accident is something the court can consider, but it cannot be the only thing, Enright said, adding that the court must use its discretion.

While Kilbride agreed with the majority in part, Enright said she thought he raised important questions about issues that could arise in other cases as a result of the ruling, specifically that part of his opinion that states as follows: “Common sense and practical experience dictate that liability coverage for the operation of a vehicle by someone without a valid driver’s license would be extremely expensive. Nonetheless, under the majority’s view, revoked drivers would be required to obtain coverage on themselves as unlicensed operators or be unable to register and license their vehicles.” ■

IRS removes tax break for some employer health-care reimbursement schemes

In years past, employers who don't offer medical plans to employees got a tax advantage for reimbursing some of their medical expenses. The IRS has greatly restricted that tax break.

Some small business owners have recently learned of an IRS decision that could affect their bottom line and reduce tax savings for their employees. The IRS rule, which is a response to provisions of the Affordable Care Act, eliminates the tax advantage for small employers reimbursing their employees health expenses when the employer does not also offer the employees a medical plan.

Some small businesses that did not offer employees health plans instead offered to reimburse some health expenses employees incurred up to a specified limit. In some cases, employers would even pay the premiums for their workers' policies. Employers were able to deduct the cost of those expenses from their payroll taxes and the employee did not have to pay income taxes on those reimbursements.

Because of the Affordable Care Act's mandate that there be no caps on coverage for essential health benefits, any pre-tax reimbursement arrangements that have a reimbursement limit – and most do – are effectively prohibited. Violating employers are subject to a per-employee excise tax.

"Essential benefits" are defined in Section 1302(b) of the Affordable Care Act to include the following:

- Ambulatory patient services

- Emergency services
- Hospitalization
- Maternity and newborn care
- Mental health and substance use disorder services, including behavioral health treatment
- Prescription drugs
- Rehabilitative and habilitative services and devices
- Laboratory services
- Preventative and wellness services and chronic disease management
- Pediatric services, including oral and vision care

The rule change was announced by the IRS in Notice 2013-54 in September and took effect January 1.

'The problem lies...with the little guy'

Gary Gehlbach, of Ehrmann Gehlbach Badger Lee & Considine, LLC in Dixon, represents small business owners in a number of legal matters and said the rule will have a substantial impact on small employers. "This is a stand-alone medical reimbursement arrangement whereby if an employee incurs medical expenses that are not covered, we compensate that employee up to a certain dollar amount. It might be \$1,000 a year."

"This works for small employers who may not have a cafeteria offering of benefits," Gehlbach said. "I had a number

of small employers for whom we established these. Some offered plans and other didn't."

The Affordable Care Act says you cannot have a dollar limit on health benefits, "so it would certainly be imprudent for employers to say we'll reimburse you with no limit."

Integrated plans, where the employer provides health care insurance and also reimburses some uncovered expenses, are still permissible under the rules, provided certain criteria are met. You can read the IRS Notice here: <http://www.irs.gov/pub/irs-drop/n-13-54.pdf>.

"There are three or four types [of integrated plans] that still survive," said Andy Biebl, a CPA and tax principal at CliftonLarsonAllen, a premier CPA consulting firm. Most are offered by larger employers, he said.

"Where the problem lies is with the little guy; every small firm, three person, five person, or 10 person business," he said. Some such businesses were using the reimbursement plans as a way to help self-insured employees. "Employees would get their own insurance and the employer would throw in a few thousand bucks.... [T]he IRS [says]...that the ACA's mandates effectively kill those plans."

An employer can still offer extra compensation as a way of helping an employee with health expenses – or any other expenses for that matter – but there would be no tax break.

There are exceptions to the reimbursement prohibition. For example, businesses can still reimburse expenses if they have only one employee. Gehlbach noted that he had a client with one employee who carried a plan with a \$20,000 deductible, and a reimbursement arrangement equal to that amount.


In addition, employers may still reimburse employees for ancillary medical expenses, such as vision and dental care. ■

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cases

Unpaid future compensation under an employment contract is not recoverable under the Illinois Wage Payment and Collection Act

Majmudar v. House of Spices (India), Inc., 2013 IL App (1st) 130292.

On November 22, 2013, the Illinois First District Appellate Court held that unpaid future wages do not constitute “final compensation” recoverable by an employee under the Illinois Wage Payment and Collection Act (the “Act”), 820 ILCS 115/1 *et seq.* (West 2006). The court reasoned that the purpose of the Act is to give employees a cause of action for payment of earned wages and final compensation. Therefore, under the Act, an employee’s rights to future wages under a contract of employment are not recoverable.

Subhash Majmudar entered into an employment contract with Gorhandas L. Soni, the president of House of Spices (India) Inc., on August 27, 2006. The original contract was handwritten, titled “5 year contract,” and signed by both Majmudar and Soni. The terms of the contract, in summary, were that: (1) Majmudar’s base salary was to be \$111,000; (2) his monthly car coupons would be paid by House of Spices; (3) he was to receive an increase of \$10,000 after 6 months; (4) he would receive an annual bonus; and (5) a “[y]early [s]alary increase [would] be paid.” *Majmudar*, 2013 IL App (1st) 130292, ¶ 3. The contract was typed up the following day, on August 27, 2006, along with an additional description of Majmudar’s duties, making him a warehouse coordinator and project manager. Majmudar claimed that he fully performed under the contract, but that his employment was wrongfully terminated on December 12, 2007.

Majmudar filed a complaint against Soni on April 21, 2008, alleging breach of contract and a claim under the Illinois Wage Payment and Collection Act. Majmudar further claimed that he was owed \$625,309.75 in damages, fees, and costs. In response to Majmudar’s complaint, Soni counterclaimed that Majmudar had been the one to breach the contract by resigning from his position, or in the alternative, that he had cause to terminate Majmudar.

The circuit court found that Majmudar and Soni had entered into an enforceable

contract, Majmudar had not resigned from his position, that Soni did not have cause to terminate Majmudar, and that Soni’s termination of Majmudar violated the contract. The court determined that Majmudar was entitled to approximately two years of his salary and granted him \$173,000, but denied his claim under the Act, concluding that “the Act doesn’t apply to prospective payments under the circumstances in which the termination is being contested by the employer for cause.” *Id.* at ¶ 7 (quoting the circuit court).

On appeal to the first district, the issue—which the Court noted was an issue of first impression—was whether the Act applies to unpaid future wages due under an employment contract after that contract has been terminated. The court determined that Majmudar was actually seeking “final compensation,” but that the Act’s definition of “compensation” requires that the employer (here Soni) had actually received something of value from his employee for the owed compensation. Because Soni was no longer receiving anything from Majmudar, and because there was a question of fact regarding whether Majmudar was terminated for cause, the court held that Majmudar was not entitled to final compensation under the Act.

The First District Appellate Court affirmed the trial court’s judgment and held that a plaintiff with rights to future compensation under a terminated employment contract, where cause for termination is contested, is not entitled to relief to recover “final compensation” under the Act.

Illinois Supreme Court strikes down regulations on the situs for local sales taxes

Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130.

On November 21, 2013, the Illinois Supreme Court held that certain Illinois Department of Revenue (“DOR”) regulations setting situs for tax liability under retail occupation taxes (“ROT”) where purchase orders are accepted were invalid. The court concluded that the regulations impermissibly narrowed the authorizing statutes’ taxation schemes by setting the situs for tax liability on the “business of selling” on a single factor—where purchase orders are accepted. In holding the regulations invalid, the court reasoned that setting the situs for tax liability on the “business of selling” required a fact-intensive inquiry con-

sidering many activities, not just acceptance. The court also held that the taxpayer in this case, who relied on the existing regulations, was entitled to abatement of penalties and tax liability. (For more, see *Supreme court ends sales-tax-avoidance practice* in the January 2014 IBJ.)

Hartney Fuel Oil Company is headquartered in Forest View, Cook County, Illinois. The company hoped to avoid the higher local ROTs of its home turf by setting up a separate sales office elsewhere. Hartney contracted with a business in the Village of Mark in Putnam County, Illinois, to obtain a local sales clerk. Thereafter, all of the company’s sales were routed through Mark.

The DOR, after determining Forest View was the proper location of Hartney’s sales, sent Hartney a tax bill for over \$23 million. Hartney paid the taxes under protest and sought a refund in the Circuit Court of Putnam County, arguing that Mark was the proper situs of its sales under the DOR regulations. The circuit court agreed with Hartney, and the appellate court affirmed. The DOR appealed.

The Illinois Supreme Court began by interpreting the language of the local ROT statutes. The statutes allowed localities to tax the “business of selling” tangible property at retail in their jurisdiction. *Hartney Fuel Oil Co.*, 2013 IL 115130, ¶ 20. In a previous case involving a similar ROT, the court had found that the “business of selling” meant a “composite of many activities,” not just the transfer of title. *Id.* at ¶ 30. The court noted that the legislature had chosen to use the same language in the ROT statutes at issue, which were enacted after its decision.

The court then looked to the purpose of the ROTs. Based on previous decisions, the court noted that their purpose was to allow jurisdictions to place some of the cost of local

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services on retailers that enjoyed the services. Thus, the court concluded, the ROT statutes allowed local governments to tax the composite of selling activities in their jurisdictions, in relation to the services enjoyed by the seller.

The court then turned to the DOR regulations. The DOR argued that the regulations incorporated the court's "composite of activities" test and it pointed to provisions that implied different factors should be considered in determining the situs of sale. The court was not persuaded, noting that one provision specified that the situs was where the purchase order was accepted, if accepted at the seller's place of business within the jurisdiction.

The court determined that the regulations could not be reconciled with the ROT enabling statutes. First, the court noted that the regulations failed to incorporate the court's composite test for the business of selling. Second, the regulations impermissibly restricted the scope of taxation allowed by the ROT statutes.

The court thus held that the DOR regulations were invalid. However, because Hartney had relied on the DOR's regulations, it was still entitled to a refund under the Tax Payers' Bill of Rights Act, 20 ILCS 2520/4(c) (West 2008).

legislation

New records requirements for public works contractors

Pub. Act 098-0328 (eff. Jan. 1, 2014) (amending 80 ILCS 130/5).

The Prevailing Wage Act has been amended to extend the period that contractors and subcontractors participating in public works are required to make and retain records for all workers employed by them in their public works projects. Such records must now be made and retained for not less than three years for projects with final payments received before January 1, 2014, and for five years following the final payment for projects with final payments received after January 1, 2014. The amendment also clarifies that records may now be retained in either paper or electronic format.

Department of Revenue can refuse registration and permit for tax default

Pub. Act 098-0496 (eff. Jan. 1, 2014) (amending 20 ILCS 2505/2505-380).

The Department of Revenue may now refuse to issue a license, registration, or permit if the owner, partner, or, in the case of a limited liability company, a manager or member whose name is on the application is in default for money due under any tax or fee act administered by the Department. For purposes of determining default under this section,

the Department shall include only amounts established as a "final liability" within the twenty years prior to the Department's notice of refusal to issue the certificate of registration, permit, or license.

New rules affecting adoptions

Pub. Act 098-0455 (eff. Jan. 1, 2014) (amending 750 ILCS 50/1).

Section 5 of the Adoption Act has been amended to expand the definition of "inter-

country adoption" and of "preadoption requirements." Intercountry adoption is defined as the process by which: (1) a person who habitually resides in the United States adopts a child from a foreign country; or (2) a person who habitually resides in a foreign country adopts a child who habitually resides in the United States. Additionally, while pre-adoption requirements (i.e., the conditions or standards that a prospective adoptive parent must meet prior to adopting a child) were previously established by the laws and regulations

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New electronic fingerprint requirements for certain concealed carry applicants

Pub. Act 098-0600 (eff. Dec. 6, 2013) (amending 430 ILCS 66/20).

Under the recent concealed carry law, law enforcement agencies are able to submit objections to license applications based upon a reasonable suspicion that an applicant is a danger to himself or the public safety. 430 ILCS 66/15. A Concealed Carry Licensing Review Board has now been established, within the Department of State Police, to evaluate such law enforcement agency objections. 430 ILCS 66/20. The Board has the authority to review materials received with the objection, and may also request additional information from the Department, the law enforcement agency, or the applicant. Under recent amendments, the Board may also require that an applicant submit "electronic fingerprints" for an updated background check if the Board determines that it "lacks sufficient information" to

make a determination on the objection(s) and the applicant's eligibility under the law. Such requests for additional information can result in longer wait times for eligibility determinations under the law.

Energy Assistance Program extended until 2018

Pub. Act 098-0429 (eff. Aug. 16, 2013) (amending 305 ILCS 20/13).

The Energy Assistance Act has been amended to extend the Supplemental Low-Income Energy Assistance Fund program until December of 2018. The program, which requires gas and electric companies to assess a monthly surcharge to be committed to a fund that provides low-income utility bill-payment assistance and assistance for weatherization services, was previously set to expire at the end of 2013.

No civil claims for parental eavesdropping

Pub. Act 098-0268 (eff. Jan. 1, 2014) (amending 720 ILCS 5/14-6).

The Criminal Code has been amended to preclude civil remedies or causes of action

against parents, grandparents, or other guardians for eavesdropping on a minor's electronic communications by accessing the minor's account if done during the guardian's exercise of supervision while the minor is in their "care, custody, or control."

Municipal regulation of wind energy systems

Pub. Act 098-0204 (eff. Aug. 9, 2013) (adding 65 ILCS 5/11-42-15).

The Illinois Municipal Code has been amended to allow municipalities to enact new prohibitions on certain wind energy systems. Municipalities may now prohibit placement within its limits of any wind turbine with generating capacity of more than 100 kilowatts and not used for generation for a primary end use.

Gambling facilities now required to withhold winnings for delinquent child support

Pub. Act 098-0318 (eff. Aug. 12, 2013) (adding 230 ILCS 5/27.2, 230 ILCS 5/34.2, 230 ILCS 10/13.05, 230 ILCS 10/13.2, 305 ILCS 5/10-17.15).

"State gaming licensees" including race track wagering facilities, riverboat gambling facilities, or other licensees that operate facilities at which lawful gambling may take place will now be required by the State to withhold winnings where the winner has past due child support payments. Gambling facilities will be required to withhold the full amount necessary to pay any past due child support payments, and will be authorized to take an additional 4% administrative fee for doing so, with the withheld amount to be paid to the Department of Healthcare and Family Services. The withheld amount cannot exceed the total winnings payout. Each gaming licensee must post signs with a statement about the withholding requirement at their entrance, exit, and near each credit location.

administrative agencies

New real estate appraiser licensing requirements

Department of Financial and Professional Regulation

The Illinois Department of Financial and Professional Regulation adopted amendments regarding real estate appraiser licensing. 68 Ill. Adm. Code 1455 (eff. Dec. 31, 2013). Supervising appraisers are now required to: (1) provide the name of each associate real estate trainee appraiser within ten days of their engagement and immediately upon their termination; (2) instruct and directly supervise an associate trainee appraiser during the first 500 hours of experience; and (3) hold an ac-



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tive, valid license as a certified general real estate appraiser or as a certified residential real estate appraiser. Associate real estate trainee appraisers must provide the Department with the name and address of each supervising appraiser and keep an appraisal log for each supervising appraiser that includes, among other things, information regarding the type of property and work performed by the trainee.

New rules affecting commercial driver training schools

Secretary of State

The Secretary of State adopted several amendments affecting Commercial Driver Training Schools and applicants for Commercial Driver Licenses (CDL). 91 Ill. Adm. Code 1060 (eff. Nov. 5, 2013). Applicants to own a commercial driving school or to teach at a commercial driving school are no longer required to release felony conviction information to the Secretary of State Vehicle Services Department. Additionally, those seeking to provide CDL endorsement or restriction classified licensure must provide a vehicle training area that: (1) is at least 27,000 square feet; (2) is made of a solid surface that accepts paint; (3) has adequate lighting and enough parking to accommodate the students in the training area; (4) is properly maintained; and (5) contains restroom facilities if the training facility is more than 100 feet from the school's main or branch location. Further, driver training school offices no longer require direct access from the outside so long as other businesses conducted in the same building have their own outside access.

Students taking the CDL accredited driving school program must complete 160 hours of instruction within nine months of beginning instruction, but the classroom courses do not need to have definite starting and completion dates. Students must complete at least 20 hours of both behind-the-wheel instruction in a training area and behind-the-wheel instruction on public streets and highways, where the requirement formerly was 16 hours per experience. The applicant must also complete 20, instead of the former 10, hours of observation experience of behind-the-wheel-range and over-the-road training. Additionally, the number of hours required for remedial behind-the-wheel-range and over-the-road training decreased from 78 to 60 hours. Lastly, audio-visual reference materials are no longer guaranteed to be available to students or to be used in assignments.

Licensing standards for child welfare agencies, day care homes, and group day care homes

Department of Children and Family Services

The Illinois Department of Children and Family Services recently adopted amendments that alter the licensing standards for

child welfare agencies, day care homes, and group day care homes. 89 Ill. Adm. Code 401, 406, 408 (eff. Nov. 30, 2013). Child welfare agencies must now report to the Department within thirty days following an agreement with an independent adoption contractor. The new rules also require adoption agencies to provide a six-hour training program for prospective adoptive parents seeking a domestic adoption and at least a ten-hour training program for prospective parents seeking international adoptions.

The initial application for a group day care home license, as well as renewal applications for day care home licenses and group day care home licenses, must now include proof that the home has been tested for radon within the last three years. The most recent radon measurements must be posted next to the license in the home. The new rules also specify the type of smoke detectors that must be installed. Homes constructed or substantially remodeled after December 15, 2011, must have smoke detectors that are permanently wired into the structure's power line so that the activation of one smoke detector will activate all the detectors in the facility. Homes constructed prior to December 5, 2011, that do not have a wired smoke detector system must install battery-operated smoke detectors in each room where children nap or sleep.

New rules for riverboat casino promotional coupons

Illinois Gaming Board

The Illinois Gaming Board made three changes to riverboat gambling regulations. 86 Ill. Adm. Code 3000 (eff. Nov. 1, 2013). First, casinos' adjusted gross receipts shall be calculated as the gross receipts less the winnings paid to the wagers, and this figure should include the value of expired vouchers. Next, vouchers are no longer confined to electric gaming devices, but may now also be printed at cashier cages. Last, wagers may now be made with authorized promotional coupons. Match play coupons, which re-

quired both a coupon and a chip to make a play, are no longer valid.

Permissible uses for medical stretcher vans

Department of Public Health

Medical stretcher vans may now provide their services to convalescent or bed-confined individuals who routinely require non-emergency transportation to or from medical appointments and who do not need medical monitoring or clinical observation. 77 Ill. Adm. Code 515 (eff. Nov. 12, 2013). The Department previously required that these passengers needed no medical equipment except for self-administered medications.

These vans, however, may not transport individuals to hospitals for emergency medical treatment or passengers who are experiencing emergency medical conditions or need active medical monitoring. Such monitoring could include isolation precautions, supplemental oxygen administered by a third party, continuous airway management, suctioning, or administering intravenous fluids.

New wild turkey hunting regulations

Department of Natural Resources

The Department of Natural Resources passed amendments to the turkey hunting regulations for gun and archery season. 17 Ill. Adm. Code 715, 720 (eff. Nov. 14, 2013). Applicants for landowner/tenant permits must submit an official application form to the Department along with a copy of a lease or rental agreement or a copy of the current Farm Service Agency 156EZ Form. During archery season, it is illegal to use any weapon except a long, recurved, or compound bow, crossbow, or broadhead with a minimum 7/8 inch diameter when fully opened. Any mechanical device capable of maintain a drawn or partially drawn position is illegal under this section. The amendments also list site-specific rules that may deviate from statewide regulations. ■



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Practice-Launching Tips for Solos and Small Firms

By Ed Finkel

IMA NEWBIE

Attorney at Law

How does an aspiring solo or small firm practitioner set up a law office and its attendant equipment and technology? How do you market yourself to clients – and manage them once they're in the door? How do you handle contracting, billing, and banking?

At the 2013 ISBA Solo and Small Conference, Chicago lawyers Sarah Toney and Juliet Boyd offered tips based on their experience as business managers. As the title of their presentation indicates (“Landmines in Opening Your Own Practice”), their focus was on helping fledgling practice owners avoid

rookie mistakes.

And they began at the beginning – the essential task of finding a place for your new shingle to hang.

Setting up an office

Start slowly. The first step for a bud-

ding solo practice or small firm is to find office space and equipment. Criminal defense practitioner Toney of The Toney Law Firm, LLC, urged lawyers not to over-commit at the outset because you don't know how your business is going to develop.

“Office buildings are more than willing to give you a great rate if you just sign a 10-year lease,” she said, warning against committing for too long too early. “There are so many options available now.” For example, office sharing allows lawyers to grow as they add staff, she said.

The same concept applies to office

Ed Finkel is an Evanston-based freelance writer.

Time to strike out on your own? Veteran practitioners help you get off to a good start – and avoid common missteps – with tips on marketing, billing, technology, retainers, client management, and more.

equipment, Toney said. “When you start out, you think, ‘I need everything: I need a fast printer, I need a copy machine, I need a coffee-maker,’” she said. “One thing I found when I started is I didn’t need a copy machine. I didn’t do a large volume of paperwork, so I could scan and print it out.”

Toney added that letterhead and envelopes bought in bulk will become obsolete if you end up moving after a year or two. And if you buy a firm car, “Don’t start out with a Mercedes,” she said.

“You don’t know how many clients you’re going to get. Keeping your overhead low is certainly going to help you,” said Boyd of Boyd and Kummer, LLC. “Once you’ve been in practice for a year or so, you’ll have a better idea what you have coming in.”

Technology – be a smart shopper. Outfitting your firm with technology is another area where you can’t be cheap, but you should be frugal, as Marc Matheny and Abra Siegel advised in last month’s IBJ cover story. Boyd and Toney offered their own set of frugal-tech tips.

Toney advised paying close attention to tech security, and especially making sure you know which apps in the “cloud” are secure. She said that well-known apps like Dropbox and Google offer limited security, while other vendors like SpiderOak do offer “100 percent privacy for your clients” because of their thorough encryption techniques.

“Sometimes when you’re a solo, you don’t go to the office every day,” Toney said. “You don’t have to practice the way they did 20 years ago, where if you want access to something you have to go to

your physical office. But [this freedom is] not without limitations. Lock your devices. Make sure if you’ve got client information on your cell phone or your iPad that you password-protect it.”

Toney uses an Internet-based VOIP phone in her office rather than a traditional landline, which offers additional capabilities. “You can set it so that it rings three numbers at one time, three different phones; you can let it ring one phone for 30 seconds, and then if you don’t answer, it can forward to another phone,” Toney said. “I [can be] in the woods in Wisconsin on my iPad... and it looks like I’m in my office.”

Toney also mentioned signing up for email discussion groups, like those included with an ISBA membership, which provide an antidote to the sometimes isolating nature of solo or small firm practice, as well as immediate answers to your questions. “There are people who are so fantastic at responding to listservs,” she said.

Solo and small firm attorneys should have billing software, Toney said, adding that she uses the Clio practice management program, available at a discount from ISBA. A calendaring system is also essential, partly to stopwatch time spent on each client’s account. And you need online legal research; Westlaw or Lexis if you want to pay for them, or the Fastcase system included with ISBA membership, Toney said. Boyd added that

Fastcase is saving her firm about \$600 per month.

Attracting and retaining clients

Facebook. Technology plays a large role in marketing to clients, which starting solos and small firms will need to do as they’re getting settled. For example, establishing a public firm page on Face-

Starting lawyers anxious to sign up anyone – or young associates looking to impress – must take care not to overstate their qualifications or the worthiness of a client’s case.

book provides capabilities that you don’t have with a personal page, Toney said. “For instance, when you post on your firm page, you can see how many people see that post,” she said. “It will also give you really fantastic demographic information, broken down by gender, age, and cities.”

A business page will track how people arrived and how often they come back, Toney said. “You’ll know who your audience is, and that’ll help gauge what you can post, whether you’re posting [case] wins or ‘thank-yous’ from clients or seminars you’re attending,” she said. But a new limitation on Facebook business pages is that they will no longer

send status updates to people who “like” them. Instead people will need to visit the page as they would a website.

Blogging. Blogging is another way to do online marketing that Toney recommended, which can be connected to your website. “Blog about those things that you think people will search,” she said. “If it were you, and you needed to find a lawyer and you didn’t have a referral, what [would you] type in as a search term? Blog about that. That’s how they’re going to find you.” Be aware,

into the lawyer’s operating account upfront.

Security retainers, probably the most common, should be established as “evergreen” retainers that the client must replenish once they are getting low on funds. “Why is that helpful?” Boyd said. “Because when you’re calling up the client, you’re saying, ‘Hey, I’m following up just to remind you that the contract you signed says you need to replenish your retainer.’”

Advance payment retainers are rare and used mainly to protect funds paid to attorneys against clients’ creditors, in a bankruptcy or collection proceeding, who would be able to access them from a trust account as established in the security retainer, Boyd said. In *Dowling v. Chicago Options Associates, Inc.* 226 Ill. 2d 277 (2007), the Illinois Supreme Court established several necessary conditions to establish such

a retainer, without which the courts can construe it as a security retainer whether or not that’s what the client and attorney had in mind.

In all types of retainer agreements, attorneys must enumerate customary fees and out-of-pocket expenses, Boyd said. That can include anything from cab fare to computer research to court reporter charges. Otherwise, those expenses might not get paid. The Illinois Appellate Court ruled as such in *Guerant v. Roth*, 334 Ill. App. 3d 259. “List all these things out,” she said. “Because the court has said, ‘If it’s in there, and the client expressly agrees to it, we’ll support that, but if it’s not in there, you’re not going to get it.’”

Such specificity helps with client relations as well, she said. “Down the line, when [clients have] had a little case of amnesia, and they’ve forgotten all the facts because they’re now paying your

bills, and they’re mad about that, you don’t have a problem because everything is set out in your retainer agreement.”

Managing client expectations. Once the agreement is signed, attorneys must handle perhaps their biggest challenge: managing client expectations. Boyd said this applies in particular to starting lawyers anxious to sign up anyone – or young associates looking to impress – who overstate either their qualifications or the worthiness of a client’s case.

“We once had a young associate tell this client, ‘Oh, you’ve got a million-dollar case, buddy,’” Boyd recalled. Problem is, “At that first meeting, you know [only] what the client is telling you; you haven’t seen the discovery, you haven’t seen anything else. Needless to say, down the line, the client didn’t have a million-dollar case. He said, ‘But you told me I had a million-dollar case.’ He was a nightmare to deal with.”

Managing expectations sometimes means not taking cases in the first place, Boyd said. If someone wants to sue a roofing contractor for \$5,000 because the new roof didn’t hold, “I say ‘[Forget about suing and] go fix your house.’ They say, ‘Why?’ [I say ‘Because] litigation is expensive, and a year from now, you’re not going to be angry [at the roofer] anymore, but you’re going to be mad when you get my bill, and I’ve got those five depositions, and you have to pay me \$10,000.”

Even when a client’s case is worth pursuing, it’s important to ensure they know the costs and timeline upfront, Boyd said. “They have no idea how long these cases can take and how expensive they can be,” she said. “Spending that little bit of time is great because...[when things get costly later in the case] they say, ‘I know, I know, you told me.’”

Failure to realistically set client expectations at the outset is often what leads to trouble with the ARDC, Boyd said. “The lack of communication is the No. 1 reason people get upset with you and then report you,” she said. “Even if it’s unfounded, you have to report that to your malpractice insurance....”

But certain clients will never be happy, and it’s important to learn how to detect that at the outset, Boyd said. For example, “If the client tells you, ‘I’ve had three prior lawyers,’ beware. Beware!” she said.

“That initial interview is as much you checking out whether you want this client,” Boyd added. “First of all, can you

As clients come on board, solos and small firms need to make sure they’re treating their business like a business, part of which means sending bills every month.

however, that bloggers may be subject to ethical restrictions on lawyer advertising. For more, see *Blogging, Marketing, and the Rules of Professional Conduct* in the October 2013 IBJ.

Retainer agreements. Once clients are sold on your services, it’s time to draw up a retainer agreement, which Boyd said lawyers tell their business clients to do but don’t necessarily do for themselves.

Boyd went over the three types of retainer agreements: (1) the general or classic retainer where the client is paying for the lawyer to be available for a specific matter or time frame and money goes into the attorney’s operating account when it is received; (2) the security retainer in which the client’s money goes into a separate trust account and the attorney bills against that every month; and (3) the advance payment retainer in which the client’s money goes directly

Find out more and earn free CLE credit

Sarah Toney and Juliet Boyd of Chicago shared practice-launching tips during the 2013 ISBA Solo and Small Firm Conference at a seminar entitled “Landmines in Opening Your Practice.” That and other great programs will be available soon at <http://isba.fastcle.com> (search under 2013 Solo and Small Firm Conference).

help the client? Is it in your area of practice? If it isn't, send them somewhere else. Second, is this client someone you want to have as a client?"

Billing and banking

Bill monthly. As clients come on board, solos and small firms need to make sure they're treating their business like a business, part of which means sending out your bills every month, Boyd said. "As lawyers, we like to focus on the cases and the depositions," she said. "It's very easy to push [billing] off on the office manager.... But remember, you are in charge of your law firm."

To send out regular bills, you need to keep regular, detailed track of your time, Boyd said, recalling an attorney fee petition she advocated for recently. As the experts and judge went through the records, "If there was an entry for e-mail or telephone calls, but they didn't have the substance of it, they put a red pen through it," she said. "The other thing the expert wanted to see, every time it said 'e-mail,' he said, 'Show me the e-mail.'...If you're not keeping track of your time, you're losing money."

Follow up about payment. Once bills go out, solos and small firms need to track them and follow up with those who haven't paid, Boyd said. "Do you know who owes you money?" she said.

"Are you looking at those clients who should have replenished their retainers and haven't? If you haven't, what would you tell your business client at this point? Pay attention to your finances. Just have your people give you a print out at the end of the month." That way, you can avoid a situation where you're advancing time and effort for a client who isn't paying you.

Banking accounts. The money you collect needs a bank account or two to go into, usually a separate operating account and a trust account for client funds, Toney said, suggesting that solos and small firms produce checks for each that look very different from one another to avoid confusion. (For more about trust accounts, see Illinois Rule of Professional Conduct 1.15 and visit the Lawyers Trust Fund of Illinois website at www.ltf.org.)

Accepting credit cards. Solos and small firms also need to figure out how to handle credit cards, and it's sometimes helpful to set up a regular withdrawal for a client from their credit card, say on the first of the month, Toney said. You need to figure out whether you want a credit card terminal in your office, or one that connects to your phone or your iPad.

"I couldn't have a terminal in my office because I don't have a land line," she said. "That quickly decided for me, I'm

going to keep this mobile, I'm going to have a swiper on my phone or my iPad,' and now I don't even swipe, I just input it right in." (See sidebar for info about credit card service LawPay.)

Bookkeeping and phone answering

Solos and small firms will help to ensure they run their business well by surrounding themselves with good support from an accountant, a bookkeeper, and a secretary or answering service on whom they can lean, Toney said.

"There are a lot of accountants who are, just like solo lawyers, looking for work, who won't be expensive but are very, very good," she said. "That's one way to save money while not spending a lot of your valuable time and not adding stress to your life because there's enough of it as it is, trying to be a solo or small firm lawyer."

Boyd recommended adding a bookkeeper to your stable, an exception to the idea of keeping your overhead low, especially since you can find one part-time. "How do lawyers lose their licenses? When they mess up with...the client's money," she said. "You don't want to mess up and take chances with that.... We didn't go to law school to become accountants."

Another one of Toney's "good people" is an answering service. "They pretend that they're this sweet Southern secretary of mine – they're located in Georgia – and I get an automatic e-mail and text immediately with the message and the phone number," she said. "Clients are happy they haven't gotten my voice mail." (See sidebar for info about another such service, Ruby Receptionists.)

Toney cited statistics that clients searching for an attorney online will wait about seven seconds before calling someone else. "If you're lucky enough to have kept their interest, and they go through the process of calling you, I find that clients who get answering machines are going to hang up," she said.

Small firms and solos need to keep clients who found them online, Toney said. "When they feel they've talked to somebody who listened, asked them about their case, got their information, and they feel like you're going to call them back at any minute – and you are, as soon as you get out of court, or whatever – you're going to get that client." ■

Tools for practice-launching lawyers

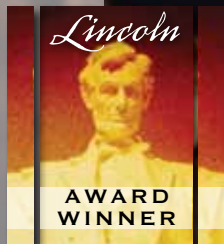
Veteran sole practitioners Sarah Toney and Juliet Boyd recommend the following services or ones like them. All are available free or at a discount to ISBA members.

Fastcase for legal research. The ISBA Fastcase plan, free to members, includes opinions of the US Supreme Court; federal circuit, district, and bankruptcy courts; and the supreme and appellate courts for Illinois and all other states. The library also includes access to statutes, regulations, constitutions, and court rules for Illinois and all 50 states. Find out more at www.isba.org/fastcase.

Clio for practice management. Clio is a web-based practice management system specifically designed for sole practitioners and small firms. It costs \$49 per month, and ISBA members get a 10 percent discount. Find out more at www.goclio.com/landing/isba.

LawPay for credit-card processing. LawPay tailors its service to the legal community. Among other lawyer-friendly features, it separates client funds into trust and operating accounts. ISBA members get up to 25 percent off credit card processing fees. Find out more at www.lawpay.com/isba.

Coming soon – Ruby Receptionists phone-answering service. Ruby Receptionists connects callers to you when you're available, wherever you are. When you're not able to take calls, you'll receive detailed messages via email or text. Watch isba.org for details.



By Angela J. Rollins

In *Padilla v. Kentucky*, the U.S. Supreme Court found counsel was ineffective for failing to advise his client of near-mandatory deportation that would result from entering a plea of guilty. This article summarizes lower courts' interpretations and extensions of *Padilla* and lists relevant resources helpful to Illinois criminal practitioners.

Collateral Consequence Considerations for Illinois Practitioners after *Padilla v. Kentucky*

In 2010 the Supreme Court concluded in *Padilla v. Kentucky*¹ that an attorney provided ineffective assistance of counsel when he failed to advise his client that deportation would likely result from his guilty plea. Prior to *Padilla*, courts distinguished between direct and collateral consequences of guilty pleas. Illinois and other courts considered deportation a collateral consequence of a guilty plea and thus outside the purview of the Sixth Amendment's guarantee of effective assistance of counsel.

Since *Padilla*, some courts have found counsel ineffective for failing to advise clients of consequences traditionally viewed as collateral. Other courts have limited *Padilla* to deportation. Some courts have also suggested that the traditional direct/collateral consequence analysis does not survive *Padilla*.

Through a review of courts' interpretations of *Padilla*, this article provides

1. *Padilla v. Kentucky*, 559 U.S. 356 (2010).

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guidance to Illinois practitioners advising their clients of the consequences of a guilty plea and reviewing a client's case for post-conviction relief. We begin with a review of the *Padilla* case.

Overview of *Padilla*

Jose Padilla was a legal permanent resident for over 40 years when he was charged with drug distribution in Kentucky.² Upon his plea of guilty, he was subject to near-automatic deportation. In a postconviction proceeding, Padilla alleged his counsel was ineffective for not advising him of his likely deportation and incorrectly advising him that he need not “worry about immigration status since he had been in the country so long.”³ The Kentucky Supreme Court found Padilla's counsel's affirmative misadvice did not constitute ineffective assistance because deportation was a collateral consequence of his conviction.

When the case reached the United States Supreme Court, that court noted it had never distinguished between collateral and direct consequences in its *Strickland* analyses.⁴ However, “because of the unique nature of deportation,”⁵ the Court deemed it unnecessary to consider the direct/collateral distinction. Deportation, said the Court, is “enmeshed” with criminal convictions and is “nearly an automatic result for a broad class of noncitizen offenders.”⁶

The Court analyzed Padilla's claim under *Strickland*, first determining “whether counsel's representation ‘fell below an objective standard of reasonableness.’”⁷ Professional norms and prior Supreme Court decisions recognized the importance of properly advising a client of deportation risks.

Further, Padilla's immigration consequences were clear from a reading of the removal statute. “When the law is not succinct and straightforward..., a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear...the duty to give correct advice is equally clear.”⁸ Padilla sufficiently alleged the first prong of *Strickland*. The Court left the second prong, prejudice, for the Kentucky courts.

Padilla did not address consequences other than deportation and did not say whether the direct/collateral analysis survived. By default, those tasks were left to the state courts and the lower federal courts. This article will next consider how Illinois courts have applied *Padilla*.

Illinois interpretations

As of the time this article went to press, Illinois courts have addressed *Padilla* in the context of civil commitment and subsequent federal sentencing enhancements. In *People v. Hughes*, the Illinois Supreme Court found counsel has a “minimal duty” to advise a client pleading guilty to an offense eligible for mandatory assessment of civil commitment that he may be civilly committed at the expiration of his prison term.⁹ The court explained that, like deportation, assessment for civil commitment is “enmeshed” in the criminal process because it is mandatory under the Sexually Violent Persons Commitment Act upon conviction of a triggering offense and will toll the defendant's mandatory supervised release.¹⁰

The court also relied on the standards of the legal community, including those from the American Bar Association (“ABA”) and the National Legal Aid and Defender Association

(“NLADA”), to determine the reasonableness of counsel's representation. Nonetheless, the court ultimately found the defendant could not establish *Strickland*'s prejudice prong and did not allow defendant to withdraw his plea.

One Illinois appellate district has addressed *Padilla* in the context of a future federal sentencing enhancement. In *People v. Johnston*, an unpublished fifth district opinion, the court concluded counsel was not ineffective where counsel failed to

***Padilla* established that constitutionally effective practitioners must advise clients of the deportation consequences of a guilty plea where these are clear.**

advise the client that a guilty plea would lead to a sentencing enhancement for a subsequent federal conviction.¹¹

Johnston pled guilty to a state burglary charge and was sentenced to six years' imprisonment in 1999. Thereafter, in 2007, Johnston pled guilty to the federal charge of being a felon in possession of a firearm. The federal court enhanced Johnston's sentence by 180 months based on his state burglary conviction. The fifth district concluded Johnston was not entitled

2. *Id.* at 359.

3. *Id.* (quoting *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008))

4. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court explained that a party claiming ineffective assistance of counsel must show that: (1) trial counsel's performance fell below objective standards for reasonably effective counsel; and (2) counsel's deficient performance prejudiced the party's defense.

5. *Padilla*, 559 U.S. at 365.

6. *Id.* at 366.

7. *Id.* (quoting *Strickland*, 466 U.S. at 688).

8. *Id.* at 369.

9. *People v. Hughes*, 2012 IL 112817, ¶ 60.

10. *Id.* at ¶ 50.

11. *People v. Johnston*, 2013 IL App (5th) 110066-U, ¶ 14.

2014 Lincoln Award writing contest winners

Angela J. Rollins won first place and \$2,000 for this article in the 2014 Lincoln Award Contest. The competition 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 2015 contest.

The second place winner was **Richard J. VanSwol**, of Purcell & Wardrobe Chtd. in Chicago, who wrote “Playing with Fire: Limitations on Insurance Coverage for Expected or Intended Harm.” He won \$1,000.

Third place and \$500 went to last year's first-place winner, **Jill Ausdenmoore** of Decatur, for “A Practitioner's Guide to Illinois' Speedy-Trial Statute.”

Many contest entries will appear in the *Illinois Bar Journal* in the coming months. Thanks to all who entered. Watch ISBA publications and our website beginning in May for information about the 2015 contest.

to relief because his enhanced federal sentence “was not an automatic consequence of this guilty plea, and any risk that the conviction could result in a more sever[e] sentence for any future crimes was entirely and necessarily contingent on Johnston’s decision to commit those future crimes.”¹²

Illinois courts have yet to consider whether *Padilla* applies to consequences other than deportation, civil commit-

ture federal sentence.

Unlike *Hughes*, in which the Illinois Supreme Court extended *Padilla* to civil commitment, the seventh circuit found that *Padilla* is specific to the realm of deportation because it “is rife with indications that the Supreme Court meant to limit its scope to the context of deportation only.”¹⁵ Based on this “limited scope of *Padilla*,” the seventh circuit applied the direct/collateral consequence test and

declined to find that counsel must advise a client of sentencing enhancements for potential future convictions. The court noted “‘deportation is a consequence of *this* [the instant] conviction; enhancement depends on the defendant’s deciding to commit future crimes.’”¹⁶

Civil commitment. Unlike the seventh circuit, the eleventh circuit interpreted *Padilla* to extend beyond the deportation context in

Bauder v. Department of Corrections.¹⁷ Bauder pled guilty to aggravated stalking in a Florida state court, an offense which made him eligible for civil commitment. Bauder’s trial attorney, however, affirmatively represented to Bauder that he would not face civil commitment.

Even though the Florida’s civil commitment law was unclear at the time of Bauder’s guilty plea, the court found Bauder’s counsel should have advised him of the potential consequences. The court stressed that counsel gave affirmative misadvice in concluding counsel was ineffective.

Pension forfeiture. Pennsylvania state courts have considered *Padilla* in the context of pension forfeiture. The state courts’ analyses demonstrate the struggles courts have in applying *Padilla*’s holding.¹⁸

In *Commonwealth v. Abraham*, Abraham pled guilty to corruption of minors and indecent assault in a Pennsylvania state court. In a post-conviction proceeding, he alleged counsel was ineffective for failing to inform him that a plea of guilty would result in the loss of his teacher’s pension.

The state appellate court declined to apply the direct/collateral consequence analysis, noting it was unclear whether that analysis survived *Padilla*. Instead, following the *Padilla* analysis, the appellate court concluded that pension loss

was like deportation and “intimately connected to the criminal process” because pension loss was automatic, punitive, and triggered only by criminal behavior.¹⁹

Accordingly, the appellate court concluded Abraham’s counsel was ineffective for failing to warn Abraham that he would lose his pension. The court noted the result would be the same under the direct/collateral analysis.

The appellate court’s extension of *Padilla* to pension forfeiture was short-lived. The Pennsylvania Supreme Court determined that *Padilla* did not foreclose the application of the direct/collateral analysis and Abraham’s pension forfeiture was a collateral consequence.²⁰ As such, the court concluded counsel was not ineffective for failing to advise Abraham of the impending loss of his pension.

Sex offender registration. In *Taylor v. State*, a Georgia state appellate court concluded counsel is constitutionally required to advise a client of sex offender registration requirements resulting from a guilty plea.²¹ Taylor pled guilty to two counts of child molestation in a Georgia state court. As a consequence of that plea, he was required to register as a sex offender.

Like the appellate court in *Abraham*, the *Taylor* court indicated it was not clear whether the direct/collateral analysis survived *Padilla*. Considering the factors in *Padilla*, the court concluded that “even if registration as a sex offender is a collateral consequence of a guilty plea, the failure to advise a client that his guilty plea will require registration is constitutionally deficient performance.”²²

In reaching its decision, the court con-

12. *Id.* at ¶ 16.

13. *United States v. Reeves*, 695 F.3d 637 (7th Cir. 2012).

14. Reeves’ claim was thus different than the defendant’s claim in *Johnston*. Reeves sought to attack the validity of his state conviction by objecting to the government’s § 851 enhancement. The seventh circuit noted “that this is a permissible although unusual method to launch a collateral attack on a prior conviction.” *Id.* at 639.

15. *Id.* at 640.

16. *Id.* (quoting *Lewis v. United States*, 902 F.2d 576, 577 (7th Cir. 1990)).

17. *Bauder v. Department of Corrections*, 619 F.3d 1272 (11th Cir. 2010).

18. *Commonwealth v. Abraham*, 996 A.2d 1090 (Pa. Super. Ct. 2010), overruled by *Commonwealth v. Abraham*, 62 A.3d 343 (Pa. 2012).

19. *Id.* at 1094-95.

20. *Commonwealth v. Abraham*, 62 A.3d 343, 350-53 (Pa. 2012).

21. *Taylor v. State*, 698 S.E.2d 384, 387 (Ga. Ct. App. 2010).

22. *Id.* at 387-88.

Whether *Padilla* extends to consequences other than deportation, and whether those consequences are characterized as collateral or direct, is unclear.

ment, or a future federal sentencing enhancement. This article will now consider other jurisdictions’ applications of *Padilla* that may be persuasive to Illinois courts.

Federal and other states

Other jurisdictions disagree over the reach of *Padilla*. Some courts have concluded that *Padilla* is limited to the deportation context. Others, however, have extended *Padilla* to cover other consequences traditionally classified as collateral. Courts have also struggled in determining whether the direct/collateral analysis survives *Padilla*. The following cases consider these uncertain implications of *Padilla*.

Future federal sentencing enhancement. Like Illinois’ fifth district in *Johnston*, the federal seventh circuit, in *United States v. Reeves*, concluded counsel was not ineffective for failing to advise a client that a conviction may be used to enhance a future sentence.¹³ The government sought to enhance Reeves’ federal sentence pursuant to 21 U.S.C. § 851 on the basis of a prior state felony conviction.¹⁴ Reeves argued the government could not use the state conviction to enhance his sentence because the state conviction was invalid. Specifically, Reeves claimed his state counsel was ineffective for failing to advise him that the state sentence could be used to enhance a fu-

sidered the ABA Standards for Criminal Justice, which list sex offender registration as a collateral consequence of which defense counsel should advise their clients before entering a guilty plea. The court also noted that sex offender registration, like deportation, is a “drastic measure” and “‘intimately related to the criminal process’ in that it is an “‘automatic result’ following certain criminal convictions.”²³

Parole eligibility. Some jurisdictions, including Missouri, Kentucky, and Alabama, have considered *Padilla*’s impact on affirmative misadvice or failure to advise a client regarding her eligibility for parole.

In *Webb v. State*, the Missouri Supreme Court found counsel could be ineffective for misadvising a client about the time in which the client would be eligible for parole.²⁴ Webb’s plea of guilty to voluntary manslaughter required him to serve 85 percent of his sentence before becoming eligible for parole. Counsel, however, advised him that the involuntary manslaughter conviction would not trigger the 85 percent rule (10.2 years) and he would be eligible for parole after only serving 40 percent (4.8 years) of his sentence.

The majority, without citing to *Padilla*, found Webb was entitled to an evidentiary hearing based on counsel’s affirmative misinformation. In a concurring opinion, Justice Wolff analyzed the matter under *Padilla*, noting that the Supreme Court did not intend to limit *Padilla* to affirmative misadvice and suggesting that *Padilla* applies to consequences beyond deportation.

The Kentucky Supreme Court has also found affirmative misadvice about parole eligibility may constitute ineffective assistance of counsel.²⁵ In *Commonwealth v. Pridham*, the defendant pleaded guilty to drug charges and the court sentenced him to 30 years. Counsel advised Pridham he would be eligible for parole after six years, but, in reality, he actually would not be eligible for parole until after 20 years pursuant to Kentucky’s violent offender statute.

The court found extended parole ineligibility to be comparable to deportation because it was punitive, easily determined from a reading of the statute, and “a prominent fixture of [Kentucky’s] criminal law.”²⁶ The court specifically rejected the Commonwealth’s argument that *Padilla* was limited to deportation

and remanded the case to the trial court to determine whether Pridham was prejudiced by his counsel’s misadvice.

An Alabama state court found counsel ineffective for failing to provide any advice regarding parole ineligibility.²⁷ Defendant Frost’s plea of guilty to sodomy and sexual abuse of a child less than 12 years made him ineligible for parole under Alabama law. In his post-conviction petition, Frost alleged his guilty plea was involuntary because counsel failed to advise him he would be ineligible for parole.

The *Frost* court employed the direct/collateral analysis and found that parole eligibility was a direct consequence of a guilty plea. The court also noted that, similar to the deportation consequences in *Padilla*, trial counsel could have easily determined Frost’s parole ineligibility by a simple reading of the statute. After finding Frost established prejudice, he satisfied the *Strickland* test.

Good time credit. In *Stith v. State*, an Alabama appellate court concluded counsel may be ineffective for failing to advise the defendant that the offense to which he was pleading guilty made him ineligible to earn good time credit.²⁸

Stith pleaded guilty to first-degree sodomy and the court sentenced him to 10 years imprisonment. Because first-degree sodomy is a Class A felony, Alabama law rendered Stith ineligible to earn good time credit while in prison.

During plea negotiations, the state offered a deal wherein Stith would plead guilty to first-degree sodomy and receive a 20-year prison term resulting in Stith only serving five years in prison. Under the proposed 20-year sentence, Stith would have served less time in prison than under the “straight” 10-year sentence to which he pleaded guilty. It was clear from the record that Stith believed he would serve less time under the “straight” 10-year sentence because he thought he would be eligible for good time credit.

Stith’s counsel failed to advise Stith of the resulting time he would actually serve and simply advised Stith that the Alabama Department of Corrections would calculate good time. Noting that Stith’s ineligibility for good conduct was apparent from a plain reading of the statute, the Alabama court found that, regardless of whether this action was classified as an omission or misrepresenta-

tion, Stith’s counsel failed to provide effective assistance.

Guidance for practitioners

As *Padilla* and the foregoing cases
(Continued on page 99)

23. *Id.* at 388.

24. *Webb v. State*, 334 S.W.3d 126, 127 (Mo. 2011).

25. *Commonwealth v. Pridham*, 394 S.W.3d 867 (Ky. 2012).

26. *Id.* at 878.

27. *Frost v. State*, 76 So. 3d 862 (Ala. Crim. App. 2011).

28. *Stith v. State*, 76 So. 3d 286 (Ala. Crim. App. 2011).

2014 Contest Judges

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The Res Judicata Defense to Legal Malpractice Claims

Res judicata and collateral estoppel can be powerful defenses in litigation malpractice cases, providing a complete defense even though the lawyer was not a party to the underlying action.

But they aren't without their limitations.

By Zachary J. Freeman

Legal malpractice lawsuits, like most of civil litigation, can become very expensive to defend absent a clear-cut basis to obtain an early resolution. Claim or issue preclusion, also referred to as res judicata or collateral estoppel, are dispositive defenses that can have a surprisingly broad application in litigation malpractice actions.

These defenses have such a broad application because, often, the court in the underlying action has already ruled – either expressly or implicitly – on the quality of the legal services provided. These types of final orders are routinely entered by courts in a wide range of cases: bank-

ruptcy proceedings, class actions, family law cases, criminal cases, and litigation involving fee-shifting statutes.

This article discusses the principal Illinois cases applying res judicata and collateral estoppel to litigation malpractice claims, the underlying theory justifying

the broad application of these defenses, important limits to when they apply, and steps lawyers can take to minimize their exposure to expensive malpractice claims.

The basics of res judicata

The doctrine of res judicata holds that a final judgment on the merits, entered by a court of competent jurisdiction, bars subsequent lawsuits between the parties or their privies that arise out of the same group of operative facts.¹ The related doctrine of collateral estoppel or

1. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998).

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issue preclusion applies the same theory to specific factual findings and precludes re-litigation of certain factual determinations in subsequent lawsuits.²

The purpose of res judicata and collateral estoppel is to ensure that all claims relating to a specific incident are litigated together and to protect parties from a multiplicity of lawsuits. They promote “fairness and judicial economy” by preventing the re-litigation of issues and claims.³

Res judicata applies to claims that were previously brought and, most importantly for present purposes, to many claims that could have been brought, through the exercise of due diligence, in the prior litigation.⁴ The barred claims can include many counterclaims that could have been brought by the defendant even though counterclaims are generally permissive, not mandatory, in Illinois. Permissive counterclaims are barred by res judicata if the litigation of the counterclaim would either “nullify the earlier judgment or impair the rights established in the earlier action.”⁵

Even if all of the elements of res judicata exist, courts are not required to apply it because it is an equitable doctrine. As stated by the supreme court, a party is permitted to bring a subsequent lawsuit that arises out of the same group of operative facts if it would be inequitable to apply res judicata.⁶

Some of the circumstances that can give rise to inequity are:

- (1) the parties have agreed in terms or in effect that plaintiff may split his claim or the defendant has acquiesced therein;
- (2) the court in the first action expressly reserved the plaintiff’s right to maintain the second action;
- (3) the plaintiff was unable to obtain relief on his claim because of a restriction on the subject-matter jurisdiction of the court in the first action;
- (4) the judgment in the first action was plainly inconsistent with the equitable implementation of a statutory scheme;
- (5) the case involves a continuing or recurrent wrong;
- or (6) it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason.⁷

Thus, a party seeking to establish that a case is barred by earlier litigation must prove that res judicata is applicable and, in most circumstances, that the application of the doctrine would be equitable.

Bankruptcy jurisprudence

Litigation malpractice cases often arise out of bankruptcy filings. Debtors

and creditors unhappy with the ultimate result frequently try to place blame on the attorneys in an after-the-fact effort to achieve a different result. Given the bankruptcy court’s close supervision of appointed counsel, the res judicata defense should bar most litigation against appointed counsel. While Illinois courts have not expressly discussed the application of res judicata in the bankruptcy court context, the law in other jurisdictions is well developed.

As explained by the U.S. Court of Appeals, D.C. Circuit, in *Capitol Hill Group v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, “fee litigation in the bankruptcy proceeding preclude[s] later malpractice claims against the bankruptcy professionals to whom the fees had been awarded.”⁸ “[A] bankruptcy court makes an implied finding of the quality and value of the professional services rendered” because section 330(a)(3) (A) of the Bankruptcy Code requires the court to consider the nature, extent, and value of the attorney’s legal services when ruling on a fee petition.⁹ Thus, as long as a party had the opportunity to object to the attorney’s final fee award, any subsequently filed legal malpractice action would likely be barred by res judicata as a result of the order granting the fee petition.

Other types of orders entered by the bankruptcy court could also provide a basis to assert a res judicata defense. For example, in *Sarno v. Akkeron*, the defendant attorney alleged that a prior bankruptcy court order finding that the plaintiffs had filed an involuntary bankruptcy petition in bad faith barred the plaintiffs’ subsequent malpractice action against him for advising them to file the involuntary bankruptcy petition.¹⁰

Even though the Illinois court found that all of the elements of res judicata were present, it concluded that application of the doctrine would be inequitable because the plaintiffs could not be expected to allege that their attorney had been negligent during the bad faith proceeding. Not only was that attorney allegedly representing them in the proceeding, but he admitted that the plaintiffs had filed the involuntary petition pursuant to his advice, which in most

circumstances would preclude a finding that the plaintiffs had acted in bad faith. *Sarno* highlights the fact that the party advancing the res judicata defense must explain that the defense not only can but should be applied.

Family law cases

Fee petitions are also closely scrutinized by family courts. As with bankruptcy courts, this scrutiny can give rise to an argument that malpractice claims arising out of the underlying proceedings are barred by res judicata. Illinois courts, however, have issued conflicting

Res judicata and collateral estoppel are potentially powerful defenses because they protect not only the parties to the underlying litigation but, often, their lawyers as well.

decisions on whether a final fee order in a marriage dissolution action bars a subsequent legal malpractice case. As with *Sarno*, the issue is not simply whether res judicata can be applied but whether it is equitable to do so.

The most recent case is *Weisman v. Schiller, Ducanto & Fleck*. In that case, the client objected to her attorney’s fee petition in the dissolution action by alleging that her attorney had been negligent. She subsequently sued that attorney for legal malpractice.¹¹

The appellate court found that all of

2. *DuPage Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill. 2d 71, 77 (2001).

3. *Id.*

4. *Westmeyer v. Flynn*, 382 Ill. App. 3d 952, 955 (1st Dist. 2008); *Hughey v. Industrial Comm’n*, 76 Ill. 2d 577, 582 (1979).

5. *Cabrera v. First National Bank of Wheaton*, 324 Ill. App. 3d 85, 92 (2d Dist. 2001); *Kosydor v. American Express Centurion Services Corp.*, 2012 IL App (5th) 120110, ¶ 19.

6. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 341 (1996).

7. *Id.* (citing Restatement (Second) of Judgments § 26(1) (1980)).

8. *Capitol Hill Group v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 490 (D.C. Cir. 2009).

9. *Marbury Law Group, PLLC v. Carl*, 799 F. Supp. 2d 66, 77 n.8 (D.D.C. 2011).

10. *Sarno v. Akkeron*, 292 Ill. App. 3d 80, 85-87 (1st Dist. 1997).

11. *Weisman v. Schiller, Ducanto & Fleck*, 314 Ill. App. 3d 577, 578 (1st Dist. 2000).

the elements of res judicata were present but declined to apply the doctrine. The court reasoned that the divorce court lacked subject matter jurisdiction over a legal malpractice counterclaim and the statutory authority to provide the plaintiff with her constitutional right to a jury trial. (It should be noted that several Illinois courts, in other contexts, have stated that the divorce court has jurisdiction to hear all justiciable matters.)¹² Thus, the court concluded, it would be fundamen-

this aspect of res judicata jurisprudence is significant because the legal malpractice case would require a finding that the lawyer had been negligent, which would impair the underlying order that the attorney was entitled to be paid for his reasonably rendered legal services.

An additional res judicata case in the family law setting is *Lane v. Kalcheim*.¹⁵ There, the plaintiff sued her divorce attorney for allegedly failing to prove up an oral settlement agreement and for negligent conduct in connection with an

alleged antenuptial agreement. After the claims relating to the settlement agreement were dismissed with prejudice, the plaintiff voluntarily dismissed the remaining allegations.

The plaintiff then refiled a complaint based solely on the antenuptial claims, and the defendant alleged that the new complaint was barred by the final order dismissing the settlement

to the entry of the fee award.¹⁸

Courts outside of Illinois have also held that the entry of fee awards in class action litigation precludes subsequent legal malpractice actions against class counsel. Most recently in *Wyly v. Weiss*, the U.S. Court of Appeals for the Second Circuit explained that when “the parties had a full and fair opportunity to litigate the reasonableness of counsel’s representation, a district court’s award of ‘fair and reasonable’ attorneys’ fees precludes a subsequent action for legal malpractice for counsel’s advocating the settlement.”¹⁹

The second circuit is not alone in reaching this conclusion. For example, the U.S. Court of Appeals for the Sixth Circuit in *Laskey v. International Union* dismissed a legal malpractice claim arising out of a class action lawsuit. The court asserted that the plaintiff’s claim was collaterally estopped because “a finding that the class was adequately represented is necessary for finding the settlement was fair and reasonable, which in turn was essential to approving the settlement.”²⁰

Lawyers would be wise to try to ensure that, whenever possible, court orders reflect any findings the court made with respect to their services, conduct, or fees.

tally unfair to apply res judicata to bar the plaintiff’s legal malpractice action.

Weisman expressly contradicted (but did not purport to overrule) an earlier decision issued by the same court: *Bennett v. Gordon*.¹³ In *Bennett*, the court held that a legal malpractice claim filed against a divorce attorney based on objections previously raised to a fee petition was barred by res judicata.

The plaintiffs in both *Weisman* and *Bennett* had objected to their attorneys’ fees in the underlying divorce case. But if a client does not object to his attorney’s fee petition in the divorce case and does not allege that his or her divorce attorney had acted negligently, a subsequent legal malpractice claim may not be barred by res judicata.

In *Wilson v. M.G. Gulo & Assocs., Inc.*, the court refused to find that a malpractice claim was barred by res judicata because the issue of the attorney’s competence was not litigated in the underlying matter.¹⁴ This reasoning is not persuasive because the only reason the attorney’s competence was not litigated was because the plaintiff decided not to put it at issue. Moreover, the court did not mention the law summarized above, which holds that permissive counterclaims should be barred if they would nullify or impair the underlying judgment. The absence of any discussion of

claims. The court agreed and dismissed the new complaint based on res judicata.¹⁶ This case highlights the dangers of voluntarily dismissing a case once a court has dismissed certain counts with prejudice.

Class actions

The application of res judicata to claims against class action lawyers was recently addressed in *Langone v. Schad, Diamond and Shedden, P.C.*¹⁷ Courts approving class action settlements (like bankruptcy and divorce courts) must scrutinize fee petitions.

In *Langone*, after the trial court made a final fee award to class counsel, one of the lawyers representing the class sued co-counsel for breach of contract alleging that he (the plaintiff) did not receive his *pro rata* share of the attorneys’ fee award. This breach of contract action was dismissed on res judicata grounds. The court found that it was equitable to bar the breach of contract action because the issue of the plaintiff’s entitlement to a *pro rata* share of the attorneys’ fee award was raised in front of the trial court and rejected by that trial court.

While recognizing the apparent harshness of the ruling, the court found that applying res judicata was equitable because the plaintiff failed to properly present his fee petition to the trial court prior

Judgments for attorneys’ fees

The elements of res judicata can also result if an attorney is required to bring an action to recover fees from its client. This is exactly what happened in *Kasny v. Coonen & Roth, Ltd.*²¹ After a client refused to pay, his attorney filed a claim in small claims court seeking less than \$5,000 in fees. The client never appeared, and the court entered a default judgment for the attorney. The client subsequently sued his lawyer for legal malpractice.

The trial court dismissed plaintiff’s complaint as barred by the earlier default judgment. The appellate court, however, reversed the dismissal even though it found that all of the elements of res judicata were present. The court con-

12. See, e.g., *In re Marriage of Olbrecht*, 232 Ill. App. 3d 358, 365 (1st Dist. 1992).

13. *Bennett v. Gordon*, 282 Ill. App. 3d 378, 385 (1st Dist. 1996).

14. *Wilson v. M.G. Gulo & Associates, Inc.*, 294 Ill. App. 3d 897, 902 (3d Dist. 1998).

15. *Lane v. Kalcheim*, 394 Ill. App. 3d 324, 329-36 (1st Dist. 2009).

16. *Id.* (citing *Hudson v. City of Chicago*, 228 Ill. 2d 462 (2008)).

17. *Langone v. Schad, Diamond and Shedden, P.C.*, 406 Ill. App. 3d 820, 832 (1st Dist. 2010).

18. *Id.* at 835.

19. *Wyly v. Weiss*, 697 F.3d 131, 144 (2d Cir. 2012).

20. *Laskey v. International Union*, 638 F.2d 954, 957 (6th Cir. 1981).

21. *Kasny v. Coonen & Roth, Ltd.*, 395 Ill. App. 3d 870 (2d Dist. 2009).

cluded that the plaintiff had alleged in his complaint that he could not have discovered that he had a malpractice claim against his attorney prior to the entry of the default judgment. The court also questioned whether the doctrine should apply to small claims court judgments, since small claims are litigated expeditiously without the same procedural rights of other courts.

The *Kasny* case illustrates one of the key factual disputes that could preclude a dismissal of a legal malpractice claim on res judicata grounds. When the malpractice is not expressly raised, the attorney may have to show that the plaintiff knew or should have known of the potential claim at the time the relevant final order was entered.

Criminal cases

The res judicata defense is also available when criminal defense lawyers are sued by their clients. In this situation, the defense would not arise out of the judicial approval of a fee petition, but instead out of a claim of ineffective assistance of counsel.

While no Illinois cases directly address this issue, the denial of a criminal defendant's ineffective assistance of counsel claim should be a complete bar to a subsequent malpractice action when the standard of care for legal malpractice claims is equivalent to or lower than the standard of care for ineffective assistance of counsel claims.²² In these situations, collateral estoppel would probably apply because a subsequent finding that the attorney had been negligent would likely impair or nullify the earlier finding that the attorney provided effective assistance of counsel.

The reverse, however, is not necessarily true. After a criminal defendant prevails on an ineffective assistance of counsel claim, collateral estoppel will not necessarily bar his attorney from disputing negligence in a subsequent legal malpractice claim.²³ Not only could the negligence standard of care be different than the standard of care for ineffective assistance of counsel, but courts have reasoned that the incentives to litigate civil and criminal matters are materially different.²⁴ As explained by the Supreme Court of Minnesota in *Noske v. Friedberg*, an ineffective assistance of counsel claim focuses on the fairness of the trial while a legal malpractice claim focuses on the conduct of the criminal defense

lawyer.²⁵

Thus, it is theoretically possible for a criminal defendant to have received ineffective assistance of counsel even though his lawyer did not violate the applicable standard of care. For all of these reasons, it has been much harder for criminal malpractice plaintiffs to preclude their attorneys from disputing negligence than it has been for criminal lawyers to preclude their former clients from re-litigating the same issue.

Agreed dismissal orders

Another related issue that arises frequently is the filing of a second suit against a defendant who settled an earlier action. This issue is slightly beyond the scope of this article because it applies to all subsequent litigation and not just to legal malpractice actions. Counsel should be aware that Illinois courts, as the court observed in *Jackson v. Callan Publishing, Inc.*, are split on whether an agreed dismissal order with prejudice can operate as a bar to a subsequent lawsuit.²⁶

On the one hand, some courts have refused to apply res judicata in this situation, concluding that it is inappropriate to do so because the dismissal order is only a "recording of the agreement between the parties" and is not a "judicial determination of the parties' rights."²⁷ On the other hand, other courts have held that dismissal orders entered pursuant to settlement agreements are "deemed to be as conclusive of rights of parties as if the matter had proceeded to trial and been resolved by final judgment."²⁸

In light of the conflicting case law on this issue, lawyers should explain to their clients that the agreed dismissal order might not preclude a subsequent lawsuit. If a client wants to eliminate the risk of a successive suit, it should require a full release in connection with the agreed dismissal order. A specific release is particularly beneficial because "courts have been willing to bar additional claims failing within the scope of the [specific] release that do not explicitly appear in the release."²⁹

For example, in *Goodman v. Hanson*, the court held that it did not have to determine whether the plaintiff had contemplated the claims when it executed the specific release because that release unambiguously and specifically released claims relating to the relevant subject-matter.³⁰ Additionally, the lawyer should

include, when appropriate and accurate, a statement in the dismissal order that the court has either reviewed the terms of the settlement agreement or that the dismissal order is deemed to be a final judicial determination of the parties' rights. Such language could provide a basis for a subsequent court to find that the case is barred by the earlier agreed dismissal order.

Conclusion: document judicial findings

Litigation malpractice cases do not operate on a clean slate. The pleadings, motions, discovery, and orders from the underlying matter must be reviewed closely to determine not only the merits of the negligence claim but also whether any affirmative defenses apply. Despite their limitations, res judicata and collateral estoppel are potentially powerful defenses because they protect not only the parties to the underlying litigation but, in the right circumstances, the lawyers representing those parties. As this article demonstrates, when a court expressly or implicitly finds that the lawyers' services were adequate, that finding could bar any subsequent legal malpractice claims.

In light of the preclusive effect that these findings and orders can have on future disputes, lawyers would be wise to ensure that, whenever possible, court orders reflect any findings the court made with respect to their services, conduct, or fees. By properly documenting these judicial findings, attorneys will be positioned to obtain their benefit if they find themselves in the unfortunate position of having to defend against a legal malpractice claim. ■

22. *Hinton v. Rudasill*, 624 F. Supp. 2d 48, 52 (D.D.C. 2009).

23. *Charlotten v. Heid*, Case No. 1:09-cv-0891 (LEK/RFT), 2011 WL 3423826, at *14 (N.D.N.Y. Aug. 4, 2011).

24. *Id.*; *People v. Trakhtenberg*, 826 N.W.2d 136, 141-42 (Sup. Ct. Mich. 2012).

25. *Noske v. Friedberg*, 670 N.W.2d 740, 746 (Sup. Ct. Minn. 2003).

26. *Jackson v. Callan Publishing, Inc.*, 356 Ill. App. 3d 326, 340 (1st Dist. 2005).

27. See *Goodman v. Hanson*, 408 Ill. App. 3d 285, 300 (1st Dist. 2011) (quoting *Kandalepas v. Economou*, 269 Ill. App. 3d 245, 252 (1st Dist. 1994)).

28. *SDS Partners, Inc. v. Cramer*, 305 Ill. App. 3d 893, 896 (4th Dist. 1999); accord *Fox v. Will County*, No. 04 C 7309, 2012 WL 2129393, at *3 (N.D. Ill. June 8, 2012).

29. *Goodman*, 408 Ill. App. 3d at 293.

30. *Id.* at 298.



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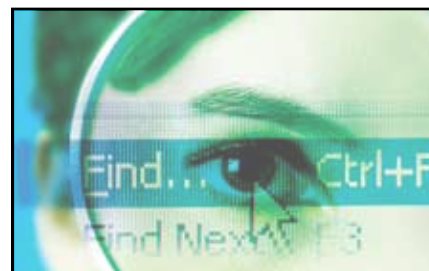
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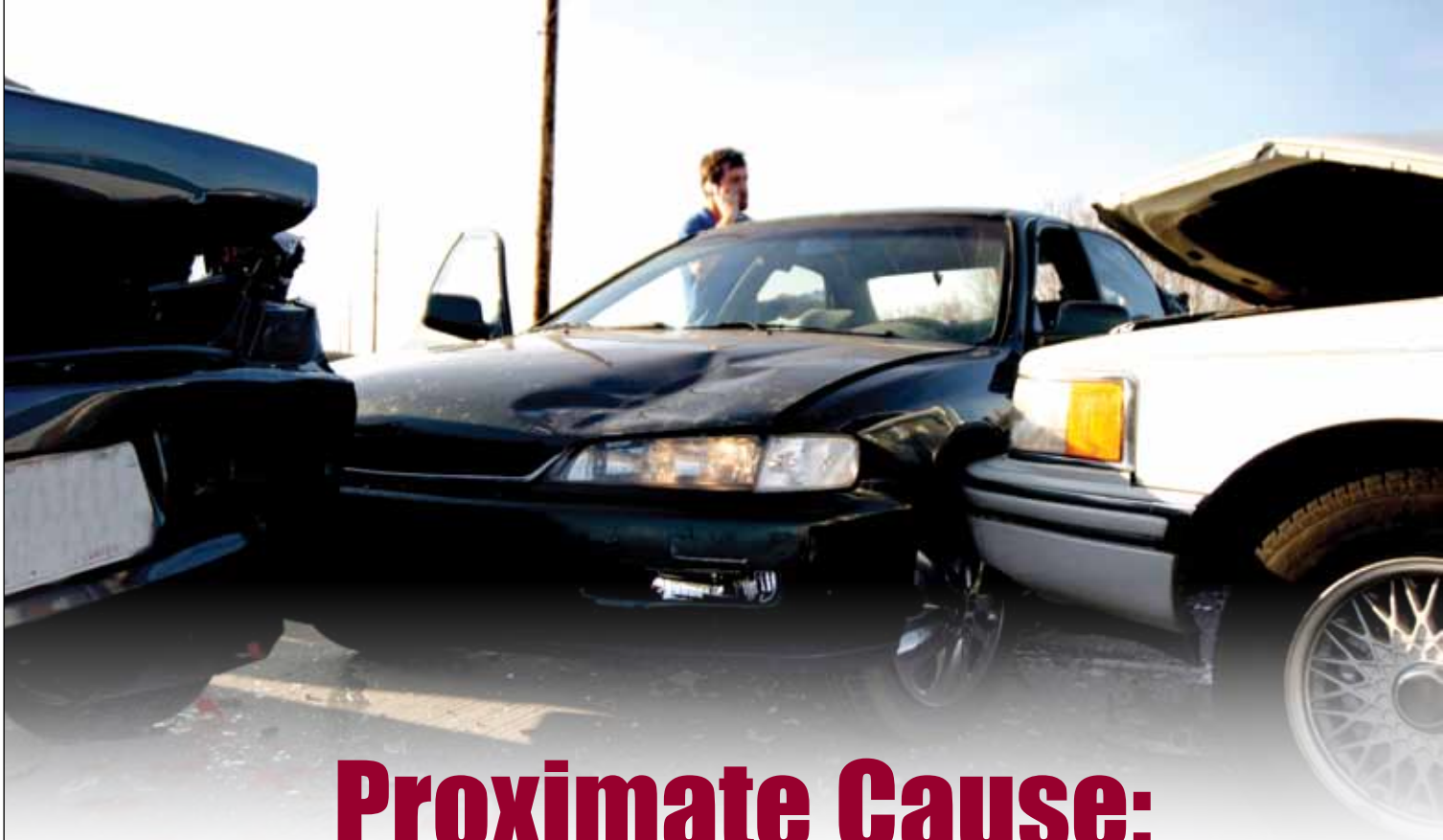
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Proximate Cause: Limiting Liability Along the Chain of Causation

By Amelia S. Buragas

It is midday and traffic along I-39 headed north toward Rockford is brisk. A driver unfamiliar with the route takes his eyes off the road to adjust his GPS. He drifts into the passing lane and collides with another automobile. Neither driver is injured, but both northbound lanes of the road are blocked by debris. Traffic quickly backs up. Most vehicles are able to safely stop. However, a semi-truck driver looking down at his map to find an alternative route plows into the line of stopped cars. The results are devastating – five people die and a dozen more are seriously injured.

Multiple car collisions present an interesting case study of the evolution of proximate cause. In the above scenario there are two negligent drivers – the automobile driver who caused the first collision and the semi-truck driver who caused the second collision. Illinois law states that more than one actor may be

the proximate cause of injuries, and it is clear that the second accident could not have happened but for the negligence of the first driver. Yet, should the first driver be legally responsible, in whole or in part, for the injuries that result from the second accident?

Proximate cause and cause-in-fact

To plead negligence, a plaintiff must allege the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury that is proximately caused by the breach.¹ To be a proximate cause of an injury, a breach must be both a cause-in-fact and a legal cause of the injury.²

Cause-in-fact is established when there is a reasonable certainty that a defendant's acts caused the injury³ and that the injury would not have occurred but for the defendant's conduct.⁴ Where

1. *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140, 554 N.E.2d 223 (1990).

2. *Harrison v. Hardin County Community Unit School Dist. No. 1*, 197 Ill. 2d 466, 476, 758 N.E.2d 848 (2001).

3. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455, 605 N.E.2d 493 (1992).

4. *Young v. Bryco Arms*, 213 Ill. 2d 433, 446, 821 N.E.2d 1078 (2004).

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Illinois courts have struggled with defining the limits of proximate cause. Multiple car collision cases present an interesting case study of the evolution of proximate cause and how the courts have both expanded and contracted this legal analysis over the years.

there are multiple factors that may have combined to cause an injury, cause-in-fact is established when the defendant's conduct "was a material element and a substantial factor in bringing about the injury."⁵

Legal cause, on the other hand, deals with the question of foreseeability.⁶ A negligent act is the legal cause of an injury only if the injury is of a type that a reasonable person would see as the likely result of his or her conduct.⁷

For example, a school bus that illegally blocked access to a crosswalk may be the legal cause of a child's personal injuries when the child attempted to cross the street outside of the crosswalk and was struck by a car.⁸ This is because it is foreseeable that blocking a crosswalk could cause children to endanger themselves by crossing elsewhere.⁹ On the other hand, a truck illegally parked along a road was not the legal cause of a jaywalking pedestrian's death because the driver of the truck could not have foreseen that a pedestrian would choose to cross the street in front of the truck where the truck was not blocking a marked crosswalk.¹⁰

In cases dealing with multiple tortfeasors, the court also will ask "whether the first wrongdoer might have anticipated the intervening efficient cause as a natural and probable result of the first party's own act or omission."¹¹ An "intervening efficient cause" is "a new and independent force which breaks the causal connection between the original wrong and the injury and itself becomes the direct and immediate cause of the injury."¹²

Condition vs. cause

Within the proximate cause analysis, Illinois courts have further distinguished between conduct that *causes* an injury, and conduct that merely creates a *condition* making injury possible.¹³ If the defendant's negligence does nothing more than create a passive condition making injury possible through the independent

act of a third person, then the defendant's negligence is not a legal cause of the injury.¹⁴

The Illinois Supreme Court has explained that the condition/cause analysis examines whether the defendant's actions were a material and substantial element in bringing about the plaintiff's injury, and "in effect ask[s] whether the intervening efficient cause was of a type that a reasonable person would see as a likely result of his or her conduct."¹⁵ Put another way, the condition/cause analysis examines whether the first wrongdoer might reasonably have anticipated the intervening cause as the "natural" and "probable" result of his or her own negligence.¹⁶ Thus, the condition/cause analysis is appropriate in scenarios where the original tortfeasor does not directly cause the plaintiff's injuries, but rather sets into motion a series of events that result in a third party causing harm to the plaintiff.¹⁷

For example, in *Hook v. Heim*, the appellate court held that a driver's negligence in causing an accident may be a proximate cause of the plaintiff's injuries when the plaintiff stopped to render aid and was struck by another vehicle.¹⁸ The court reasoned that the "events were concatenated by circumstances that were not unusual or extraordinary" and that the plaintiff's injuries were the "natural and probable result" of the circumstances created by the initial accident.¹⁹

30 years of evolution

On November 2, 1962, defendant Richard J. Jones lost control of his car while attempting to pass another vehicle in the westbound lanes of I-74 near Champaign.²⁰ Jones' car crossed the median and collided with a Buick in the eastbound lanes of the interstate. A

Ford Thunderbird traveling in the eastbound lanes then collided with the rear of Jones' car and was propelled onto the opposite side of the interstate, where it came to rest blocking both westbound lanes of traffic.

Plaintiff James F. Anderson and his family were in a 1958 Prefect that stopped due to the blocked westbound

While the courts have developed a guiding legal framework for the proximate cause analysis, the unique facts of each case drive the court's ultimate decision.

lanes. The Andersons were injured when a subsequent driver, defendant John D. Zehr, collided with their vehicle. The

5. *Id.*

6. *Harrison*, 197 Ill. 2d at 476-77.

7. *Id.*

8. *Scerba v. Chicago Transit Authority*, 284 Ill. App. 3d 435, 441, 672 N.E.2d 312 (1st Dist. 1996).

9. *Id.*

10. *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 261, 720 N.E.2d 1068 (1999).

11. *Id.* at 256.

12. *Greene v. Chicago*, 73 Ill. 2d 100, 111, 382 N.E.2d 1205 (1978) (quoting *Neering v. Illinois Central R.R. Co.*, 383 Ill. 366, 380, 50 N.E.2d 497 (1943)).

13. *Galman*, 188 Ill. 2d at 257.

14. *Briske v. Village of Burnham*, 379 Ill. 193, 199, 39 N.E.2d 976 (1942).

15. *Galman*, 188 Ill. 2d at 259.

16. *Merlo v. Public Service Co.*, 381 Ill. 300, 317, 316 N.E.2d 665 (1942).

17. *See, e.g., Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 554, 836 N.E.2d 640 (1st Dist. 2005).

18. *Hook v. Heim*, 54 Ill. App. 3d 368, 369 N.E.2d 563 (5th Dist. 1977).

19. *Id.* at 371. Whether the defendant was liable to the plaintiff pursuant to the rescue doctrine was not at issue in the case. For more on proximate cause and the rescue doctrine, *see Reed v. Ault*, 2012 IL App (2d) 110744, 969 N.E.2d 515.

20. *Anderson v. Jones*, 66 Ill. App. 2d 407, 409, 213 N.E.2d 627 (4th Dist. 1966).

plaintiffs sued both Jones and Zehr for negligence. A jury found Jones and Zehr jointly liable for the plaintiffs' injuries.

However, on appeal, the fourth district reversed the judgment against defendant Jones, finding that defendant Zehr was the sole proximate cause of the plaintiff's injuries. The court reasoned that "Zehr's negligence initiated a new force and began a new chain of causation that cannot trace its origin in whole or in part to Jones."²¹

Nearly two decades later, the fourth district again considered the issue of

judgment in favor of three of the defendant drivers.

The appellate court upheld summary judgment in favor of a defendant driver that had safely stopped prior to the arrival of plaintiff's vehicle, stating the driver's actions were not a cause, "let alone a legal cause," of the plaintiff's injuries.²³ The appellate court also affirmed judgment in favor of a defendant driver that had collided with vehicles blocking the roadway, but who had removed his car from the road prior to plaintiff's arrival.

The court reasoned that the defendant did not "contribute to the blocked highway that confronted the vehicles subsequently arriving at the scene. Thus, the lack of showing of causal relationship between [defendant's] conduct and plaintiff's injuries also justified the summary judgment entered in his favor."²⁴

However, the appellate court reversed summary judgment granted by the trial court in favor of a third defendant who was involved in a collision prior to the one that injured the plaintiff and who did not remove his automobile from the road prior to plaintiff's arrival. The court rejected the argument that the driver that hit the cars behind the one in which plaintiff had been a passenger was an intervening factor that set into motion a new chain of causation. The court instead found that the defendant was a cause-in-fact of the plaintiff's injuries, and that the question of whether the defendant was a legal cause of the injuries was one for the jury. Thus, the court held that the driver who contributed to the blocked highway through his own negligence could be found to be a proximate cause of the subsequent collision in which the plaintiff was injured.

One explanation for the seemingly different results between *Anderson* and *Cox* was the publication of the Restatement (Second) of Torts (1965), which refined the definition of proximate cause to provide that "[t]he intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about."²⁵

Reliance on the language of the Restatement (Second) allowed *Cox* to extend proximate cause further along the chain of causation. Further, *Cox* did not overrule *Anderson*. The *Cox* court distinguished its ruling by noting that defendant Zehr's behavior in *Anderson* was "highly extraordinary." This brought it within the purview of section 435 of the Restatement (Second) of Torts, which provides that "[t]he actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm."²⁶

Anderson also was decided prior to adoption of comparative fault in Illinois. This doctrine has led at least some courts to suggest that a "relaxed" standard be used in the legal cause prong of the proximate cause analysis.

For example, the third district has stated that under the historical doctrine of contributory negligence, a strict application of proximate cause was necessary to prevent the "injustice that would result if the actor were liable for the full measure of damages even for acts remotely connected with the injury."²⁷ This need greatly diminished with the adoption of comparative fault and, thus, "courts have been less willing to label an actor's conduct as a remote cause or condition of injury."²⁸ The fourth district also has stated that the adoption of comparative fault "has diminished the need for a policy which protects the remotely negligent defendant from liability for the full measure of damages."²⁹

This does not mean, however, that the courts are ready to place decisions of proximate cause solely within the hands of the jury.

A wrinkle in the seventh circuit

Citing concerns about a potentially endless chain of liability, the U.S. Seventh Circuit Court of Appeals took up the issue of proximate cause in a mul-

It remains to be seen if the courts will continue to expand the boundaries of proximate cause with a preference toward determination by the jury as fact finder.

proximate cause in a case dealing with injuries resulting from consecutive collisions.²² On December 24, 1980, there was a multiple car pile-up on I-57 near Tuscola. Collisions occurred for more than an hour in inclement weather.

Plaintiff Ruth Cox was a passenger in a car that stopped without incident. Ms. Cox got out of the vehicle and was severely injured when a subsequent vehicle failed to stop, causing the car Cox had been riding in to hit her. The plaintiff filed a complaint against multiple defendants who were involved in the chain reaction of accidents. The fourth district was tasked with untangling the chain of causation to determine whether the trial court had properly granted summary

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21. *Id.* at 414.

22. *Cox v. Stutts*, 130 Ill. App. 3d 1018, 474 N.E.2d 1382 (4th Dist. 1985).

23. *Id.* at 1,020.

24. *Id.* at 1,021.

25. Restatement (Second) of Torts, § 443 (1965).

26. *Id.* at § 435.

27. *Michalak v. County of La Salle*, 121 Ill. App. 3d 574, 578, 459 N.E.2d 1131 (3d Dist. 1984).

28. *Id.*

29. *Cherry v. McDonald*, 176 Ill. App. 3d 471, 481-82, 531 N.E.2d 78 (4th Dist. 1988).

tiple vehicle pile-up case decided in February 2012.³⁰ On September 26, 2008, Dennis Hernandez, a commercial truck driver for MTV Networks, crossed the center median on I-57 in Southern Illinois and caused a three-car accident. The northbound lanes of the interstate were closed for several hours, causing traffic to back up a distance of 4 to 5 miles from the scene of the original collision. Approximately four hours after the initial collision, plaintiff David Blood's car stopped at the end of the line of traffic. A few moments later, Milinko Cukovic, a driver for T.E.A.M. Logistics Systems, Inc., slammed into David Blood's vehicle, causing him severe injury and killing his brother who was a passenger in the car.

David Blood filed a complaint for negligence against Cukovic and T.E.A.M. Logistics Systems, Inc. The defendants then filed third-party complaints against Dennis Hernandez, 51 Minds Entertainment, LLC, Endemol USA, Inc., and VH-1 Music First ("Hernandez defendants") alleging that Hernandez's negligence in causing the initial collision was a proximate cause of the second accident between Cukovic and Blood. The plaintiff amended his complaint to add the Hernandez defendants as direct defendants.

The district court entered summary judgment in favor of the Hernandez defendants, finding that the plaintiff could

not prove they were a proximate cause of the second accident. The seventh circuit affirmed this decision.

Relying on *Anderson*, the seventh circuit noted that in cases involving successive car accidents, the court may consider the following factors in its proximate cause analysis: (1) lapse of time; (2) whether the force initiated by the original wrongdoer continued in active operation up to the injury; (3) whether the act of the intervener could be considered "extraordinary;" and (4) whether the intervening act was a normal response to the situation created by the wrongdoer.³¹

Relying on these factors, the seventh circuit upheld summary judgment finding that as a matter of law the Hernandez defendants were not a proximate cause of the plaintiff's injuries because of the lapse of time and the "extraordinary" acts of defendant Cukovic.³² While the court acknowledged that "drawing the line for proximate cause is usually a task for the factfinder," it further noted that "[t]o allow this case to continue beyond summary judgment opens the door to endless liability, such that the first wrongdoer in a high-way accident will forever be liable to all other drivers that follow."³³

Thus, the seventh circuit's recent decision makes it clear that the issue of proximate cause is alive and well – and likely one that the courts will continue to refine.

Conclusion

Proximate cause in Illinois is an evolving concept that has been broadened by the adoption of comparative fault. Yet, proximate cause continues to have boundaries and the courts will end litigation that exceeds its limits.

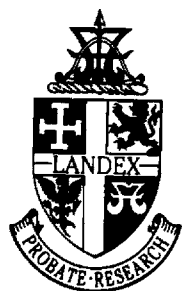
Because of their factual simplicity, multiple car collision cases serve as a model for the proximate cause analysis. These cases demonstrate that while the courts have developed a guiding legal framework for the proximate cause analysis, it is the unique facts of each case that drive the court's ultimate decision. Further, it remains to be seen if the courts will continue to expand the boundaries of proximate cause with a preference toward determination by the jury as fact finder, or if they will focus on the development of new legal tests that narrow the analysis and favor legal findings. ■

30. *Blood v. VH-1 Music First*, 668 F.3d 543 (7th Cir. 2012).

31. *Id.* at 546.

32. *Id.* at 549.

33. *Id.*



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Estate Tax Relief, Income Tax Headache: ESTATE PLANNING AND THE AMERICAN TAXPAYER RELIEF ACT

Thanks to the American Taxpayer Relief Act, a married couple with a properly structured estate can pass more than \$10 million free of federal estate tax. But potential income taxes are daunting. Here's how to avoid creating one big tax liability while reducing another.

By Stephen M. Margolin and Lindsey Paige Markus

The American Taxpayer Relief Act of 2012 (“ATRA”) was signed into law on January 2, 2013, making several of the Bush era tax cuts permanent.¹ At first glance, ATRA looked taxpayer friendly. But upon closer examination, a minefield came into view – not of potential estate tax, but rather of income tax.

Depending on the year of death, a decedent may pass a certain amount of assets free of the federal estate tax (i.e., the estate tax exemption).² In addition, during an individual's lifetime, she may gift assets through an annual gift exclusion (\$14,000 per person in 2013 and 2014) and a lifetime gift exemption (which reduces the estate tax exemption at death).³ Transfers to a “skip person” (a grandchild) are also subject to generation skipping transfer (“GST”) limitations.⁴

ATRA fixed the federal estate tax exemption, lifetime gift exemption, and GST exemptions at \$5 million, adjusted for inflation (\$5.25 million in 2013 and \$5.34 million in 2014).⁵ In addition, ATRA increased the maximum estate tax rate, gift tax rate, and GST rate at

the federal level to 40 percent.⁶ Thus, a married couple with a properly structured estate plan had the opportunity to pass a \$10,500,000 estate tax free in 2013 – but the potential income tax consequence is daunting.

This article places these estate and income tax changes (with apologies to Clint Eastwood and Sergio Leone) in

1. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 102 (2013).

2. 26 U.S.C. § 2010 (2013) (providing the “applicable exclusion amount” estate tax exemption). All references are to the Internal Revenue Code unless otherwise stated.

3. 26 U.S.C. §§ 2503(b), 2010(c) (2013); Rev. Proc. 2012-45 I.R.B.

4. 26 U.S.C. § 2642 (2013); American Taxpayer Relief Act of 2012, Pub. L. No. 112-240 (2013).

5. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240 (2013).

6. 26 U.S.C. § 2001(c) (2013).



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the framework of “*The Good, the Bad and the Ugly*.”

The good – “portability” is permanent

Portability allows a surviving spouse to take advantage of the unused portion of the federal exemption of a predeceased spouse, thereby providing the survivor with a larger exclusion amount. The portability amount, however, was fixed at \$5 million and is not adjusted for inflation.⁷

For example, David had a taxable estate of \$3 million when he died in January 2012. His wife, Diane, filed a 706 federal estate tax return electing to capture his unused exemption of \$2 million. When Diane died in December 2013, David’s unused exemption of \$2 million was added to Diane’s unused exempt amount of \$5.25 million, and Diane was able to pass a \$7.25 million estate tax free.

Portability, or the deceased spousal unused exclusion amount, is only available to the surviving spouse if an election is made on a timely filed estate tax return.⁸ If the surviving spouse is predeceased by more than one spouse, the exclusion amount would be limited to the lesser of the \$5 million exemption or the unused exclusion of the last deceased spouse.

However, portability does not apply to GST exemptions. In addition, portability is not applicable to state tax exemptions. So residents of states, like Illinois, that are subject to estate tax do not have this exclusion.

The bad – income taxes increases for some

Unfortunately for taxpayers, ATRA increased the 15 percent capital gain, qualified dividend, interest, and other investment income tax to 20 percent for various filers (married taxpayers with \$450,000 or more in taxable income, single filers with \$400,000 or more in taxable income, and trusts with income over \$11,950).⁹ The capital gains tax increased to 25 percent for precious metals, antiques, artwork, etc.¹⁰

Further, the Health Care and Education Reconciliation Act of 2010 (“2010 Tax Act”), which became effective in 2013, imposed a Medicare tax of 3.8 percent.¹¹ This Medicare tax applies to the lesser of investment income (capital gains, dividends, interest, rents, etc.) or adjusted gross income over \$250,000 for married taxpayers, \$200,000 for single filers, and \$11,950 for trusts.¹²

No federal estate tax – good! Thus, assume when David died he had a traditional A/B trust that created an A trust (“marital deduction trust”) and a B trust

(“credit shelter trust”) (see Figure 1).

David died in 2012 (when the exemption amount was \$5.12 million) with a \$3 million estate, so David’s entire estate was allocated to the credit shelter trust. Upon David’s death, the assets in the credit shelter trust received a step-up in basis to the fair market value of \$3 million. From the date of David’s death to December 2013 when Diane died, the assets in David’s credit shelter trust appreciated to \$4.5 million. The assets in David’s credit shelter trust and all appreciation of them pass federal estate tax free to the next generation.

At the time of Diane’s death in 2013, the value of her estate was \$4.5 million, less than the applicable exclusion amount of \$5,250,000, so no federal estate tax was due.

Potential income tax – bad! Upon Diane’s death, any amount in David’s marital deduction trust and the \$4.5 million in Diane’s estate get a basis adjustment equal to its fair market value at Diane’s date of death.¹³ In other words, there was a “step up” in basis to fair market value, avoiding income tax on the sale or disposition of these assets.

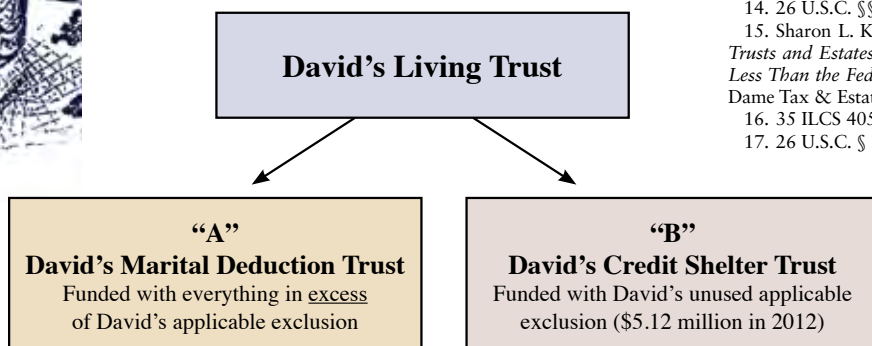
However, the amount in David’s credit shelter trust does not get a step up in basis since Diane had no incidences of ownership or control over the credit shelter trust.¹⁴ Thus, the \$1.5 million (\$4.5 million minus \$3 million) gain in David’s Credit Shelter Trust was potentially subject to a 23.8 percent tax (capital gain and Medicare), or \$357,000.

The ugly – state tax consequences

In addition to the federal income tax, various states hungry for additional revenue also get in on the act. Many states have decoupled from the federal estate tax regime and impose a state level estate tax.¹⁵ In December 2011, Illinois passed legislation setting the Illinois estate tax exemption at \$4 million for 2013 and beyond.¹⁶

Absent proper planning or updating outdated documents, an Illinois estate tax may be due on the first spouse’s death, even if no federal estate tax is due. When an estate is paying estate tax at both the federal and state levels, federal law provides a deduction for state death taxes paid.¹⁷ Therefore, the amount of the federal estate tax depends, in part, on state estate taxes paid and involves a circular calculation. When an estate is only paying state level estate taxes and is not receiving the deduction at the federal level, the net effective state tax can be very high.

Figure 1



7. 26 U.S.C. § 2010(c)(4) (2013).

8. 26 U.S.C. § 2010(c)(5)(A) (2013).

9. 26 U.S.C. § 1(h) (2013).

10. *Id.*

11. 26 U.S.C. § 1411(a) (2013).

12. 26 U.S.C. § 1411(b) (2013).

13. 26 U.S.C. § 1014(a) (2013).

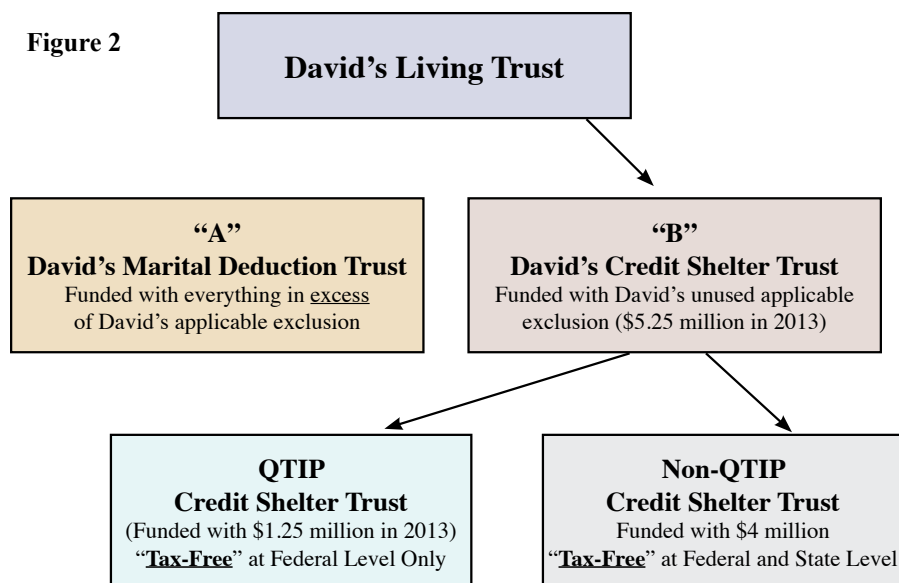
14. 26 U.S.C. §§ 2035, 2036, 2038, 2041 (2013).

15. Sharon L. Klein, *State Law Current Developments: Income Tax Impact on Trusts and Estates, Decanting, Estate Tax Problems When the State Exemption is Less Than the Federal Estate Tax Exemption*, Ch. 16, Thirty-Eighth Annual Notre Dame Tax & Estate Planning Institute, South Bend, IN, Sept. 21, 2012.

16. 35 ILCS 405/2(b)(iii) (2013).

17. 26 U.S.C. § 2058(a) (2013).

Figure 2



Assume David, an Illinois resident, died in 2013 with a \$5.25 million estate. David's credit shelter trust would be fully funded with the federal exemption of \$5.25 million, but only \$4 million would pass estate tax free at the state level. The balance of \$1.25 million is subject to a graduated estate tax to the state of Illinois, translating to an estate tax to the state of Illinois of \$357,143.¹⁸

To prevent such tax, the trustee may divide the credit shelter trust into two trusts: (1) one trust with \$4 million, which is exempt at the federal and state level; and (2) a second trust with \$1.25 million, which is exempt at the federal level but includes a state qualified terminable interest property ("QTIP") provision.

The QTIP provision defers Illinois taxation on the amount in excess of the state exemption (\$1.25 million in 2013) until the survivor dies.¹⁹ The QTIP provision defers the payment of \$357,143 in taxes to the state of Illinois.²⁰ If the surviving spouse uses all of the money in the QTIP sub-trust prior to the death of the surviving spouse, or moves to another state, no estate tax is owed to the state of Illinois. See Figure 2.

There are states, such as New Jersey and New York, that do not permit a state QTIP provision, and electing the full federal exemption in the credit shelter trust may trigger enormous state estate tax.²¹

In addition to the steep estate tax rates, Illinois also imposes a 5 percent income tax, including on capital gains.²² Further, in the states that have decoupled from the federal estate tax exemption, like Illinois, there is no state portability.

The dilemma

Because the estate tax exemption is so high (\$5.34 million in 2014), the demand to protect against federal estate tax has lessened to perhaps 1 percent of the population.²³ However, the estate tax levied by various states with differing exemptions must be considered.

The traditional A/B trust remains a useful choice to minimize potential estate tax, both federal and state, and to preserve the first decedent's \$5,340,000 generation-skipping tax exemption, which portability does not cover. In addition, the credit shelter trust is useful for non-tax reasons, including: (1) protecting family assets; (2) allowing "spray" provisions to various family members; (3) allowing flexibility of distributions; and (4) ensuring certainty of disposition to specific persons.

However, for married couples with less than \$10.68 million in assets in 2014, the increased capital gains tax rates coupled with the 3.8 percent Medicare tax pose new tax threats that demand closer analysis and proactive management to minimize potential income tax consequences.

Mitigating income taxes

Outright distribution. Some have contemplated an outright distribution directly to the surviving spouse. On the first spouse's death, the assets would receive a step-up in basis, and on the surviving spouse's death, the assets would receive a second step-up, thereby avoiding the income tax threat. The advantage of this solution is its simplicity. The dis-

advantages include:

- portability of the deceased spouse's unused applicable exclusion amount may terminate if the surviving spouse remarries, because portability is only available for the last decedent spouse;
- an outright distribution is inappropriate for an elderly, frail, easily influenced surviving spouse;
- assets left outright and free of trust are subject to the survivor's creditors and would pass according to the surviving spouse's estate plan, which may be inconsistent with the predeceased spouse's intentions;
- portability is fixed at \$5 million and is not adjusted for inflation. If the decedent's taxable estate plus the survivor's exceeds \$10.34 million in 2014 (\$5 million portability plus \$5.34 million exemption), the excess over the exemption is taxed at a maximum tax rate of 40 percent at the federal level; and
- additional estate taxes may be imposed at the state level, since portability is not available.

Fully fund the marital deduction trust. Another option is to include a formula that fully funds the marital deduction trust. Upon the first spouse's death, all assets would be allocated to a marital deduction trust.

This option is advantageous in that it secures a basis adjustment to the fair market value at the survivor's death. If the combined estates of David and Diane are less than the estate tax exemption at the state level (\$4 million for Illinois residents) and are not expected to increase, this is a viable tax option. The fully funded marital deduction trust could include the option allowing the surviving spouse to disclaim her interest in that trust, forcing the allocation to the traditional credit shelter trust.²⁴ See Figure 3.

Often in first marriages, a surviving

18. 26 U.S.C. § 2011(b)(1) (2013); 35 ILCS 405/2(b) (2013). At the time of publication, the 2014 Illinois estate tax calculation was not yet made available.

19. 35 ILCS 405/2(b-1) (2013).

20. See Illinois Attorney General, 2013 *Decedent Estate Tax Calculator*, <http://illinoisattorneygeneral.gov/publications/calculator/2013calc/calculator2013.html> (accessed June 4, 2013).

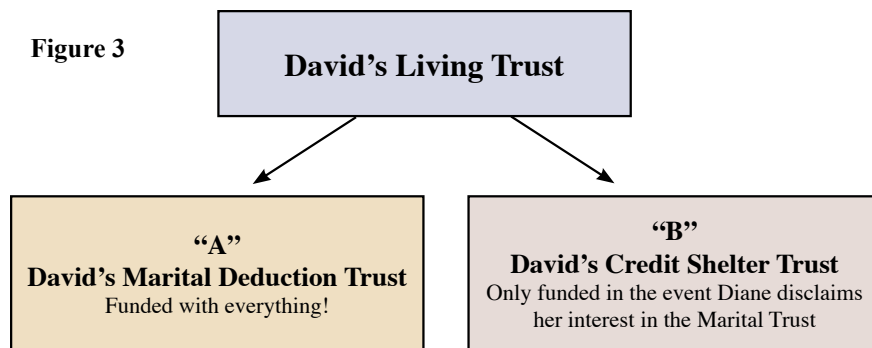
21. See Bruce Steiner, *The General Power of Appointment Trust is Back*, 2060 LISI Estate Planning Newsletter (2013).

22. 35 ILCS 5/201 (2013).

23. Robert Avery, Daniel Grodzicki & Kevin Moore, *Estate vs. Capital Gains Taxation: An Evaluation of Prospective Policies for Taxing Wealth at the Time of Death*, The Federal Reserve Board (April 2013), available at <http://www.c.federalreserve.gov/pubs/feds/2013/201328/201328pap.pdf>.

24. 26 U.S.C. § 2518 (2013); Rev. Proc. 2001-38 I.R.B.

Figure 3



spouse will be given a limited power of appointment to allocate the credit shelter trust among the descendants of the grantor. This power is forfeited if the surviving spouse disclaims her marital deduction trust to a credit shelter trust.²⁵ This is because a disclaimed interest must pass without any direction by the disclaimant.²⁶ Thus, a disclaimer of the marital deduction trust fixes the allocation to the next generation based on the predecessor spouse's credit shelter trust.

The primary caution with this planning technique is that it can be hard to predict with certainty that the combined gross estates will be valued less than the federal estate or state estate tax exemptions. For young couples whose future earnings are unknown, this may not be the appropriate plan. However, for a couple nearing retirement with relatively fixed asset values, this may be an appropriate tax fit.

There are many other cautions associated with fully funding the marital deduction trust, including the following:

- a potential federal estate tax is exposed for clients with assets in excess of the federal exemption of \$5 million, indexed for inflation;
- a potential state estate tax is exposed for clients who reside in states that have decoupled from the federal legislation – which could be a surprisingly large tax;
- it abandons the predeceased spouse's GST exemption;
- the IRS Code requires the marital deduction trust must be solely for the benefit of the surviving spouse (descendants cannot be beneficiaries);
- if there is a depressed period like 2008 and 2009 upon the survivor's death, the fair market value could produce a "step down" in basis, creating income tax liabilities when later sold;²⁷
- if disclaimer is a choice, the election must be made within nine months of the predecessor's death, which may be too

soon to make a thorough evaluation;²⁸

- the IRS Code requires the income to be distributed to the surviving spouse, which means the creditors of a surviving spouse might reach the income; and

- some survivors may simply not like the provisions in the credit shelter trust and refuse to disclaim in spite of the tax issues.

A better solution

To allow for increased flexibility, adding specific language to the traditional A/B trust to address the income tax concerns related to appreciated assets may be the best fit.²⁹ While this structure is more complicated than a simple outright distribution to a surviving spouse or to fully fund a marital deduction trust, the advantages are as follows:

- it preserves the federal estate tax exemption upon the first spouse's death;
- it preserves the state estate tax exemption upon the first spouse's death;
- it preserves the GST exemption amount upon the first spouse's death;
- the credit shelter trust offers asset protection for the surviving spouse and descendants, since distributions are often discretionary;
- it allows for a spray provision to descendants, heirs, charities, etc.;
- it preserves the potential for a double step-up in basis without running the risk of a step-down in basis; and
- it provides greater flexibility in allowing the surviving spouse to allocate assets in the credit shelter trust.³⁰

A/B trust: Avoiding capital gains/Medicare tax

To avoid the potential capital gains, Medicare, and state income tax in the credit shelter trust, a step-up in basis at the survivor's death is required. There could be substantial appreciation in the assets of the credit shelter trust between the date of the death of the first spouse

and the surviving spouse.

Code Section 1014(a) provides that a decedent has a basis adjustment to fair market value at death. It states: "The basis of property in the hands of a person acquiring the property from a decedent...shall, if not sold, exchanged, or otherwise disposed of, be...the fair market value of the property at the date of the decedent's death...."³¹

The challenge: how can we transmute the fair market value at the date of death of the first spouse to the fair market value at the date of death of the surviving spouse? And how, in a depressed economy, can we avoid a potential step down in basis at the surviving spouse's death? We want to enable our clients to get a double step-up in basis (but not a step-down) and at the same time minimize any potential federal or state estate tax consequences.

General power of appointment. A solution to this dilemma may be to give a special trustee (an independent, non-adverse trustee or protector) the power to grant the surviving spouse a general power of appointment over particular assets. If we do, Code Section 2041(a)(2) states those assets are included in the survivor's estate. If the assets are included in the surviving spouse's estate, a basis adjustment is realized.³²

Under Code Section 2041(b)(1), "the term 'general power of appointment' means a power which is exercisable in favor of the decedent, his estate, his creditors or the creditors of his estate...."³³ Thus, consider using the following credit shelter trust provisions.

- First, in the credit shelter trust of the predecessor spouse, the special trustee/protector is given the option to

25. 26 U.S.C. § 2518(b)(4) (2013).

26. See Christopher P. Cline, *Disclaimers—Federal Estate, Gift and Generation-Skipping Tax Considerations*, 848-2nd Tax Mgmt. (BNA) Estates, Gifts, and Trusts, at A-19 (2012).

27. 26 U.S.C. § 1014(a) (2013).

28. 26 U.S.C. § 2518(b)(2) (2013).

29. See Ed Morrow, *Ed Morrow & The Optimal Basis Increase Trust*, 2080 LISI Estate Planning Newsletter (2013).

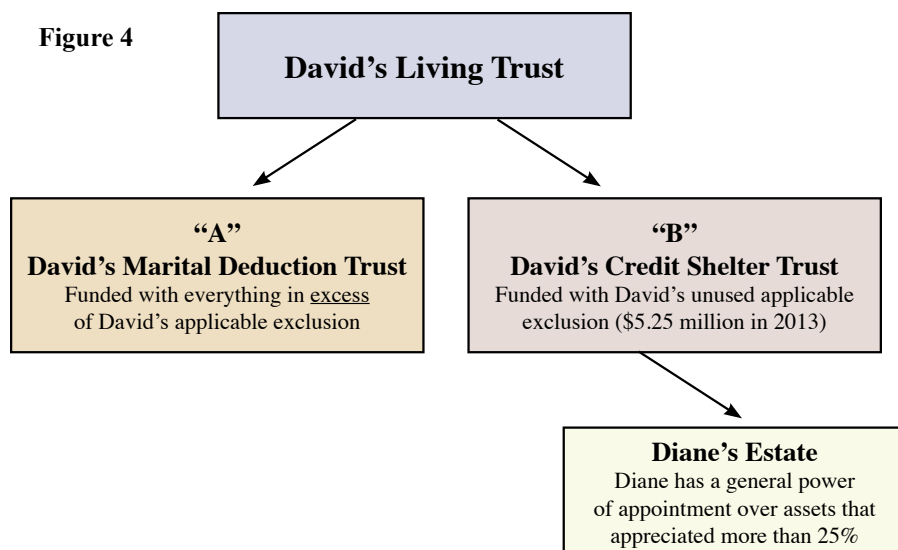
30. Specifically, the surviving spouse retains a limited power to allocate assets among descendants, heirs, and charities in the surviving spouse's discretion. Things change between the passing of the spouses. It may be appropriate to allocate more assets to a disabled grandchild or a child with limited means, and perhaps less to a child who has had substance abuse problems. The predeceased spouse could not know this.

31. 26 U.S.C. § 1014(a) (2013).

32. 26 U.S.C. §§ 1014(a), 1014(b)(9) (2013); see also Howard M. Zaritsky, *Revocable Inter Vivos Trust*, 860 Tax Mgmt. (BNA) Estates, Gifts, and Trusts, at A-63 (2010) (discussing the applicability of 1014(e) to certain joint trusts).

33. 26 U.S.C. § 2041(b)(1) (2013).

Figure 4



grant the survivor a testamentary general power of appointment exercisable by will in favor of the “creditors of the survivor’s estate.” This is a very narrow definition, but all that is necessary to activate the general power.

- Second, limit the general power of appointment pro rata over property with a basis less than a particular level – for example, the power of appointment only applies to assets valued at less than 75 percent of fair market value at the survivor’s date of death.

Can we so limit the power? IRS regulation 20.2041-1(b)(3) states as follows: “If a power of appointment exists as to part of an entire group of assets or only over a limited interest in property, Section 2041 applies only to such part or interest.”³⁴

Thus, the general power only applies to property that has a fair market value exceeding its basis by 25 percent or more as of the date of the survivor’s death. So, David’s trust would be structured as a traditional A/B trust. A special trustee would have the option to grant Diane a general power of appointment over assets in the credit shelter trust that appreciated more than 25 percent. This would cause those assets to be included in Diane’s estate and receive a step-up in basis. See Figure 4.

With respect to state tax where a QTIP provision is permissible in the credit shelter trust, the general power could apply only to the portion of the trust that makes the state QTIP election. Recall that the QTIP property remains subject to state estate taxes to the survivor with or without the general power. If the potential gain was significant, how-

ever, the general power could also apply to the non-QTIP portion.

To assure the amount subject to the power does not trigger federal estate tax to the survivor, the trust could provide that the power is not applicable, nor exercisable, nor effective in excess of the surviving spouse’s applicable exclusion amount.

In addition, because the special trustee has the option to grant the surviving spouse the general power, we can avoid issues related to whether the surviving spouse should disclaim her testamentary power of appointment.³⁵ A testamentary power of appointment must be disclaimed within nine months of the date of creation of the power.³⁶

Thus, if the surviving spouse was granted this power directly, arguably the spouse may have to disclaim within nine months after the predecessor spouse dies. She could, however, survive many years after the predecessor spouse. To provide more flexibility to the survivor, a special trustee may be empowered to grant the general power to the survivor.

Sample language. To achieve a step-up in basis for appreciated property in the credit shelter trust, consider using the following language. Please note that for residents of jurisdictions that have not decoupled (or have decoupled but do not allow for a QTIP election at the state level), the language should be revised accordingly.

Notwithstanding any provision inconsistent herewith, the special trustee is authorized and empowered in his or her absolute discretion at any time to grant the Grantor’s spouse a testamentary general power to appoint to creditors of her estate by will the following property: property

determined pro rata, in either the QTIP or non-QTIP portion of the Credit Shelter Trust, that has a tax basis of less than 75% of its finally determined fair market value at the date of death of Grantor’s spouse. Provided, however, this general power to appoint shall not be applicable, nor effective, nor shall it be exercised over any property that causes the Grantor’s spouse to exceed her federal or state applicable exclusion amount, nor in any manner that causes or increases federal or state estate taxes to the estate of Grantor’s spouse.³⁷

Conclusion

For clients with combined estates that are reasonably certain to remain under the federal and state exemptions, a fully funded marital deduction trust may be the appropriate fit. In other instances, it seems wise to continue with the traditional A/B trust format if clients are expected to have combined net worth in excess of a certain amount that threatens federal or state estate taxes.

However, as the foregoing examination reveals, the “bad” and “ugly” provisions of the new law demand greater attention to income tax considerations than in the past. To avoid increased income tax while preserving the A/B trust structure, it may be best to add language to the credit shelter trust allowing a special trustee/protector the power to grant the surviving spouse a general power of appointment over trust assets that appreciate by more than 25 percent. ■

34. 26 C.F.R. § 20.2041-1(b)(3) (2013); see also I.R.S. Priv. Ltr. Rul. 200403094 (Jan. 16, 2004).

35. 26 C.F.R. § 25.2518-2(c)(3) (2013) (providing that “[w]ith respect to transfers made by a decedent at death, or transfers that become irrevocable at death, the transfer creating the interest occurs on the date of the decedent’s death”); 26 C.F.R. § 20.2041-3(d)(6) (2013) (providing that “[a] disclaimer or renunciation of a general power of appointment...is not considered to be the release of the power if the disclaimer or renunciation is a qualified disclaimer”); see also 755 ILCS 5/2-7 (2013).

36. 26 C.F.R. § 25.2518-2(c)(3) (2013) (stating that “...in the case of a general power of appointment, the holder of the power has a 9 month period after the creation of the power in which to disclaim”); see also Christopher P. Cline, *Disclaimers – Federal Estate, Gift and Generation-Skipping Tax Considerations*, 848-2nd Tax Mgmt. (BNA) Estates, Gifts, and Trusts, at A-11 (2012); Christopher P. Cline, *Powers of Appointment – Estate, Gift, and Income Tax Considerations*, 825-3rd Tax Mgmt. (BNA) Estates, Gifts, and Trusts, at A-37 (2012).

37. Turney P. Berry and Paul S. Lee posit that in CA, NY, and other high income tax states, it may be beneficial to achieve the step-up in basis and avoid paying more expensive capital gains, Medicare, and state income tax, even if it means paying a Federal estate tax. Specifically, even for a \$20 million estate, it may be less expensive to pay Federal estate taxes than state income tax, capital gains tax, and Medicare tax. Turney P. Berry & Paul S. Lee, *Retaining, Obtaining, and Sustaining Basis*, Ch.6, Thirty Ninth Annual Notre Dame Tax & Estate Planning Institute, South Bend, IN, Oct. 17, 2013.

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Judicial Independence: Two Westerns and a Promise

Like the mythic justice-seekers of the American frontier, judges are sometimes obliged to make a lonely stand against the majority.

While guest speaking at the local law school's constitutional law class, Judge Justice addressed several controversial court cases. One student asked a provocative question about judicial independence. "In most cases at least one-half the litigants are upset by the court's ruling, but sometimes the majority of the community is outraged. Is a judge's decision influenced by the probable public reaction? Does it matter whether those judges are elected or appointed?"

Judge Justice gave the pat answer that judges, whether elected or appointed, must decide based on the facts and law, without fear or favor, regardless of public opinion. But he went on to concede that judges are only human, and the consequences of doing the right thing can be much greater than commonly understood.

In explaining the response, Judge Justice talked about two westerns and a promise. The movies are *The Ox-Bow Incident* and *High Noon*.

Sometimes upholding the law subjects a judge to community scorn and even threats. While honoring the judicial oath may not be heroic, it can be courageous.

The movies

In the *Ox-Bow Incident*, a popular local rancher is found shot and his cattle stolen. With the sheriff unavailable, locals form a posse to bring those responsible to justice.

The posse finds three cowboys new to the area near the Ox-Bow valley. The strangers have had recent dealings with the attacked rancher and have some of his cattle (they claim they bought from him).

The posse had to decide what to do. Should they hang the cowboys on the spot or take them back for trial? A minority of the large posse opposed hanging but they were unable or unwilling to stand against the angry majority. As a result, three innocent people were victims of the lynch mob.

As Tocqueville noted as early as the 1840s,

"there is hardly a political question in the United States which does not sooner or later turn into a judicial question." Under the Constitution, judges must decide the hard cases. They cannot rule based on polls or who protests the loudest.

Criticism of judges may not be fair. Without complete or accurate information, public opinion about controversial cases can be stirred by social media, talk radio, television, other branches of government, and special interest groups. Any case can go viral and rational discussion can quickly yield to personal attacks on the judge and judicial system.

In *High Noon*, a popular marshal, Will Kane, is preparing to retire and move out of town with his new bride. He learns that a murderer he had stopped from terrorizing the town has been released and was returning on the noon train to rejoin his gang, kill Kane, and get vengeance on the town.

Instead of supporting the marshal, the community urges him to leave town, hoping appeasement avoids trouble. Kane starts to leave but returns to confront the gang, upholding his oath to enforce the law. He seeks public help to fight the gang but the townspeople, including many friends and supporters, refuse to come to his aid. Outnumbered and rejected by those he is defending, Kane faces the gang.

In both movies, the justice-seekers stood apart from the majority. Furthering justice can be a lonely, even solitary, act of conscience and, for judges, an exercise in living up to their judicial oath.

The promise

Judges volunteer for the office, agreeing to uphold the law even when they do not like or agree with it, and necessarily accepting the responsibility of making lonely, unpopular decisions. They must accept the consequences, including public condemnation or even retaliation. Sadly, the judge's need for public support is frequently met with silence. Judicial ethics may even prevent the judge from pub-

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licly defending the decision.

Judges make a promise: “I do solemnly swear (or affirm), that I will support the constitution of the United States and the constitution of the state of Illinois, and that I will faithfully discharge the duties of (name of position) judge, to the best of my ability.”

Most judicial decisions resolve disputes between litigants and receive little note. But sometimes upholding the law subjects a judge to community scorn and even threats. While honoring the judicial oath may not be heroic, it can be courageous.

Examples are not hard to find. Federal Judge Frank Johnson’s civil rights rulings (along with those of many other judges) helped end the era of segregation in the south. He and his family received hate mail and death threats, a cross was burned in his yard, and his mother’s house was bombed. Some in the legislative branch threatened impeachment

and restriction on judicial jurisdiction and pay. Even though life tenure ultimately protected federal judges’ employment, upholding the law cost them their friends, community standing, peace, and security.

Elected state court judges face the additional threat of loss of employment. Three Iowa Supreme Court justices were defeated for retention in retaliation for joining a unanimous opinion on marriage equality under Iowa law. Incumbent judges in Florida and other states have faced aggressive efforts by special interest groups to unseat them in retention elections. The legislatures in some states have even attempted forms of court packing or reduction of judicial funding and compensation in retaliation for unpopular decisions.

Of course, not all distrust of the judicial system can be chalked up to tyranny of the majority. When the system of electing or retaining judges per-

mits excessive campaign contributions and expenditures, encourages campaign promises, and allows politicizing of the judiciary, public suspicion of judicial decisions is hardly surprising. If a judge exercises unrestrained ideological preference through the guise of law, it invites disrespect. Cases of first impression, expanding or creating legal rights, must adequately show the legal authorities and legal reasoning relied upon. Split decisions in such cases, with accusatory conflicting opinions, damage the public’s expectation that following ascertainable law triumphed over other possible motivations.

Ultimately, judges must wrestle with their conscience to determine whether they have been faithful to their oath or yielded to ideology or the fear of retaliation by the public, special interests, or other branches of government. Whether elected or appointed for life, the judge’s promise is the same. ■

COLLATERAL CONSEQUENCE | Continued from 79

demonstrate, lawyers must have a working knowledge of the consequences that will result from their client’s plea to provide constitutionally effective counsel. Even if the failure to advise a client of a certain consequence does not constitute ineffective assistance of counsel under *Padilla*, professional standards require advocates to have knowledge of the consequences of clients’ pleas.²⁹

While the number of consequences flowing from a conviction may seem overwhelming, organizations such as the ABA and NLADA provide guidance. These standards and guides are particularly relevant because *Padilla* and lower court decisions applying *Padilla* cite to ABA and NLADA standards as relevant in determining whether counsel must constitutionally advise a defendant of a particular consequence.

The ABA standards provide that “[t]o the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.”³⁰ In addition to its standards, the ABA maintains a very useful database

containing collateral consequences by state which can be found at <http://www.abacollateralconsequences.org/>.³¹ After selecting the appropriate jurisdiction, the practitioner can search by consequence or triggering offense category.

NLADA also publishes its standards for attorney performance, which can be found at <http://www.mynlada.org/defender/DOJ/standardsv2/welcome.html>.³² In addition to other standards, when entering a plea the NLADA standards provide that “[c]ounsel should be fully aware, and ensure the client is fully aware of...collateral consequences of conviction, e.g., deportation, civil disabilities, and enhanced sentences for future convictions.”³³ The standard further provides that counsel should advise the client of potential “asset forfeiture,” and “restrictions on, loss of, or other potential consequences affecting the client’s driver’s or professional license.”³⁴

Conclusion

Padilla established that constitutionally effective practitioners must advise clients of the deportation consequences of a guilty plea where these are clear. Where those consequences are not clear,

practitioners must advise the client there is a risk of adverse immigration consequences.

Whether *Padilla* extends to consequences other than deportation, and whether those consequences are characterized as collateral or direct, is unclear. While Illinois has only extended the *Padilla* analysis to civil commitment, other courts have found counsel must advise their clients of other consequences such as parole ineligibility and sex offender registration requirements. In order to provide constitutionally effective counsel or evaluate post-conviction relief claims in light of *Padilla*, counsel should reference the foregoing opinions and professional standards. ■

29. See, e.g., Am. Bar Ass’n, Criminal Justice Section Standards – Pleas of Guilty, available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk.html (last visited Dec. 2, 2013).

30. *Id.*

31. Am. Bar Ass’n, National Inventory of Collateral Consequences, available at <http://www.abacollateralconsequences.org/> (last visited Dec. 2, 2013).

32. Nat’l Legal Aid & Defender Ass’n, Standards for Attorney Performance, available at <http://www.mynlada.org/defender/DOJ/standardsv2/welcome.html> (last visited Dec. 2, 2013).

33. *Id.*

34. *Id.*



Put Not Your Trust in Nigerian Princes

A recent iteration of the Nigerian email scam teaches lawyers that 1) if it sounds too good to be true it almost certainly is and 2) doing business with clients requires careful attention to ethics rules.

*Your rich uncle died
And left you all his M---
The Electric Company¹*

The story you are about to read is true – but the underlying scam was pure fiction.

Robert Wright Jr., a general practitioner in Des Moines, Iowa, was representing Floyd Lee Madison in a criminal case when Madison told him some remarkable news. Madison was the beneficiary of an \$18.8 million bequest from a long-lost cousin in Nigeria, which would be paid as soon as Madison paid taxes of \$177,600. He asked Wright for help in securing the transfer of the funds from Nigeria, and Wright agreed to do so for a fee of 10 percent of the funds collected.

Wright took an active role in helping Madison obtain the money to pay the taxes. He approached Danny Wayne Rynearson, whom he was representing in a felony criminal case, to see if he would be interested in lending Madison some money. Wright

arranged for Rynearson and his wife to meet with Madison in Wright's office, and the Rynearsons agreed to lend Madison \$12,000. In return, the Rynearsons were to receive \$50,000 once Madison received his inheritance. Wright prepared a letter confirming this agreement. Later on, in response to an urgent plea from Wright, the Rynearsons agreed to

loan an additional \$12,500.

Another client, Linda Putz, was about to receive approximately \$25,000 from a workers compensation settlement. Wright told her about Madison, who needed to borrow money to pay Nigerian authorities for an "anti-terrorism certificate." Putz agreed to loan Madison \$12,500, for which she was to be repaid \$50,000 when Madison received

his inheritance. Wright drafted the loan agreement. Ultimately, Putz agreed to pay an additional \$12,500 in exchange for Madison's promise to pay her \$100,000 upon receipt of his inheritance. Wright also solicited and received loans for Madison from three former clients totaling \$187,000.

After all of the funds were transferred, Wright and Madison received word that the inheritance – now in the form of U.S. currency – had been shipped in two trunks to Spain and were now in the possession of a "diplomat" in Madrid. The diplomat's email to Madison instructed him to come to Madrid to pick up the trunks – after paying "administrative Logistic charges" of €25,600. The diplomat wrote that he didn't "know of any Bank here" and so he suggested bringing the Euros "in your baggage, have it hide in your trouser's and have the trouser fold careful package in your luggage." Madison did indeed travel to Madrid, where he saw, but for some reason was not able to collect, the trunks.

To date, Madison has not received his inheritance, and none of the loans made to him by Wright's clients or former clients have been repaid. In December 2013, the Iowa Supreme Court suspended Wright's law license for one year.²

Maybe the trunk isn't in the mail

Most of the commentary about the Wright case

1. *The Electric Company* was a Children's Television Workshop show for "graduates" of *Sesame Street* that aired from 1971 to 1977. This annoyingly earwormish tune was part of a skit involving an unfortunately truncated singing telegram, forcing the recipient to guess what the bequest might be, knowing only that it begins with the letter "M." Marshmallows? Mermaids? Monsters? As I recall, the word "Money" was never suggested. This, kids, is what passed for after-school entertainment in the Dark Ages.

2. *Iowa Supreme Court Attorney Disciplinary Board v. Robert Allan Wright, Jr.*, 13-0780, December 6, 2013 (hereafter, "Opinion"). The Iowa Supreme Court's opinion is worth reading, both for the additional details of the fraud and for Justice Hecht's even-handed, empathetic treatment of truly incredible facts. The stoic refusal to be sarcastic or take a cheap shot is one of the best things about Iowans and Iowa. http://www.iowacourts.gov/About_the_Courts/Supreme_Court/Supreme_Court_Opinions/Recent_Opinions/20131206/13-0780.pdf

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As the Iowa court noted, lawyers who engage in business transactions with their clients "[skate] on thin ice and will receive little sympathy...if the ice should break."

has focused on the fact that an experienced lawyer – Wright passed the bar in 1981 – fell for the old “Nigerian inheritance” scam.³ It does seem incredible that he bought into the story so completely – and yet the Iowa disciplinary board was convinced that he did: “Wright clearly believed in the legitimacy of Madison’s inheritance... [H]e appears to have honestly believed – and continues to believe – that one day a trunk full of...one hundred dollar bills is going to appear upon his office doorstep.”⁴

Wright did, apparently, make some efforts to confirm the story. He received a will and other documents, and spoke with persons identifying themselves as representatives of the Central Bank of Nigeria, an adviser to the President of Nigeria, the Nigerian lawyer who witnessed the will, and an English lawyer who had traveled to Nigeria and investigated the legitimacy of the inheritance.

But, as the court noted, Wright did not verify that the documents or the callers were what and who they claimed to be, and a simple Internet search would have turned up evidence that a scam was afoot. The Court held that Wright’s failure “to make a competent analysis of the bona fides of Madison’s Nigerian legal matter” constituted a violation of Rule 1.1 – the duty to provide competent representation to the client.⁵

The Wright case is a good reminder to be vigilant about scams, and to discern glitter from gold when evaluating legal matters.⁶ As the court pointed out, Wright is far from the only lawyer to be taken in by “a deception with ostensible Nigerian connections.”⁷ Taking steps to avoid being scammed is not only a sensible precaution but also an ethical obligation.

Unpacking the conflicts of interest rule

But there is another lesson in the Wright case, and it is applicable even to sophisticated lawyers who routinely delete emails that purport to be from Nigerian royalty and/or involve far-fetched tales of foreign intrigue and desperate pleas for legal assistance.⁸ Wright stands as a stark reminder of the perils of doing business with clients and the importance of compliance with the Rules of Professional Conduct – whether the transaction takes place in Nigeria or Naperville.

Often overlooked in discussion of the case is the fact that Wright was also

found to be in violation of Rule 1.8(a) regarding conflicts of interest with current clients. The court determined that Wright’s 10 percent contingent interest in Madison’s inheritance constituted a pecuniary interest adverse to his clients Rynearson and Putz. Iowa’s Rule 1.8(a) forbids knowingly taking such an interest unless

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction;⁹ and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.

Wright failed to satisfy *any* of these conditions. He did not disclose his contingent fee interest to Rynearson and Putz – in writing or otherwise. He did not advise them to seek counsel from an independent lawyer regarding the loans he solicited from them. And he failed to obtain their informed written consent to the fact that he had a contingent fee interest in the inheritance and was not representing their interests in the loan transactions.

The court also found that Wright’s conduct violated Rule 8.4(c), which states that it is professional misconduct for lawyers to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation: “The commission found Wright’s failure to disclose to Rynearson and Putz: (1) the substantial risks inherent in the loans to Madison in furtherance of the risky Nigerian transaction, (2) that he did not intend to protect the interests of Rynearson and Putz in the

loan transactions, and (3) his contingent fee interest in Madison’s inheritance claim constituted deceit and resulted in a violation of rule 32.8.4(c). We agree.”¹⁰

As the Iowa court noted, lawyers who engage in business transactions with their clients “[skate] on thin ice and will receive little sympathy...if the ice should break.”¹¹ Lawyers venturing out on that perilous pond should first consider whether the risk is worth taking at all, and proceed with caution and scrupulous attention to the requirements of the Rules of Professional Conduct. ■

3. See, e.g., David Lat, *Lawyer falls for Nigerian Inheritance Scam, Gets Suspended*, Above the Law, March 6, 2013: <http://abovethelaw.com/2013/12/lawyer-falls-for-nigerian-inheritance-scam-gets-suspended/>

4. Opinion at 7-8.

5. Rule 1.1 of the Illinois Rules of Professional Conduct, like the Iowa rule, states that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

6. For a helpful primer on scam-spotting, see Robert S. Held, “Note to law firms: Beware of the Nigerian scam,” www.illinoislawyernow.com, Summer 2012 at 17: <http://www.isba.org/sites/default/files/publications/ILNQ%20Summer%202012.pdf>.

7. Opinion at 9, and see, e.g., Alan Farnham, *Lawyers Scammed? Now There’s a Switch*, ABCNews.com, August 7, 2012 <http://abcnews.go.com/Business/lawyers-scammed-29-million/story?id=16946726>

8. For an amusing analysis of the “fiction writing” that underlies these email scams, see Douglas Cruickshank, *I crave your distinguished indulgence (and all your cash)*, Salon.com, August 7, 2001: <http://www.salon.com/2001/08/07/419scams/>. “I’ve fallen... not for the scam part, but for the writing, the plots... the characters, the earnest, alluring evocations of dark deeds and urgent needs, Lebanese mistresses, governments spun out of control...and all manner of other imaginative details all delivered in a prose style that is as awkward and archaic as it is enchanting. It’s some of the most entertaining short fiction around these days.”

9. Iowa’s 1.8(a)(2) differs slightly from Illinois’ Rule 1.8(a)(2), which requires that the client be “informed in writing that the client may seek the advice of independent legal counsel on the transaction, and is given a reasonable opportunity to do so.”

10. Opinion at 12-13.

11. Opinion at 11, citing 16 Gregory C. Sisk & Mark S. Cady, Iowa Practice Series: Lawyer and Judicial Ethics § 5.8(c), at 373 (2013).

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In his back-to-basics presentation on estate planning, Chicago lawyer Samuel M. Dotzler cautioned attendees to account for the reality that important assets often pass outside probate. "A will deals with any asset in your sole, individual name at the time of your death." But joint bank accounts, for example, don't pass under the will. "They pass by law to the surviving account owner," he said.

Insurance and retirement-plan proceeds also pass outside probate, according to Dotzler, who was a member of the trusts and estates group of Katten Muchin Rosenman LLP in Chicago before opening his own practice. For many clients, assets like these are a big part of their estate, he said. "And they...pass pursuant to the beneficiary designation you spell out when you first take out the policy or account."

Lack of planning for this reality can produce profoundly disappointing results for clients, Dotzler said. "[Say] the client dies leaving life insurance, and it turns out the policy was bought before he was married and he named his brother as beneficiary. Suddenly his wife is missing out on 80 percent of the inheritance."

It's thus important to consider non-testamentary elements of the estate in your planning. For many clients, a useful tool for managing these assets is a "living" or "revocable" trust, Dotzler said. "It's an entity that can own assets in and of itself. It has the same social security number as the person who signed it. But we can now start naming the trust as the beneficiary of assets," he said.

"So we can go to Fidelity or Charles Schwab and say we need a beneficiary change form so we can name the trust or trustee as beneficiary of those retirement plans, life insurance policies, and so on," Dotzler said. "Instead of going to the previously named beneficiaries, [these assets will go] into the trust and the trustee will distribute them in a way that's consistent with the entire estate plan."

The trustee of a revocable trust can be the grantor, with perhaps the spouse or children named as successor trustees. This allows the grantor to continue to exert control over the assets.

Having a revocable trust in place is especially useful if the grantor later loses decision-making capacity, Dotzler said. Say you're the grantor and "you're in a car accident, in a coma, or incapacitated for whatever reason, Alzheimer's, whatever that may be, and you lose the ability to manage your own assets. Instead of having to open up a time-consuming and costly disabled adult guardianship estate if you can no longer manage your affairs, the trustee of your revocable trust [or the successor trustee if the grantor is the trustee] can manage those assets without having to report to a court," Dotzler said.

If the trust is properly drafted, these changes can be made "without having to open up a disabled adult's estate, to manage your assets for your health-care or living expenses. So it gives a lot of flexibility both during [the grantor's] lifetime and upon death," Dotzler said.

An important consideration that arises when you create a living trust is choosing a trustee – or successor trustee, if the grantor is trustee – whom your client trusts to serve in this role. "When you're naming executors, trustees, guardians of your children, these are some of the most difficult decisions your clients are going to struggle with," Dotzler said. "They are the trustee holding the assets for the benefit of the children, for the benefit for whom-ever they've named beneficiaries. So it's important that you advise the client about the importance of the decision and that they spend some real time thinking about that and not necessarily coming up with the first name that comes to mind."

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