

Bench & Bar

The newsletter of the Illinois State Bar Association's Bench & Bar Section

Leadership, U.S. Presidents, & the University of Illinois College of Law

BY JUDGE DEBRA WALKER AND ANDREA FISCHER

The University of Illinois College of Law recently launched The Leadership Project to develop leadership skills in professionals in the legal field. The project is taking a four-pronged approach: Classroom experiences for current U of I College of Law students, leadership lecture series, book discussions, and leadership seminars. Successful completion of The Leadership Project will provide students a certificate of completion. Greg Miarecki,

the project director, shared that this program's aim is to bridge the gap between the typical legal education and real-world leadership acumen that employers crave in new lawyers. But, programming is not limited to law students. The University of Illinois College of Law held a June 9, 2021, CLE as part of its Leadership Project. The online event was attended by over 200 alumni to discuss Doris Kearns Goodwin's

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Illinois Supreme Court Sinks the 'Test the Waters' Doctrine

BY EDWARD CASMERE

The Illinois Supreme Court has answered the question of whether the "test the waters" doctrine is a valid basis to deny a party's motion for substitution of judge under section 2-1001 (a)(2) of the Code of Civil Procedure—it is not. After choosing not to address the question in 2015, the Illinois high court recently determined that the doctrine is incompatible with the plain language of the statute and cannot be used to justify denying a motion for substitution.

See *Palos Community Hospital v. Humana Ins. Co., Inc.*, 2021 IL 126008. The Illinois Supreme Court reminded litigants, however, that there is no safe harbor for would-be judge shopping since trial courts have other tools to "protect the integrity of the court." *Id.* at ¶ 35. In fact, while the Court may have sunk the test the waters doctrine, it floated a reminder that trial courts have broad and sweeping authority to make any orders necessary to prevent abuse, avoid

undue delays, and to otherwise control their dockets and protect against gamesmanship and manipulation. *Id.*

Under 735 ILCS 5/2-1001(2), a party is entitled to one substitution of judge without cause as a matter of right provided the motion is properly made and timely exercised. 735 ILCS 5/2-1001(a)(2). Such an application for substitution of judge is timely if it "is presented before trial or

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Leadership in Turbulent Times.

The panel consisted of Judge Debra Walker, Lee Reichert, and Ajay Shah. All three panelists graduated from the U of I College of Law. Judge Walker has served in the Cook County Domestic Relations Division for more than 12 years. She has served as president or as chair of a plethora of organizations including Women's Bar Association of Illinois, Illinois Supreme Court Commission on Professionalism, Illinois Bar Foundation, and Illinois Judges Foundation. She is an active alumna of the College of Law, mentoring several law students each year. Lee Reichert works as the chief legal & government affairs officer for MolsonCoors. He spent about 20 years in private practice and has been in-house counsel for about 10 years. Ajay Shah has been the CEO of Globetrotters Engineering Corporation for almost four years. Shah also serves on the Illinois Supreme Court Committee on Character and Fitness. Greg Miarecki moderated the panel. He serves as the executive assistant dean of career planning at the U of I College of Law. Before becoming dean, he was a partner at Winston & Strawn LLP.

While the general topic of this panel was leadership, discussions were centered around six key leadership traits outlined in *Leadership in Turbulent Times*. Dean Miarecki began each subtopic by detailing Goodwin's analysis on how successfully, or unsuccessfully, Presidents Theodore Roosevelt, Franklin D. Roosevelt, Lyndon B. Johnson, and Abraham Lincoln displayed the six key leadership traits. The panelists then added their own experience with how to best embody these leadership traits in today's legal environment.

The six key leadership traits were:

1. Keep the focus on your teammates or your colleagues;
2. Set the vision and tone, and make it appealing to the team;
3. Communicate well and often;
4. Provide a diverse, inclusive environment that encourages

debate and discussion;

5. Be as optimistic and persistent as possible; and
6. Project humility and be willing to change course when necessary.

Keep the Focus on Your Teammates or Your Colleagues

Judge Walker began this section by reminding the audience of the adage: "There is no 'I' in team." She shared that, especially during the pandemic, the court staff has been working overtime to serve the public. Showing gratitude has been an important part of Judge Walker's leadership style. She recommended for those who find expressing thanks more difficult, that they make it a regular part of their day. It can even be calendared to make sure colleagues are acknowledged.

Lee Reichert noted that the priorities for individuals are different in private practice versus in-house counsel. Lawyers in private practice are often focused on their own career advancement and less on the team's success, whereas lawyers serving as in-house counsel are focused on the success of the company and their team. Ajay Shah added that appreciation must be authentic to be effective. Knowing your colleagues and employees makes giving specific, genuine appreciation easier.

Set the Vision and Tone, and Make it Appealing to the Team

To begin discussions on this key trait, Dean Miarecki noted that *Leadership in Turbulent Times* portrayed FDR's ability to bring Democrats and Republicans together during the Great Depression and LBJ's explanations of The Great Society to create a national vision as a way that they both enhanced buy-in.

Judge Walker has spent time educating lawyers and judges on civility as part of her tenure on the Illinois Supreme Court Commission on Professionalism. She noted that civility is often created top-down, with the leaders needing to set that expectation so that others follow their example.

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Judge Walker shared that in proceedings like the ones in domestic relations, it is crucial that she establish civility at the very beginning. Specifically, she warmly greets the courtroom staff and attorneys and expects them to follow suit.

Reichert shared that while his company isn't saving the world, a shared vision is still necessary. Bringing people together over beer is something that his team can rally around. Further, since his company has been branching out from being just a beer company to now being a beverage company, the team is working to figure out how to successfully navigate this new space.

Shah remarked that it is a question of framing. He explained that almost all lawyers use framing in their practice by strategically presenting facts or the law from the perspective of their clients. Shah noted that setting vision when an issue comes up means framing it positively, but authentically in a way that inspires people. He explained that his company's focus on infrastructure is not on its face something in which everyone would be interested. But, when framed by saying that working on infrastructure means dealing with things that people use every day to live their lives, the topic is more interesting and the vision is more inspiring.

Communicate Well and Often

Dean Miarecki noted here that FDR's fireside chats told people what they can expect and what would be expected from them. This was effective communication. Alternatively, LBJ failed to communicate with the country how long and costly the Vietnam War would likely be.

Judge Walker uses different ways to communicate. In her role as a team lead judge, she holds meetings with the other judges on the team. Judge Walker emphasized that giving those judges the opportunity to be a part of the decision-making process helped them feel heard.

Reichert realized that, during the pandemic, he became a more proficient communicator. The remote nature of working required more intentional communication. He started holding weekly calls with team members, monthly "all hands" calls, and listening sessions. Reichert also pointed out that the storytelling theme

from *Leadership in Turbulent Times* is something he has used. He uses stories to make points or give lessons. Judge Walker noted that this also makes leaders more human and empathetic.

Shah pointed out that to have useful communication, leaders need to ask themselves certain questions, such as "Who is the audience?" and "What do we want to communicate?" He also mentioned that leaders need to be mindful of non-verbal communication. Stopping by a person's desk to ask a question is more organic than a phone call.

Provide a Diverse, Inclusive Environment that Encourages Debate and Discussion

Dean Miarecki remarked that both Lincoln and FDR surrounded themselves with people who had diversity of thought and opinion while LBJ ostracized dissenters to the Vietnam War. Judge Walker explained that diversity purely of thought is certainly beneficial; but diversity is also about differences in gender, race, sexual orientation, geography, age, religion, socioeconomic status, and more.

Judge Walker explained the difference between diversity and inclusion. Diversity is being invited to an event. Inclusion is being asked to dance at that event. In the legal field, diversity is hiring people with different identities and backgrounds. Inclusion is bringing those people into important discussions. Walker teaches judges and lawyers on the benefits of diversity and inclusion. She emphasized that input from diverse people is crucial, especially in marketing.

Reichert built upon this by sharing that his company sells to all different types of consumers, and they need to have people who know those groups and can give their insights. Reichert did note that while private practice seemed diverse, upon reflection it was not nearly as diverse as his current company. At Coors, the leadership team is made up of people with all different backgrounds and identities and having those perspectives allows for diversity of thought.

Shah pointed out that, as leaders, it is our responsibility to give people opportunities so they can rise to being "at the table." Dean

Miarecki noted that he had an experience with a leader who expounded upon the benefits of diversity and even made sure teams were diverse, but that this leader would not listen to those diverse people. This embracing of diversity but rejection of inclusion does not foster an environment of debate and discussion.

Be as Optimistic and Persistent as Possible

Judge Walker noted that being an optimistic leader goes along with setting the tone. Only optimistic people can truly be persistent because those who do not believe that they will achieve their goals will give up on them. She challenged the audience listening to the panel to explicitly state their personal and professional goals and then think about how they can persist in achieving those goals. In her own life, Judge Walker had to persist and stay optimistic about her goal to become a judge. Dealing with the politics of getting appointed to the bench proved challenging. She worked for nine years to get on the bench and finally achieved her goal when she decided to run for an elected judge position. She has now been on the bench for twelve and half years.

One of the most difficult times for Reichert in remaining optimistic was after a tragic incident in 2020 when one of the breweries faced an active shooter situation. [Five people were killed by the active shooter](#). Reichert shared that he had moments of self-doubt during this time, but other General Counsels reached out to help and give advice based on their own experience in dealing with the aftermath of an active shooter. Through this difficult time, Reichert prioritized authenticity and transparency.

Ajay Shah cautioned that while optimism is important to creating a vision, balance is prudent. If a leader is too optimistic, the team may lose faith in that leader or think they are not taking the situation seriously. Effective leadership is not just optimism, it is confidence.

Project Humility and be Willing to Change Course when Necessary

During Judge Walker's new judge training, Justice Warren Wolfson imparted

a piece of wisdom that she well remembers: Avoid “robe-itis.” He explained that while people stand up when a judge enters the courtroom, it is because a person with a gun is telling them to do so. Walker informed the audience that after serving as a team lead judge, she realized her skills from being a CPA were not being best utilized because financially complicated cases would be heard by other judges. Sometimes being humble means being able to admit that something is not right for you.

Reichert shared that his team operates using a “fail fast” culture. It is okay to be wrong, celebrate the mistakes, and learn from them. Shah likened this trait to sailing a ship. The leader is the captain and they

make decisions about what direction the ship should take. But sometimes course corrections are necessary. If the captain does not take the time to make those corrections to get the ship back on course, the ship will not get where it needs to go. As a leader, Shah tries to ensure that his team openly gives him feedback.

The leadership lessons to be learned from this panel were numerous and wide-ranging. Ultimately, the theme that seemed to emerge was honesty: honesty in delivery, in appreciation, and in knowing your own limitations. Whether it is the leadership of presidents, judges, CEOs, or in-house counsel, effective leadership must be centered around candor and intentionality. ■

Judge Debra B. Walker has served in the Cook County Domestic Relations Division for over 12 years. She has led many organizations including Women’s Bar Association of Illinois, Illinois Supreme Court Commission on Professionalism, Illinois Bar Foundation, Illinois Judges Foundation, and is currently the chair of the ISBA’s Bench & Bar Section Council. Andrea Fischer is working as Judge Walker’s extern this summer. She is a rising 2L at the U of I College of Law. She will be working in the Federal Civil Rights Clinic this upcoming year. Fischer serves as the secretary for the Student Bar Association and as the community service chair for the Women’s Law Society.

Illinois Supreme Court Sinks the ‘Test the Waters’ Doctrine

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hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case, or if it is presented by consent of the parties.” 735 ILCS 5/2-1001(a)(2)(ii). While not expressly included in the language of the statute, a motion to substitute is improper and should be denied if it is a delay tactic or used in a manner that facilitates or encourages judge shopping. See *Bowman v. Ottney*, 2015 IL 119000, ¶¶ 17-20. Over the last two decades, a body of jurisprudence developed holding that a substitution of judge motion was untimely if the party filing it had an opportunity to “test the waters” with the trial court sufficient to form a view on how the court may rule on substantive issues—despite being filed before the court actually issued any substantive ruling.

The test the waters doctrine was recognized by appellate courts in Illinois’ first, second, third, and fifth districts. See *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶¶ 14-15 (finding the trial court’s denial of motion for substitution based on finding that plaintiff had opportunity to test the waters); *Galvan v. Allied Ins. Co.*, 2013 IL App (2d) 120525-U at ¶ 26-27 (“even in the absence of any substantive ruling, a motion for substitution of judge may be denied if

the movant had an opportunity to ‘test the waters’ and form an opinion as to the judge’s reaction to her claim.”); *In re Estate of Gay*, 353 Ill. App. 3d 341, 343-44 (3d Dist. 2004); and *City of Granite City v. House of Prayers, Inc.*, 333 Ill. App. 3d 452, 461 (5th Dist. 2002). The fourth district rejected the test the waters doctrine, reasoning that the doctrine was developed to prevent judge shopping under a previous version of section 2-1001, and finding that the newer version of section 2-1001 adequately addressed that concern. *Schnepf v. Schnepf*, 2013 IL App (4th) 121142.

THE ILLINOIS SUPREME COURT REMINDED LITIGANTS, HOWEVER, THAT THERE IS NO SAFE HARBOR FOR WOULD-BE JUDGE SHOPPING SINCE TRIAL COURTS HAVE OTHER TOOLS TO “PROTECT THE INTEGRITY OF THE COURT.”

The Illinois Supreme Court had the opportunity to consider the viability of the test the waters doctrine when it addressed a certified question in 2015. In that case, *Bowman v. Ottney*, a medical malpractice action had been voluntarily dismissed after years of litigation then refiled, ending up on the same court’s docket. 2015 IL 119000 ¶ 1.

Unpersuaded by arguments that the newly refiled case was a “new case” for purposes of the statute, the *Bowman* court determined that the denial of the motion for substitution was proper. *Id.* at ¶ 19. The *Bowman* court based its decision not on the test the waters doctrine, but on section 2-1001 itself. *Id.* at ¶¶ 27 - 29. In doing so, the Illinois Supreme Court reiterated that a party “may not ‘judge shop’ until he finds one in total sympathy to his cause,” and that courts should avoid a construing a statute in a manner “that would defeat the statute’s purpose or yield absurd or unjust results.” *Bowman*, 2015 IL 119000 ¶¶ 17-18. “[C]ourts may,” *Bowman* explained, “take into consideration the circumstances surrounding a motion for substitution of judge and may deny the motion if it is apparent that the request has been made as a delay tactic.” *Id.* at ¶ 18. *Bowman* also made clear that section 2-1001 should not be construed “in a manner that facilitates or encourages ‘judge shopping’” as “[a]ny other rule would spell the immediate demise of the adversary system.” *Id.* ¶¶ 18, 20 (quoting *In re Marriage of O’Brien*, 2011 IL 109039, ¶ 30).

Bowman thus left undecided whether the test the waters doctrine was a viable tool for courts to prevent abuse. *Palos Community*

Hospital unambiguously slams the door on the doctrine, but also confirms that trial courts are not without options. In fact, *Palos Community Hospital* arguably serves as a reminder that the doctrine is unnecessary where judge-shopping is suspected.

[T]RIAL COURTS HAVE INHERENT AUTHORITY TO ENTER ANY ORDER NECESSARY TO PREVENT ABUSE OR MANIPULATION OF THE SYSTEM.

The procedural history in *Palos Community Hospital* set up the challenge to the test waters doctrine squarely. There a new trial judge began presiding over the case after more than two years of litigation. 2021 IL 126008 at ¶ 8. At a hearing objecting to the use of a discovery master the new trial judge indicated, without ruling, that precedent existed “for a judicial officer to seek assistance in matters of this nature.” *Id.* at ¶ 10. The trial court then pledged to review all the cases cited and ended the hearing without ruling. *Id.* The party challenging the use of the discovery master quickly filed a motion for substitution before the court ruled on the discovery master issue. *Id.* at ¶ 11. Both the trial court and the appellate court employed the test the waters doctrine as justification for the proper denial of the motion for substitution. *Id.* at ¶¶ 13, 20.

Palos Community Hospital acknowledges

that a primary concern underlying the test the waters doctrine is that litigants might strategically time the filing of their motions for substitution of judge as a form of gamesmanship. 2021 IL 126008 at ¶ 35. Citing to *Bowman*, the Court agreed that “courts may take into consideration the circumstances surrounding a motion for substitution of judge and deny the motion if it is apparent that the request has been made as a delay tactic.” *Id.* The *Palos Community Hospital* court further noted that while section 2-1001 is designed to prevent “procedural maneuvering,” and not enable it, the test the waters doctrine is far from the only tool available to the trial judge to protect the integrity of the court. *Id.* In fact, the Court held that “[s]ettled law recognizes that trial courts possess ‘inherent powers that are ‘governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’” *Id.*

Critically, although the Illinois Supreme Court overturned the appellate court and held the test the waters doctrine an invalid basis to deny a motion for substitution, the Court stressed that trial judges have inherent authority to enter any orders necessary to prevent abuse or manipulation of the system. This “any orders necessary” authority is not cabined by a rule or statute and is possessed by trial courts as part of their inherent

powers. *Palos Community Hosp.*, 2021 IL 126008 at ¶ 35 (citing e.g., *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 66 (1995) (“The recognition of the court’s inherent authority is necessary to prevent undue delays in the disposition of cases caused by abuses of procedural rules, and also to empower courts to control their dockets.”)).

So, while a trial court cannot rely on the test the waters doctrine to deny a motion for substitution of judge, it may rely on its inherent authority to enter any orders necessary to prevent abuse or manipulation of the system. Given the Illinois Supreme Court’s guidance in *Bowman*—trial judges may take into consideration the circumstances surrounding a motion for substitution, and that section 2-1001 cannot be construed “in a manner that facilitates or encourages ‘judge shopping,’” (*Bowman Id.* ¶¶ 18)—coupled with *Palos Community Hospital*’s “any orders necessary” rule, no litigant should feel emboldened to engage in gamesmanship, manipulation, or judge-shopping with the demise of the test the waters doctrine. Trial courts have more sweeping means to prevent abuse and uphold the integrity of the adversary system. ■

Edward Casmere is a litigation partner at Riley Safer Holmes & Cancila LLP in Chicago

50 Hyproverbs

BY JUSTICE MICHAEL HYMAN

After seeing this line by F. Scott Fitzgerald—“He repeated to himself an old French proverb that he had made up that morning”—I got to thinking about making up my own proverbs, just not old French ones. I selected traditional proverbs and reworked them to reveal a general truth or bit of advice about the legal profession. I’ve called them “hyproverbs.” (The first two letters of my surname attached to “proverbs.”) I present 50 examples of hyproverbs as that is all that fits on this page.

01. A client comes in like a lion, and out like

- a lamb.
02. A file divided is made lighter.
03. A lawyer’s laptop is mightier than the Library of Congress.
04. A lawsuit of five-thousand days begins with a file stamp.
05. A lawsuit is known by its facts.
06. A poor lawyer blames the judge.
07. Absence makes the case grow harder.
08. Bad cases make hard work.
09. Barking lawyers should muzzle themselves.
10. Better to carry one portable charger than

- curse the blank screen.
11. Briefs expand to fill the word count.
12. Civility is a virtue.
13. Do a good deed, do pro bono.
14. Don’t count your fees before they’re paid.
15. Don’t slight the client who pays the bill.
16. Every contract has its fine print.
17. Every lawyer thinks their counsel is best.
18. Facts are a lawyer’s best friend.
19. For want of a fact a claim was lost.
20. Fortune favors the prepared.
21. Give a lawyer a case, and you feed at least two lawyers and one judge.

22. Good things come to lawyers who aren't late.
23. Hell has no fury like a malicious lawyer.
24. If at first you don't succeed, amend.
25. If Fortune calls, take the case.
26. If it ain't the truth, don't offer it.
27. If the robe fits, still check that your name is on the collar.
28. If you can't beat them, settle.
29. It takes a whole firm to make an associate.
30. Justice is in the eyes of the beholder.
31. Lawyers propose, judges dispose.
32. Like partner, like associate.
33. Lie down with one boorish lawyer, two boorish lawyers get up.
34. Liars and lawyers need good memories.
35. Necessity is the mother of contracts.
36. Nothing comes to lawyers who wait.
37. Rewrite makes right.
38. Plan to win, prepare to lose.
39. Practice what you know.
40. The other side's position looks easier than yours.
41. The road to hell is paved with motions for sanctions.
42. The squeaky lawyer gets the judge's ire.
43. Think before speaking and whilst speaking, still think.
44. When in court, follow the standing order.
45. When a lawyer gets tough, their case must be bad.
46. Where there's smoke, there's a possible lawsuit.
47. Your bad arguments will elevate their good arguments.
48. You can't teach an old lawyer new procedures.
49. You win more concessions with reason than demands.
50. A hyproverb is worth a thousand words, give or take a few. ■

Recent Appointments and Retirements

1. Pursuant to its constitutional authority, the supreme court has appointed the following to be circuit judge:
 - Amy Sholar, 3rd Circuit, May 1, 2021
2. The circuit judges have appointed the following to be associate judge:
 - Michelle S. Fitzsimmons, 14th Circuit, June 1, 2021
 - Sherri Hale, 12th Circuit, June 28, 2021 ■



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