

# Bench & Bar

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

## Broadening our horizons

BY JUSTICE MICHAEL B. HYMAN, CHAIR BENCH & BAR SECTION

**Consider these recent statements by lawyers** about how the public views various aspects of the profession and the legal system:

- “Unfortunately the public perception of the legal profession is not good at the moment. Much of this is driven by the

perception that legal services are hugely expensive and do not deliver value for money. There has also generally been a dumbing down and commoditization of legal services, which we as a profession have been slow to address. We have

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## Can justice be served online?

BY JAYNE R. REARDON

**I recently had an experience with online dispute resolution.** And it wasn't pretty. I am embarrassed to admit it all came about when I clicked on an alluring ad for a face cream. I charged \$4.95 on my credit card and within a few days, received the product (curiously absent any packing slip or documentation) in the mail. My enjoyment of the smooth and glowing effects of the face cream came to an abrupt end when the next month's credit card bill came with a charge for an additional \$94.99.

That's when I switched into zealous advocacy. I disputed the charge, asked for documentation showing I ordered or received the product, disputed the documentation of a recurring monthly charge that the company put forward, and appealed the denial of my dispute.

Ultimately, I lost. The credit card company refunded me a portion of the charge to keep me as a customer, but I had to pay for a product I had not ordered and which I definitely did not receive. What alternative did I have?

### Disputes Related to Online Purchases are not Conducive to Being Resolved in Court

I could have filed a case in small claims court. According to the National Center for State Court's 2015 report "The Landscape of Civil Litigation in State Courts," I would have joined a queue of small court claimants. According to this report, 75% of the cases filed in the state courts involved judgments of less than \$5,200. 64% of the cases filed in state courts are contract cases, comprised

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## Broadening our horizons

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also not been effective in promoting ourselves and the positive contribution that we make to the wider society.”

- “In fact, although politically appointed judges, including those previously active in partisan politics, have invariably risen to the occasion, they have had to struggle to counter the public perception of political bias.”
- “While [sentencing in criminal] cases represent a very small part of the everyday work of the courts, they can have a significant impact on public perception and confidence in the justice system and the sentencing process.”

The president of the Cardiff & District Law Society, Wales, made the first statement. The next statement came from the president of the Chamber of Advocates, the Republic of Malta. And the final statement quotes the justice minister of Northern Ireland. Surprised? You shouldn't be.

I traveled several countries via the Internet, and found the challenges faced by the bench and bar here not to differ much from the challenges faced by judges and lawyers the world over. Just a few months ago, a British newspaper reported that a member of the Privy Council of the United Kingdom said, “I have always thought that people do not like lawyers until they need one.” I doubt American lawyers and English barristers are alone in feeling this way. Lawyers, wherever they practice, contend with a public that distrusts them and lacks confidence in the courts. Blame human nature. Conflict breeds contempt, and contempt leads to resentment and negativity.

Yet, rarely do we look abroad for ways to overcome the public's negative perceptions.

The president of the Cardiff & District Law Society, for example, suggested that the profession must “deliver a positive message” about its work and showcase pro bono service, charitable fundraising, and initiatives undertaken by the profession. Maybe we can improve public perception

here by studying the approach of the Wales bar. Similarly, we might benefit from Northern Ireland's review of sentencing. The justice minister there, “to ensure the effectiveness of legislative framework,” has ordered “a comprehensive review of sentencing policy,” though not sentencing decisions, which she emphasized is within the purview of the courts. The public's reaction to the final report might provide some useful insights for us.

A broader world view could help us better shape our future because, while the legal systems in democratic nations vary, the way people react to the legal system and lawyers varies less than we might imagine. My suggestion is simple—in dealing with issues that vex us, we should not ignore the experiences of our peers elsewhere.

We might learn something. ■



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## Bench & Bar

Published at least four times per year.  
Annual subscription rates for ISBA  
members: \$25.

To subscribe, visit [www.isba.org](http://www.isba.org) or call  
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## Can justice be served online?

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largely of debt collection and landlord-tenant cases.

The report spoke to my situation in noting that, “For most represented litigants, the costs of litigating a case through trial would greatly exceed the monetary value of the case. In some instances, the costs of even initiating the lawsuit or making an appearance as a defendant would exceed the value of the case.” And contrary to the traditional paradigm of civil litigation being competently handled by attorneys representing both parties, 76% of the cases studied in the report had at least one party self-representing.

Trials have been dropping in number. In federal courts, 11.5% of cases went to trial in the early 1960s, whereas only 1.8% went to trial in 2002. The National Center for State Courts reported that between 1976 and 2002, civil jury trials decreased by 28%. Case filings across Illinois have been dropping, too. According to the 2015 report of the Illinois Supreme Court, filings in every judicial circuit dropped over the years 2011-2015. The percentage of decrease varied from 9% to 26%.

### More Disputes Require More Resolution Tools

Although traditional court filings and trials may be down, disputes are not. As the authors of *Getting to Yes* asserted over three decades ago, “conflict is a growth industry.” Conflicts inevitably come with the territory of new products and services. As with all things related to the Internet, they are coming at a faster rate. Disputes are also arising from the increased complexity in relationships and systems being created and the larger volumes of data being collected, processed and communicated.

According to the forthcoming book *Digital Justice: Technology and the Internet of Disputes*, disputes arise in 3-5% of online transactions, totaling over \$700 million in e-commerce disputes in 2015 alone. Millions are over-charged, find credit report mistakes, are hacked, subjected to identity theft or are harassed while playing

online games. ODR tools for resolving disputes include substituting software-based decision-making for the exchange of information that typically characterizes the mediation process. In 2012, eBay claims to have handled over 60 million disputes between buyers and sellers by providing software that assisted the parties to negotiate a satisfactory outcome over 80% of the time. Alibaba, as of last year the world’s largest retailer, generating more revenue than Amazon.com and eBay combined, handles hundreds of millions of disputes per year.

So there are a lot of disputes, but the amount at issue is generally small and the buyer and seller are often in different countries, aided by distributors in yet a third or fourth location. This puts notions of subject matter jurisdiction and service of process a-spinning.

That’s where technology enters the picture as a way to efficiently and equitably resolve disputes. The premise of the *Digital Justice* authors is that access to justice can be enabled by software and mouse clicks just as in the old days, it was affected by the hours a court was open or how distant it was located from one’s home. Experimentation in small claims online courts is happening in the United Kingdom, British Columbia, the Netherlands and spottily in the United States.

Beyond resolution, the authors challenge us to think about how people could be better served by the law if we focus on preventing the relationship from erupting into a full-blown dispute in the first place.

The traditional “map” of conflict resolution is to focus on the point after the disagreement had already evolved and grown, what the authors call naming, blaming and claiming. The parties moved from feeling there was a problem (naming); to identifying sources of the problem (blaming); to actually airing a complaint (claiming). It was only in the “claiming” phase that there was something that was considered to be called a dispute. In an age

of data-driven environments, however, the entire “naming, blaming and claiming” trajectory is likely to be both broadened and accelerated.

### Online Dispute Prevention

ODR proponents claim technology can also prevent disputes. What if, similar to a GPS system, parties could learn that the relationship was off track in time to correct course—before they were lost or the claim was fully erupted? There is a branch of study in the ODR field called “dispute systems design” that challenges the assumption that we should focus on more efficient tools to address individual disputes on an ad hoc basis. This approach says that technology can be used to address and prevent disputes systematically.

By studying the data uncovered in the dispute resolution processes, eBay has managed to uncover common sources of problems and to structure information and services on its site so that the problems do not recur. Another example of an online ODR system is the one established on Wikipedia. Alongside its dispute resolution efforts, Wikipedia focuses on dispute prevention to study patterns of disputes and effective resolution strategies, and for automatically detecting such problems as illegitimate editing of content and deleting such content immediately, even before reported by the users.

This approach is beginning to seep into the courts. In Israel, an entire industry has shifted from litigating individual subrogation claims for property damages to an online arbitration procedure.

### What Values Are Upheld in Private Dispute Resolution?

The private nature of ODR makes it difficult to document results or study patterns. How can precedent be established? How do users have a feeling of fairness? While exploring new systems of making the law work for our citizens, lawyers and judges need to make sure the values of the third branch are brought forward.

Historically, the public trial in our

society has been about not only resolving disputes between parties but also about education, healing and change. Trials can shine the light of justice on what otherwise may fester and grow in the dark recesses of our world. Courts allow the voices of the

voiceless to be heard. The public nature of our court system has been emblematic of our democracy.

These issues and more will be discussed at the Commission on Professionalism's future law program, "The Future is Now:

Legal Services 2017," on May 18, 2017, in Chicago. Ethan Katsh, the "father of online dispute resolution" and one of the authors of the book *Digital Justice*, will be a speaker. For more information or to register go to [www.2civility.org](http://www.2civility.org). ■

# Proportionality in e-discovery: The Illinois appellate court seeks to find the right fit

BY ELI LITOFF, KELLY WARNER, AND EDWARD CASMERE

Effective July 1, 2014, Illinois amended Supreme Court Rule 201 to account for discovery of electronically stored information ("ESI"). Among the amendments, section 201(c)(3) added specific language regarding "proportionality," instructing courts to weigh the benefit of any proposed discovery against its likely burden or expense.<sup>1</sup> In the years that followed, Illinois appellate courts did not have occasion to apply the proportionality test, leaving litigants to resort to federal precedent to define their proportionality arguments.

That landscape changed last year when the Illinois Appellate Court for the Second District decided *Carlson v. Jerousek*. 2016 IL App (2d) 151248. *Carlson* provides Illinois litigants with much-needed guidance on Rule 201's proportionality test. *Carlson* was a personal injury case arising out of a vehicle collision, wherein the defendants sought to forensically image Carlson's personal computers as well as a laptop owned by his employer. Forensic imaging is a process that must be performed by a forensic analyst and copies all active and deleted content on a computer. The defendants argued that they should be allowed to inspect Carlson's computers because he performed his work almost entirely on computers, and had claimed that his ability to perform his work tasks had been hindered by the collision. Carlson's supervisor testified, however, that Carlson was competent at his job. Further, during the litigation

Carlson produced a "symptoms log," which described his symptoms using sophisticated language the defendants believed may have been obtained through Internet searches. Accordingly, the defendants wished to inspect Carlson's computer usage, including metadata and any stored record of his Internet searches since the collision.

In response, Carlson argued that there was no basis for "such a wide-ranging and intrusive discovery method." Carlson noted that the computers were not the focal point of the case, and that the defendants could obtain discovery about the extent of his damages through other means, including written discovery, depositions, and testing by the defendants' expert. The trial court ordered Carlson to comply with the request, and when he refused to do so, he was held in contempt. In an opinion authored by Justice Schostok, the appellate court reversed and remanded with instructions that the trial court conduct the proper proportionality balancing test required by Rule 201.

While the appellate court noted the lack of Illinois case law addressing Rule 201(c)(3)'s proportionality provision, it observed that the 2014 amendments explicitly drew upon the Federal Rules of Civil Procedure where substantial case law interpreting Rule 26(b)(1)'s proportionality provision exists. Accordingly, the court relied upon that federal case law for guidance. The appellate court identified the overarching purpose of Rule 201 as preventing unreasonable "embarrassment" and "oppression" caused

by discovery. To carry out this purpose, the court reasoned that it was not limited to considering the factors expressly articulated in Rule 201(c)(3), but instead was free to consider other factors that might be present in a particular case. One such factor, as recognized by federal courts, was the invasion of the privacy interests of the responding party. Thus, the appellate court found the defendants' request for forensic imaging unjustified – especially in light of the proposed discovery's dubious relevance and defendants' failure to seek the discovery through less intrusive means.<sup>2</sup>

The appellate court explained:

Forensic imaging of all of the contents of Carlson's computers will yield an enormous amount of data that goes far beyond the issues that are relevant to this suit, potentially including personal photographs, declarations of love, bank records and other financial information, records of online purchases, confidential information about family and friends contained in communications with them, and private online activities utterly unconnected to this suit.

Analogizing forensic imaging to more traditional discovery, the court found "[a] request to search the forensic image of a computer is like asking to search the entire contents of a house merely because some items in the house might be

relevant.” Because such a search was not narrowly restricted to yield only relevant information, the court held “it pose[d] a high risk of being overbroad and intrusive in a manner that violates the constitutional right to privacy.”<sup>3</sup>

The appellate court’s opinion confirms the federal court guidance of considering all relevant factors, even those not expressly articulated in Rule 201, to determine whether the burden of any proposed discovery is proportionate to the benefit.

The committee comments to Rule 201 contain categories of ESI that are presumptively not discoverable under the proportionality balancing test. Some of the discovery sought by the defendants in *Carlson* fell into these categories (e.g. “deleted,” “slack,” “fragmented,” or “unallocated” data on hard drives; “online access data”; and “data in metadata fields that are frequently updated automatically”). As the court noted, Illinois has not developed a framework for analyzing these requests. Plaintiff Carlson urged the court to adopt the approach developed by the Colorado Supreme Court in cases such as

*In re Gateway Logistics, Inc.*, 2013 CO 25 (April 15, 2013):

[O]nce the responding party objects on the ground that the information sought falls into one of those categories, the burden shifts to the requesting party to show that (1) there is a compelling need for the information, (2) the information is not available from other sources, and (3) the requesting party is using the least intrusive means to obtain the information.

The appellate court found Colorado’s approach easy to apply and consistent with the policies embodied in the 2014 amendments and the committee comments to Rule 201. Nonetheless, the court declined to formally adopt Colorado’s analysis, holding that such a decision is better left to the Illinois Supreme Court. Instead, the court instructed the trial court to contemplate any factors it considers helpful to the determination. ■

The authors are lawyers in the Chicago office

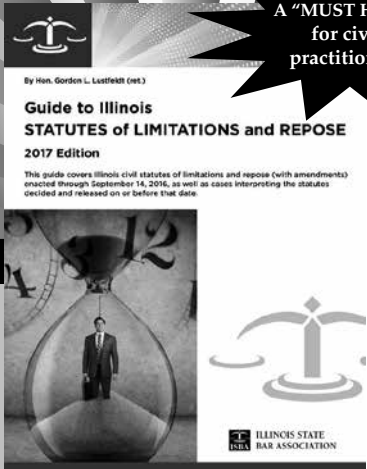
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1. One year later, the 2015 amendments to the Federal Rules of Civil Procedure similarly elevated the importance of proportionality. Fed. R. Civ. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”).

2. Interestingly, in an opinion issued the same day as *Carlson*, Judge Jorge Alonso of the Northern District of Illinois also considered a plaintiff’s privacy interests in holding that the defendants’ discovery requests were not proportional to the needs of the case. *Hespe v. City of Chicago*, No. 13 C 7998, 2016 WL 7240754 (N.D. Ill. Dec. 15, 2016).

3. The court also held the trial court abused its discretion in ordering Carlson to produce his work laptop because there was no showing that the laptop was in Carlson’s “possession or control.” The court held that the laptop’s ownership remained a disputed issue on remand, and ordered the trial court to allow the parties to present evidence on the issue.

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By Hon. Gordon L. Lustfeldt (ret.)

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# What does the Second Amendment really mean?

BY MITCHELL GOLDBERG

**The Second Amendment is a dominating and divisive issue** in today's political discourse. The 2008 and 2010 Supreme Court decisions in *District of Columbia v. Heller* and *McDonald v. Chicago*, which struck down handgun bans as unconstitutional, have inflamed this discussion. Further, in light of mass shootings around the country in recent years, we have been inundated with demands for either limitations on gun ownership or limitations on government interference with gun ownership by private citizens. Statistics on gun ownership and gun crimes are constantly thrown at us, as is often emotionally charged rhetoric advancing one position or another. Yet, proponents and opponents of gun ownership in the United States rarely discuss, in a detailed fashion, the Constitutional framework or historical legal understanding governing the Second Amendment or its application to the states through incorporation in the Fourteenth Amendment's Due Process Clause. This article will briefly attempt to do so.

The text of the Second Amendment, as ratified by the States and authenticated by Thomas Jefferson, then-Secretary of State, reads: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Gun control advocates give significant attention to the "well regulated militia" wording. The general idea offered by such advocates is summed up in a 2012 New Yorker article called "So You Think You Know the Second Amendment?" That article argues (i) that the Second Amendment is divided into two clauses (the "militia clause" and the "bear arms clause") and (ii) that the "militia clause" trumps the "bear arms clause" because the Second Amendment merely "conferred on state militias a right to bear arms—but did not give individuals a right to own or carry a weapon." (See, e.g., <[newyorker.com/news/daily-comment/so-you-think-you-know-](http://newyorker.com/news/daily-comment/so-you-think-you-know-the-second-amendment)

[the-second-amendment](http://newyorker.com/news/daily-comment/so-you-think-you-know-the-second-amendment)>.) Proponents of this argument seek to convince the public that the framers of the Constitution never intended to give the people an individual right to keep and bear arms.

Gun-rights advocates, perhaps not surprisingly, take the opposite approach, focusing on the "keep and bear arms" portion of the Second Amendment. Often the "well regulated militia" portion of the Amendment is deemphasized or ignored in arguments that the Constitution prohibits the government from regulating or even establishing reasonable limits on civilians having unfettered access to high-tech, military-grade ordnance. (See e.g., Matt MacBradaigh, "Gun Control Myth: The Second Amendment Makes Clear Guns Aren't Just For the Military," PolicyMic, The Brenner Brief, The Bell Towers, Vocativ and Tavern Keepers, January 28, 2013.)

These respective positions are actually helpful in framing several important questions about the Second Amendment, namely:

- (1) What does the term "militia" mean in the context of the Constitution and in the minds of the framers?
- (2) Did the framers intend to give the right to "keep and bear" arms to individuals?
- (3) Having answered the first two questions, can the Second Amendment be broken into two clauses?

This article will attempt to answer each of these questions succinctly.

## A. The Definition of the Word "Militia"

As discussed above, one of the main points of contention in the arguments surrounding the right of individual citizens to "keep and bear arms" is the use of the term "Militia." Most of these arguments assume definitions—often diametrically opposed to those their opponents use—such that discussions quickly break down as those of differing views start talking over each other. For

example, some argue that the "Militia" is the U.S. Army or National Guard. (See e.g. David McGrath, "NRA version of 2nd Amendment Lacks Common Sense," Chicago Tribune Publishing, June 5, 2015.) As with all discourse, establishing a common definition is necessary to facilitate rational discussion. So we will start with defining the term "militia" as used in the Constitution.

### 1. Why the term "well regulated Militia" cannot refer to the U.S. Army or National Guard

A well-established principle in Constitutional analysis is that the document must be read in its entirety. Accordingly, the Second Amendment, as it currently exists, must be framed in the context of the rest of the Constitution. This exercise can help us eliminate potential erroneous definitions of the term.

Article I, Section 8 sets forth the enumerated powers of Congress, which include the power "To raise and support Armies..." Separately, it authorizes Congress "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions" and "To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States." Further, Article II, Section 2, setting forth the powers of the President, states "The President shall be Commander in Chief of the Army and Navy, and of the Militia of the several States, when called into the actual Service of the United States..." In differentiating the terms Army from Militia, on its face the Second Amendment cannot mean the Army. It must mean something else. But under that plain language, the powers of Congress and the President were limited to only those parts of the "Militia" that would be called to national service (which includes states' National Guard forces—designed to be called up into national service). Therefore, the Constitution contemplates that the "Militia"

is something greater than and different from the National Guard (which definitionally are those elements called into service of the United States.) Thus the term “Militia” refers to something other than the Army and National Guard.

Separately, the 14th Amendment necessarily seems to remove the term “Militia” from applying to official state militias. Though long debated, the Supreme Court settled incorporation of the Second Amendment to the states through the 14th Amendment in *McDonald v. City of Chicago* (2010). The entire basis of the “incorporation doctrine,” which successive courts have used to apply various amendments in the Bill of Rights to the states, is derived from either the due process or privileges and immunities clauses of the 14th Amendment. And though successive courts used “selective incorporation” to identify limits on states in interfering with these rights, if the “right to keep and bear arms” is a right of citizens, it too should properly apply to the states. If states cannot abridge the “right of the people to keep and bear arms,” then, definitionally, the term “militia” cannot be satisfied with the mere existence of state militias. Accordingly, it must mean something else.

## **2. How the term “Militia” was popularly understood at the time of the Constitution**

Historians dislike interposing of modern beliefs or ideas into the past. The tendency of some to do this is often referred to as the “Flintstone Fallacy”—after the popular cartoon which placed modern concepts in a pre-historic context. Just because people today tend to refer to the term “militia” as an institution of government does not make it so. Therefore, an exploration into the historical use of the term is important. And in this, it is key to understanding that our founders, who were citizens of the Crown of the British Empire, were legal students of British concepts—including that of the term “militia.”

From at least the enactment of the English Bill of Rights in 1689 and continuing through the Revolutionary War period, the British Empire (a) maintained a large navy as the first line of defense of the

Empire; (b) maintained a standing Army and various standing colonial militias (including in each American colony) for defensive deterrence and to fight foreign wars; and (c) relied on informal civilian militias to provide additional domestic defense and to preserve domestic order.

The British Empire maintained various “official military” forts (e.g., Fort Carillon/Ticonderoga, Fort Niagara, Fort William Henry, etc.) for use by the standing Army and official colonial Militias in North America, under the ostensible control of local authorities, to protect the frontiers of its Colonial territories. However, of necessity, it also permitted local settler militias to be formed to defend local communities from actual or perceived threats. Examples of privately-built local forts constructed on individual homesteads (e.g., Prickett’s Fort (West Virginia), Nutter Fort (Virginia), Light’s Fort (Pennsylvania), etc.) are simply too numerous to list in this article.

Indeed, in 1766 (ten years before the Declaration of Independence), Justice William Blackstone specifically referenced this factual history when setting forth the common law definition of the term “militia,” which he stated was an “auxiliary right of the individual, supporting the natural rights of self-defense, resistance to oppression, and the civic duty, to act in concert with his neighbors in defense of the state.” (Blackstone, J., *Commentaries on the Laws of England*, Page 139, Book the First, Chapter the First, London, 1766.) In 1774 (just before the American Revolution), the Colony of Virginia alone was speckled with literally hundreds of civilian militia forts, palisades, blockhouses, and stations where families would gather in times of danger. These civilian militia forts would be stocked with supplies and food that could last weeks and would be defended by civilian militiamen—able-bodied men—armed with muskets and other weapons (in several cases, some privately-owned cannons).

This legal and popular understanding of the term “Militia” was the one known to the likes of James Madison and the other framers, as they drafted the Constitution. Indeed, the debates in the Convention, the history and legislation of colonies and states, and the writings of approved

commentators, show plainly enough that the term Militia comprised nothing less than all males physically capable of acting in concert for the common defense. Indeed, Alexander Hamilton, in his *Federalist Paper No. 29, Concerning the Militia* (New York 1788), specifically clarified that the phrase “a well regulated militia” meant something totally different than that of a “standing army” since “standing armies are dangerous to liberty” but “militias” consist of “citizens ... who stand ready to defend their own rights and those of their fellow-citizens,” and a “well-regulated militia” consists of an “excellent body of well-trained militia, ready to take the field” who would “be, little, if at all, inferior to [a standing army] in discipline” if such standing army was ever used by the State to try to take away the liberties of its citizens. Additionally, James Madison, in his *Federalist Paper No. 46, The Influence of the State and Federal Governments Compared* (New York 1788), pointed out that the American people should not fear threats of force by an army regulated by Congress precisely because of the right of the citizenry to form militias by keeping and bearing arms and joining together in common defense: “The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed 100th part of the whole number of souls; or one 25th part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than 25- or 30,000 men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties...” (*Id.*) “Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.” (*Id.*) “Let us not insult the free and gallant citizens of America with the suspicion, that they would be less able to defend the rights of which they would be in

actual possession, than the debased subjects of arbitrary power would be to rescue theirs from the hands of their oppressors.” (*Id.*) Or, as the U.S. Supreme Court, citing to Blackstone’s Commentaries, Adam Smith’s *Wealth of Nations*, and Osgood’s *The American Colonies in the 17th Century*, defined a militia as “A body of citizens enrolled for military discipline.” See *United States v. Miller*, 307 U.S. 174 (1939). But of critical importance is the understanding that “ordinarily, when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” *Id.*

Based on the above, it is clear that the word “militia” likely refers to the common-law definition of “militia” set forth by Justice Blackstone—which, as stated, was all private individuals capable of forming groups that would gather together for self-defense.

## B. The Right to Keep and Bear Arms is an Individual Right

Now that we have a working definition of the term “Militia” as popularly understood at the time of the drafting of the Constitution, we turn to whether the right stated in the Second Amendment—to keep and bear arms—is a “communal right” or an “individual right.” To do this, we should look at these rights in the context of the other rights identified in the Constitution.

The entirety of the Constitution, it is understood, arises from the principles enunciated in our nation’s founding document, the Declaration of Independence, in which Thomas Jefferson adopted, as a basis of our government’s right to exist, the principles of the social contract:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.  
- That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed...

As John Locke stated in his *Second Treatise on Government*, every just society exists based on a “social contract” where each man (citizen) surrenders certain freedoms (e.g., the freedom to take the property or happiness of others by overpowering and/or killing them - as animals do in their natural state) in exchange for the expectancy that others cannot do the same to them. Under this social contract, the purpose of government is to protect all of its citizens impartially—preserving certain inalienable rights (life, liberty, property, etc.) while preventing each man from acting as his own judge, jury, and executioner.

With this lens, historians and jurists understand the purpose of the Bill of Rights was to expound on the above principles and to set forth explicit language in their goal of limiting government interference with the preexisting inalienable rights of the kind recognized in this country’s founding document—the Declaration of Independence.

Indeed, the Supreme Court, when it took up the issue of the District of Columbia’s handgun ban in *Heller*, engaged in a textual analysis of the words “right of the people,” as used in the Second Amendment, to determine that it must apply to individual (rather than collective) rights. As the *Heller* Court observed, those identical words—“right of the People” - are used in other Bill of Rights Amendments that the Supreme Court has previously and unequivocally defined as individual rights: In the First Amendment’s Assembly-and-Petition Clause the term is used as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (Emphasis added.)

And the Fourth Amendment’s Search-and-Seizure Clause states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported

by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (Emphasis added.)

Thus, the *Heller* Court’s determination that the identical language as used in the Second Amendment should also refer to individual rights is hardly baseless or absurd. Further, the *Heller* Court was certainly not the originator of the concept of the right to bear arms as an individual right.

The historical analysis above about privately-owned citizen forts shows that common law presumed a right to bear arms. This extends back to at least the English Bill of Rights in 1689, which explicitly refers to an individual’s right to be armed when it reversed King James II’s presumably illegal disarmament of Protestants, explicitly granting them the right to “Arms for their Defence suitable to their Conditions and as allowed by Law.”

Moreover, a review of antebellum American case law shows a plethora of state and federal decisions all recognizing an individual right to be armed. See, e.g., *Nunn v. State of Georgia* (1 Ga. (1 Kel.) 243 (1846) (Georgia Supreme Court deeming state ban on individual gun ownership unconstitutional as Second Amendment violation.) The Supreme Court even addressed the issue, in *dicta*, in the infamous decision of *Dred Scott v. Sandford*, 60 U.S. 393 (1857). There, the Court reasoned that if it held individual African-Americans were entitled to all the rights and benefits under the Bill of Rights, it would be forced to hold them entitled to “the full liberty of speech in public and in private upon all subjects upon which [every other] citizen might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.”

The Court recognized this individual right more explicitly in *U.S. v. Cruickshank*, 92 U.S. 542 (1876) (“This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed...”). Indeed, for over a century, the Supreme Court has recognized that “the law is perfectly well settled that the first ten amendments to the Constitution,



commonly known as the ‘Bill of Rights,’ were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well recognized exceptions arising from the necessities of the case.” *Robertson v. Baldwin*, 165 U.S. 275 (1897).

Given the above, stating anything approaching what periodicals like the *New Yorker* assert (e.g., that “the amendment conferred on state militias a right to bear arms—but did not give individuals a right to own or carry a weapon.”) is simply unsupported by the factual and legal history of the Second Amendment.

### C. In the Context of the Above, The Words “Well Regulated Militia” Do Not Trump the Right to Keep and Bear Arms

Taking the above in its entirety, attempts to break down the Second Amendment into separate clauses is erroneous. Using (i) the historically understood term “Militia” (defined by Blackstone as all citizens capable of service), (ii) recognition that the right to keep and bear arms is an inherent right pre-existing the Constitution; and (iii) the context of the use of “Militia” in Articles I and II of the Constitution, the Second Amendment’s intent becomes clear: Although the Congress and the President have authority to call up the citizenry in the service of this country (e.g. selective service, the draft, etc...), the government cannot interfere with groups of private citizens from banding together in times of danger.

Even if the clauses could be broken down, the “keep and bear arms” clause would trump the “militia” clause. In the context of the Second Amendment, the “militia” clause is merely an explanatory reason for the “keep and bear arms” clause. It does not make sense for the reason to trump the rule. It only makes sense the other way around. If “the right of the people to keep and bear arms” were truly ambiguous, as the above discussion is intended to refute, the militia clause might resolve the ambiguity. But there is no ambiguity. The plain meaning of “people”

having the right to keep and bear arms means individual people, not merely some collective group of people.

Indeed, events about a dozen years ago, when Hurricane Katrina devastated the U.S. Gulf Coast, illustrate the proper intent of the Second Amendment. At that time, civil society simply broke down. Law enforcement officers had either abandoned their posts or were unable to cope with the devastation. Further, neither state nor federal forces were able to easily access those communities that were devastated. And citizens were left victims of those law-breakers with guns. Indeed, for the days following the hurricane, stores were looted, homes were robbed, and people were beaten by groups of armed thugs brandishing weapons. The only people who stood any chance of not being victims were those lawfully armed. And they exercised the true intent of the Second Amendment: to band together with their neighbors for mutual protection.

### Conclusion

The phrase “well regulated militia” in the Second Amendment cannot be interpreted to mean the same thing as the Army or National Guard (which constitutes only those portions of the Militia referenced in Articles I and II of the Constitution, called forth into the “actual service of the United States”). It is also separate from state militaries. Rather, along with the rest of the Bill of Rights, the Second Amendment sets forth restrictions on governmental interference with personal liberties. This “right” to keep and bear arms in the Second Amendment uses the same language as two other deeply held “a fortiori” rights that rest with individuals. The language of the Second Amendment is not mere surplusage (an abhorrent proposition under ordinary rules of construction). And the term was commonly understood to refer to all persons capable of defending themselves, their communities, their states, and their country.

This is not to say that there is a very appropriate discussion regarding whether and to what extent Congress (or the States) can regulate or establish reasonable limits on the Second Amendment, subject to similar heightened scrutiny tests that would

be applied to other inalienable rights set forth in the Bill of Rights. Moreover, as *Heller* suggests, certain weapons of war may even be outside the scope of Second Amendment protection. With its October 2015 decision in *Shew v. Malloy*, the Second Circuit entered this discussion, applying heightened scrutiny to New York and Connecticut statutes enacted after the December 2012 Newtown school shootings to ban certain types of semi-automatic weapons and large-capacity ammunition magazines. In *Shew*, the Second Circuit upheld the core elements of each statute while also striking down a provision of the New York law regulating load limits and a specific provision of the Connecticut law prohibiting a specific kind of non-semiautomatic weapon as unconstitutionally infringing upon the Second Amendment.

The Fourth Circuit joined this discussion in *Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016), where a divided panel applied strict scrutiny in analyzing a challenge to Maryland’s bans on “assault weapons” and large-capacity magazines. This was recently vacated by an *en banc* panel of the 4th Circuit, which held such devices are outside of Second Amendment protections. Nonetheless, the *en banc* Fourth Circuit still applied intermediate scrutiny in upholding Maryland’s ban. Until the U.S. Supreme Court chooses to step into the fray (having declined to take up *Shew*), the analyses of the Second and Fourth Circuits may instruct a more constructive national conversation that will focus on narrowly tailored gun control restrictions that could survive heightened scrutiny, rather than the kinds of blanket bans struck down in *Heller* and *McDonald*. And such a conversation is needed. After all, no rationally prudent person can deny the tremendous degree to which technology has transformed firearms into vastly more efficient and easier to use weapons over the past two centuries. However, the factual and legal history of the Second Amendment also prevents those same rationally prudent persons from denying the automatic corollary—namely, that there has always been a fundamental individual right to own and carry firearms, subject to reasonable restrictions. ■

# A judge's perspective on sentencing hearings

BY JUDGE ROBERT J. ANDERSON

**This article started with a mistake.** I had written an article for the Child Law Section Council on juvenile sentencing hearings. After it was published, my friend, Retired Judge Al Swanson, the editor of this publication, asked me if I would modify it for adult sentencing hearings. The mistake was that I said “yes.” When I said “yes,” I had forgotten that I have not sentenced any adult for any criminal, traffic or ordinance violation since 2008. So, I frantically reached out for advice from some other judges. Judges George Bakalis and Michael Wolfe of DuPage County were kind in providing ideas and advice for this article. Most of what you will find helpful in this article will be thanks to them; anything you don’t like or any mistakes are my fault. So, here we are!

There are sentencing hearings in many types of cases: Traffic, Misdemeanor, Ordinance Violations and Felony cases. As most of you know, most cases do not go to trial and are resolved by pleas. If there is a negotiated plea, the sentencing hearing is usually brief and the result predetermined by the agreement. In this article, I intend to focus on blind (or non-negotiated) pleas and sentencing hearings after trials.

In felony cases, a presentence report will normally be prepared by the Probation Department. The reports are very thorough and detail almost every aspect of a defendant’s life. The defendant’s prior contacts with the justice system; prior adult and juvenile criminal background; residential history; economic situation; physical and mental health; drug or alcohol use; school performance—both academic and disciplinary; and much more is set out in detail in the report. The Probation Department can and usually does make specific sentencing recommendations.

Attorneys need to prepare their clients to properly participate in the preparation of the report. Remind them—before they meet with the probation officer—that everything they say to the probation officer preparing the report can and will

be reported to the judge. It is helpful to ask your client some of the questions that the probation officer might ask them before they actually meet with the probation officer. You can help them prepare appropriate responses to these questions. Also, remind them that they need to treat the probation officer with courtesy and respect. These officers are the “eyes and ears” of the judge in this process.

Defendants are often asked to comment on the effect of the crime on the victim or to give their version of the offense. Please remember to go over this with your client before they turn anything in for the report. I have often seen answers like: “They got what they deserved”; or “I don’t care” in the report. These types of answers are not particularly helpful to these defendants at sentencing. As a lawyer, it is your responsibility to spend some time preparing your client for this process.

In most pleas, there is no Pre-sentence Report. It is still a good idea to look at the statutory factors in aggravation and mitigation contained in 730 ILCS 5/5-5-3.1 and 3.2. This can help you and your client focus on things that the judge will consider at the sentencing hearing. You may be able to anticipate what the prosecutor will focus on and come up with a strategy to respond in a way that helps your client.

Prior to the hearing, you should consider if letters of good character or potential character witnesses might be of benefit to your client. Family, friends, work supervisors, teachers or others may be beneficial to your client. You need to provide any documents to the other side and to the judge at the hearing. Use some common sense in considering whether these will be of benefit. If they are too generic, they may mean nothing; but, in some cases, they can be powerful tools to help your client. Also, if you are calling witnesses, be certain to properly prepare your witness. Make sure they know why you are calling them and what you are going to ask. Also, remember to prepare

them for cross-examination by the other side. Again, emphasize that they also must treat everyone with courtesy and respect. That does include the prosecutor! Remind them not to argue or be rude.

You should have your clients come to court early on the date of the sentencing hearing. Remind them to be courteous and respectful to everyone in the courtroom. This includes the prosecutor, the victim, judge and all the court staff. Tell your client how to dress for court. I have been shocked to see defendants wearing incredibly inappropriate clothing to court. One defendant came to court in a shirt that had a picture of someone pointing a gun at the viewer. I literally asked them: “What were you thinking when you decided to wear that shirt today?”

You and your client need to carefully read the pre-sentence report (if there is one) prior to the hearing. As a judge, I always ask if the defendant has read the report. If they have not; I pass the case until they have read it. You should read the report and be ready to highlight the good parts for your client and explain the “bad” parts. In cases where you know jail or penitentiary time is a possibility, you should be ready to explain why a sentence of probation would benefit your client and society.

Also, like most judges, I always follow a set order for sentencing hearings. I have the state go first; then the lawyer for the defendant; and, finally, the defendant. On occasion, the victim or a member of the victim’s family will be present in court. They also have the right to speak; I usually have them go first. You should find out what the practice is for each judge. You can ask the prosecutor or the public defender assigned to the courtroom about how the judge handles sentencing hearings. Trust me, they will know.

If the victim or a member of the victim’s family is present in court, your client and your client’s family, if present, needs to be respectful to them. If your client has

pled guilty, he or she should apologize to the victim. If there was a trial and your client is maintaining their innocence, as a good lawyer, you will not want your client to incriminate themselves. However, depending on the facts of the case, there is often a way that you or your client can be respectful to the victim without admitting any fault. Having your client apologize, when appropriate, can be very beneficial to the victim and have a positive impact on the judge's view of your client. Just having your client say: "I'm sorry" can be helpful to them in the eyes of the judge. As a judge, I am shocked at how often this does not occur.

Prepare your client for the fact that the victim or victim's family may be speaking at the sentencing hearing and give them some instructions on how to act while they are doing so. Laughing, rolling their eyes, and

shaking their heads are all reactions that I have seen as a judge. Judges don't react well to this type of conduct.

Obviously, the prosecutor will speak at the sentencing hearing. He or she will talk about the aggravating factors in their remarks. Again, make sure that your client is prepared and does not respond in an inappropriate way.

Your client has the right to speak on his or her own behalf at the sentencing hearing. This can help or hurt, depending on what is said and how it is said. Again, preparation is crucial. You need to make sure that your clients present themselves to the judge in the best light possible. As their lawyer, you should have them tell you what they wish to say before they say it to the judge. Things like: "I am sorry;" or, "I made a mistake, I have learned from this and I will never do this again" can be

very impactful. Saying the wrong thing – *i.e.* "They (the victim) got what they deserve" or "They left the keys in the car, it was their fault I took the car" (statements that I have actually heard in Court) - are probably not very helpful to their cause. In an appropriate case, it may be better to say nothing than to say something. As their lawyer, you need to advise your clients and make appropriate suggestions of what would be best for them.

Again, preparation is critical to this whole process. It is important to prepare your client for the hearing. What your client says and does at the hearing can have a profound impact on the judge. As a good lawyer, you need to prepare them to help rather than hurt themselves. Also, unless you are in public service, get paid! That can be the subject of a whole different article. No, Al, I am not volunteering for that! ■

## Recent appointments and retirements

1. Pursuant to its Constitutional authority, the Supreme Court has appointed the following to be Circuit Judge:
  - Charles C. Hall, 5<sup>th</sup> Circuit, March 1, 2017
  - David W. Dugan, 3<sup>rd</sup> Circuit, March 3, 2017
  - Toya T. Harvey, Cook County Circuit, 2<sup>nd</sup> Subcircuit, March 16, 2017
  - Adrienne E. Davis, Cook County Circuit, 2<sup>nd</sup> Subcircuit, March 17, 2017
  - H. Yvonne Coleman, Cook County Circuit, 5<sup>th</sup> Subcircuit, March 27, 2017
2. The Circuit Judges have appointed the following to be Associate Judge:
  - Donald P. Shriver, 17<sup>th</sup> Circuit, March 3, 2017
  - Mark R. Facchini, 22<sup>nd</sup> Circuit, March 13, 2017
  - Michael W. Reidy, 18<sup>th</sup> Circuit, March 31, 2017
3. The following judges have retired:
  - Hon. Frank G. Zelezinski, Cook County Circuit, 15<sup>th</sup> Subcircuit, March 20, 2017
  - Hon. Michael R. Albert, Associate Judge, 14<sup>th</sup> Circuit, March 31, 2017 ■

## Upcoming CLE programs

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**Wednesday, 05-03-17 Chicago, Live Webcast**—The First Hundred Days and Beyond: Labor & Employment Law Developments Under President Trump. Presented by Corporate Law. 12 – 1 p.m.

**Thursday –Friday, 05-04-17 and 05-05-17 – Chicago, ISBA Regional Office**—16th Annual Environmental Law Conference. Presented by the Environmental Law Section. 8:00 – 4:45 Thursday with reception until 6:00. 8:00 – 1:00 pm Friday.

**Wednesday, 05-10-17- Chicago, ISBA Regional Office**—Settlement in Federal Court Cases. Presented by the Federal Civil Practice Section. 1:00 p.m. – 5:00 p.m.

**Thursday, 05-11-17 – Loyola University of Chicago School of Law Ceremonial Courtroom**—Balancing the Scales. 11 a.m. -2:00 p.m.

**Thursday, 5-15-17 – Webinar**—Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 – 1:00 pm.

**Friday, 05-19-17 – LIVE Webcast**—How Not To Throw Away Your Shot at Appeal – Protecting and Preserving the Record for Review. Presented by Administrative Law. Co-Sponsored by the Illinois Association of Administrative Law Judges. 12:00 pm – 1:30 pm. ■

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APRIL 2017

VOL. 47 NO. 9

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