

Bench & Bar

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

A few words on why lawyers still admire an Illinois lawyer named Abraham

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

No lawyer remains as popular with Illinois lawyers as Abraham Lincoln, even though Lincoln last appeared in a courtroom nearly 160 years ago.

We admire that Lincoln built a life from nothing. That he exuded an unrivaled work ethic. That he loved to read and learn. And that he treated everyone with good faith, truthfulness, and respect. As Lincoln

scholar Harold Holzer has noted, "He rose from obscurity through hard work, self-education[,] and honesty."

Lincoln never pretended to be somebody he wasn't. Leonard Swett, a lawyer who rode the Eighth Judicial Circuit with Lincoln, recalled: "The way he became educated was by never being

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Lincoln sites of interest

BY HON. EDWARD SCHOENBAUM (RET.)

As a volunteer at the Abraham Lincoln Presidential Museum for the last nine years, which was the one new thing I took on when I retired and in honor of his birthday on February 12, I have excerpted some of my favorite Lincoln links for your convenience.

Visit the Abraham Lincoln Presidential Museum and Library in Springfield, Illinois. <www.alplm.org>.

Places Lincoln Knew

To give yourself a taste of what life was like while Mr. Lincoln was studying

to become a lawyer, visit the New Salem State Historic site. <<http://www.lincolnsnewsalem.com/>>.

Visiting **Lincoln's Home**, which was the only home he ever owned, is in Springfield and is part of the National Park Service. <<http://www.nps.gov/liho/>>. Free to go through it from 9:00-5:00 daily. (Last tour starts at 4:30).

The Depot – Lincoln made his last speech to his friends in Springfield, Illinois, as he departed for Washington, D.C. from

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A few words on why lawyers still admire Abraham

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ashamed to confess his ignorance of what in fact he did not know, by always asking questions where he could probably elicit information, and by studying all his life. I have seen him repeatedly around upon the circuit with school books.”

He wasn't just out for himself; Lincoln always sympathized with those of little means. Though he represented large corporations and individuals of privilege, the vast majority of his clients were ordinary people with ordinary problems. He would help people in need. According to William Herndon, his law biographer and law partner, Lincoln could “never say ‘No’ to any one who puts up a poor mouth [pleads poverty]” and “will hand out the dollar he has sometimes when he needs it himself and needs it badly.”

And, a more civil and courteous lawyer would be hard to imagine. Affable in public, gracious, and genuine, Lincoln amassed friendships with people of all walks of life, and, based on their recollections, practically every lawyer who ever came in

contact with him. Lincoln was likeable and congenial, including to opposing counsel, and nary a bad word has been recorded about his interactions with judges, lawyers, parties, or witnesses. For Lincoln, personal character mattered, “Character is like a tree and reputation like a shadow. The shadow is what we think of it; the tree is the real thing.”

Then there is Lincoln's legal skills, which in the intervening decades have become legendary. Whether he was a good lawyer or a great lawyer can be debated; his preparedness, professionalism, brutal honesty, and self-confidence cannot.

I could go on, but I think you can sense that he was a lawyer everybody respected, trusted, and listened to. Abraham Lincoln is the model of the heroic lawyer. Our own superhero.

After more than a century-and-a-half, Lincoln still challenges “the better angels of our nature,” still moves us to practice with grace and decency. ■

Lincoln sites of interest

CONTINUED FROM PAGE 1

this location. www.nps.gov/liho/. Pinkie Noll, wife of Jon Gray Noll, a local attorney, bought it in June 2012 renovated it and Jon moved his law office in April 2013.

The **Vandalia State House**, the fourth Illinois statehouse, served as the capitol from 1836 until 1839 and is the oldest surviving capitol building in the state. The first (1818-1820) was at Kaskaskia, the state's first capital. The second (1820-1823), third (1824-1836), and fourth (1836-1839) were at Vandalia. The fifth (1839-1876) is in Springfield and is preserved as the Old State Capitol State Historic Site. The sixth is the current capitol (1876-present) in Springfield. ■

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A call for caution when limiting the public's access to criminal courtrooms

BY EVAN BRUNO

The Sixth Amendment to the United States Constitution guarantees the accused in a criminal case the right to a public trial. A violation of this right is considered “structural error,” the occurrence of which mandates reversal of a defendant’s conviction regardless of whether prejudice resulted from the error. *People v. Thompson*, 238 Ill. 2d 598, 609, 939 N.E.2d 403, 411 (2010). This article examines the delicate—and often blurry—line between a judge’s permissible exclusion of persons from the courtroom and the unconstitutional denial of the defendant’s right to a public trial. Although existing jurisprudence does not provide a one-size-fits-all approach, judges should, at a minimum, conduct a thorough analysis of the applicable law on the record prior to ordering anyone out of the courtroom. As recent case law demonstrates, failure to do so can fatally compromise an otherwise valid conviction.

The United States Supreme Court has held that, prior to ordering closure of a criminal proceeding, “the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.” *Waller v. Georgia*, 467 U.S. 39, 48, 104 S. Ct. 2210, 2216, (1984).

A judge may decide to exclude members of the public from a courtroom for a variety of reasons, such as to avoid the risk of jury contamination, to make a witness more comfortable while delivering sensitive testimony, or to simply open up space for others to sit when space is limited. In Illinois, however, the only statutorily recognized valid basis for closing the courtroom in a criminal trial is to allow the testimony of a minor victim in certain abuse cases. 725 ILCS 5/115-11. In all other instances, a case-specific inquiry is necessary to determine whether an interest is “overriding.”

The Supreme Court in *Waller* was careful to specify that the interest advanced in support of closure must be not only overriding, but also *likely* to be prejudiced if no action is taken. Judges all too often order full or partial closure of a courtroom based upon theoretical problems that could arise, regardless of whether any unique circumstances exist to suggest that such problems *will* arise. For instance, in the recent case of *People v. Evans*, 2016 IL App (1st) 142190, the trial court excluded the defendant’s step-grandmother from the gallery of the courtroom during *voir dire* based upon a desire to avoid juror contamination. The defendant was subsequently convicted of murder and sentenced to 100 years in prison.

In reversing the defendant’s conviction in *Evans*, the First District Appellate Court concluded that although avoiding juror contamination was an overriding interest, that interest was not likely to be prejudiced where no evidence suggested that the defendant’s step-grandmother had attempted to communicate with or intimidate any potential jurors. In so concluding, the *Evans* court cited several precedential cases in which courts of review have rejected trial courts’ unsubstantiated fears that jurors would be contaminated simply because the jurors were in close proximity to the defendant’s family members. *Evans* and the cited cases stand for the proposition that the mere *opportunity* for the public to cause problems in the courtroom is insufficient to support closure. Instead, the “findings adequate to support the closure” (*Waller*, 467 U.S. 48, 104 S. Ct. 2216) must consist of actual, articulable reasons to believe that *these* members of the public in *this* courtroom for *this* trial will cause problems. In other words, the constitution requires a case-by-case analysis coupled with a case-specific exclusion order.

(It should also be noted that the trial court in *Evans* cited the limited seating capacity of the courtroom as an additional

reason for excluding the defendant’s step-grandmother. The *Evans* court rejected that rationale as well, holding that “[t]he size of a courtroom, or the number of potential jurors who are summoned to a courtroom, do not constitute an ‘overriding interest.’” *Evans*, 2016 IL App (1st) 142190).

Evans, which is one of dozens of Illinois cases in which the Appellate Court has reversed a criminal conviction based a denial of the right to a public trial, may be part of a broader failing of many Illinois trial courts to conduct the full *Waller* analysis before limiting the public’s access to the courtroom. In Champaign County, for instance, some courtrooms have signs posted on the doors prohibiting members of the public from entering the courtroom during trial unless during a break in the proceedings. These rules are purportedly intended to prevent jurors or witnesses from becoming distracted by people entering the courtroom during testimony or argument. However, in the absence of any case-by-case tailoring and analysis on the record, these types of seemingly minor restrictions on public access to courtrooms during trials may overstep the permissible constitutional bounds of ‘courtroom management.’

Judges should recognize that a defendant’s right to a public trial will often trump other logistical concerns in the courtroom. For that reason, full or partial exclusion of the public should be ordered only as a last resort. When such a drastic step is necessary, it is important for judges to (1) make a clear record of their reasons for exclusion, (2) list the possible alternatives that have been deemed unworkable, and (3) articulate the specific parameters of the exclusion order itself. All parties, especially prosecutors, should be familiar with the *Waller* analysis because failure to perform that analysis on the record can doom a conviction on appeal. Accordingly, attorneys should not hesitate to carefully remind judges of the applicable rules whenever closure or exclusion is contemplated. ■

The Supreme Court moves proactively on attorney malpractice insurance and liability issues

BY HON. ALFRED M. SWANSON, JR. (RET.)

The Illinois Supreme Court is taking a proactive approach to encouraging Illinois lawyers to have professional liability insurance. In an amendment to Rule 756 that took effect January 25, 2017, the Supreme Court will, starting in 2018, require lawyers to answer questions about their professional liability insurance every other year at the time they renew their authorization to practice law. (See sidebar for the text of the amended Rule.)

With this proactive management based regulation, Illinois becomes the first state in the United States to adopt this approach to attorney regulation. Chief Justice Lloyd Karmeier explains that traditionally attorney regulation has been reactive efforts that arise only after problems arise. “This PMBR approach is aimed at helping lawyers avoid disciplinary problems before they occur.”

The rule change is based on data the ARDC compiled in research over several years on the demographics of Illinois attorneys who do not have professional liability insurance and a study of data from other states, as well. According to Chief Justice Karmeier, the data shows that a majority of those without malpractice insurance are solo practitioners.

The amended Rule does not change the registration fee exemption for judges or for lawyers on judges’ staffs. It does require attorneys to complete a questionnaire that the Chief Justice says is similar to the questions insurance companies ask when attorneys apply to obtain or renew their professional liability coverage.

Chief Justice Karmeier calls this rule change a “stick and carrot” approach to increasing awareness of professional liability insurance and of ways to lessen the chances of attorneys facing liability issues. In renewing their license to practice, the Rule requires attorneys to complete a risk self-assessment questionnaire much like the ones insurance companies require on policy renewal. The “carrot” for attorneys is receiving four hours of professional liability credits toward the six hours the MCLE rules require in each two-year reporting period.

The Supreme Court’s idea is to improve lawyer diligence. “Our hope is to improve the practices of the sole practitioner who may now be relying on memory to keep track of deadlines.” The entire self-assessment questionnaire provides confidential results to the attorney. All the ARDC will learn is that the attorney completed the questionnaire.

Chief Justice Karmeier notes that after the Supreme Court started asking lawyers to report on the *pro bono* work they do each year, data indicates lawyers may be doing more *pro bono* work. He notes that solo practitioners are a sub-group at risk for complaints with the ARDC. “The idea is to get people to think more about professional liability issues and ways to avoid problems.” The Chief Justice terms this rule change a “win-win-win” situation. “Lawyers win with more awareness of liability risks and the ways to avoid problems. Clients win because their attorneys are more aware of ways to avoid problems. And, the lawyers receive professional responsibility CLE credit by completing the questionnaire.” ■

Rule 756. Registration and Fees

(e) Disclosure of Malpractice Insurance.

- (1) Each lawyer, except for those registering pursuant to (a)(2), (a)(3), (a)(5), (a)(6), and (k)(5) of this rule, shall disclose whether the lawyer has malpractice insurance on the date of the registration, and if so, shall disclose the dates of coverage for the policy. The Administrator may conduct random audits to assure the accuracy of information reported. Each lawyer shall maintain, for a period of seven years from the date the coverage is reported, documentation showing the name of the insurer, the policy number, the amount of coverage and the term of the policy, and shall produce such documentation upon the Administrator’s request. The requirements of this subsection shall not apply to attorneys serving in the office of justice, judge, associate judge or magistrate as defined in subparagraph (a)(3) of this rule on the date of registration.
- (2) Every other year, beginning with registration for 2018, each lawyer who discloses pursuant to paragraph (e) (1) that he or she does not have malpractice insurance and who is engaged in the private practice of law shall complete a self-assessment of the operation of his or her law practice or shall obtain malpractice insurance and report that fact, as a requirement of registering in the year following. The lawyer shall conduct the self-assessment in an interactive online educational program provided by the Administrator regarding professional responsibility requirements for the operation of a law firm. The self-assessment shall require that the lawyer demonstrate an engagement in learning about those requirements and that the lawyer assess his or her law firm operations based upon those requirements. The self-assessment shall be designed to allow the lawyer to earn four hours of MCLE professional responsibility credit and to provide the lawyer with results of the self-assessment and resources for the lawyer to use to address any issues raised by the self-assessment. All information related to the self-assessment shall be confidential, except for the fact of completion of the self-assessment, whether the information is in the possession of the Administrator or the lawyer. Neither the Administrator nor the lawyer may offer this information into evidence in a disciplinary proceeding. The Administrator may report self-assessment data publicly in the aggregate.

Recent appointments and retirements

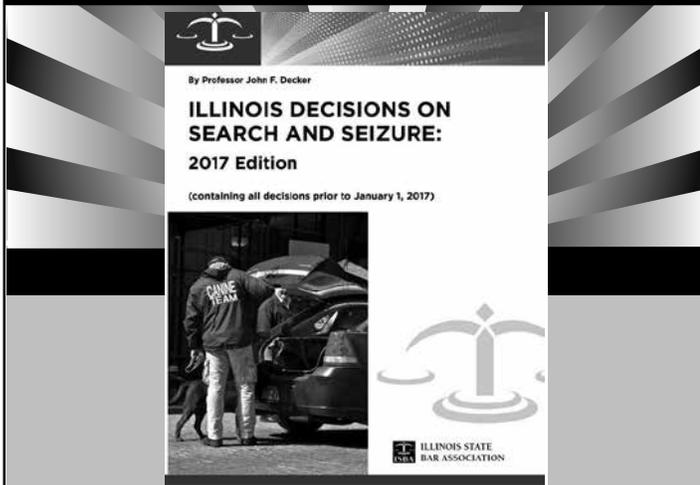
1. Pursuant to its Constitutional authority, the Supreme Court has appointed the following to be Circuit Judge:
 - Patrick T. Stanton, Cook County Circuit, 3rd Subcircuit, 1/1/2017
 - Robert A. Wilbrandt, Jr. 22nd Circuit, 1/3/2017
 - Kent Delgado, Cook County Circuit, 6th Subcircuit, 1/4/2017
 - Cecilia A. Horan, Cook County Circuit, 1/19/2017
 - Joanne F. Rosado, Cook County Circuit, 11th Subcircuit, 1/20/2017
 - Stephanie K. Miller, Cook County Circuit, 6th Subcircuit, 1/30/2017

2. The Circuit Judges have appointed the following to be Associate Judge:
 - Joshua J. Dieden, 18th Circuit, 1/3/2017
 - Erick F. Hubbard, 6th Circuit, 1/17/2017
 - James B. Baber, 9th Circuit, 1/20/2017
 - Charles E. Petersen, 16th Circuit, 1/20/2017

3. The following judges have retired:
 - Hon. William I. Ferguson, 18th Circuit, 1/10/2017
 - Hon. Dan L. Flannell, 6th Circuit, 1/13/2017
 - Hon. Daniel J. Rozak, 12th Circuit, 1/16/2017
 - Hon. Russell W. Hartigan, Cook County Circuit, 1/17/2017
 - Hon. Marjorie C. Laws, Cook County Circuit, 2nd Subcircuit, 1/20/2017
 - Hon. John D. Turner, Jr., Cook County Circuit, 2nd Subcircuit, 1/25/2017
 - Hon. Patricia Banks, Cook County Circuit, 5th Subcircuit, 1/27/2017
 - Hon. Camille E. Willis, Cook County Circuit, 2nd Subcircuit, 1/29/2017
 - Hon. Rick A. Mason, Associate Judge, 12th Circuit, 1/30/2017

4. The following judges have been reinstated:
 - Hon. Anthony W. Vaupel, Associate Judge, 9th Circuit, 1/5/2017 ■

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March

Wednesday, 3-1-27 – Webcast—A New Summary Judgment Standard for Discrimination Cases: *Ortiz v Werner Enterprises, Inc.* Presented by the Labor & Employment Section. 1:00 – 2:00 pm.

Thursday, 3-2-17 – Webinar—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 – 1:00 pm.

Thursday, 03-02-17—Chicago, ISBA Regional Office—Family Law Table Clinic Series—Session 4. Presented by Family Law.

Friday, 03-03-17- Chicago, ISBA Regional Office & Webcast—8th Annual Animal Law Conference. Presented by Animal Law. 9:00 a.m. – 5:00 p.m.

Wednesday, 03-08 – Live Webcast—Life After High School: Post-Secondary Transition Options and Education Protections for Young Adults with Disabilities. Presented by the Standing Committee for Disability Law; Co-sponsored by the Education Law Section. 10:00 am – 12:00 pm.

Wednesday, 03-08 – Webinar—Engagement Letters, Timesheets & Billing Tips. Presented by the Committee on Law Office Management and Economics. 12:00 pm – 1:00 pm.

Thursday, 03-09-17 – Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 – 1:00 pm

Thursday, 03-09 and Friday, 03-10—New Orleans—Family Law Update 2017: A French Quarter Festival. Presented by Family Law. Thursday: 12:00 pm – 5:45 pm; Reception 5:45- 7:00 pm. Friday: 9:00 am –

5:00 pm.

Tuesday, 03-14-17- Webinar—Matter Management Software- Why Outlook Isn't Good Enough. Practice Toolbox Series. 12:00 -1:00 p.m.

Wednesday, 03-15-17- Live Webcast—Economic Development in Your Community: Learn from the Leaders. Presented by Local Government Law Section. 1:00 pm – 3:00 pm.

Thursday, 3-16-17 – Webinar—Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 – 1:00 pm.

Wednesday, 03-22-17- Live Webcast—Housing Justice v. Housing Injustice: How Unfair Housing Practices Keep Segregation Intact. Part 3: Mortgage Fraud, Subprime Lenders, and Foreclosure Crisis. Presented by Committee on Racial and Ethnic Minorities; multiple cosponsors (see agenda). 1:00 – 3:00 p.m.

Thursday, 03-23-17 – Live Webcast—Immigration Hearings: How to Get the Job Done. Presented by the Administrative Law Section; Co-sponsored by the International and Immigration Law Section. 1:00 – 2:00 pm.

Friday, 03-24-17- Chicago, ISBA Regional Office—Jury Selection Techniques and the Use of Jury Focus Groups. Presented by Labor and Employment. TIME TBD—full day.

Tuesday, 03-28-17- Webinar—Access Your Documents from Anywhere and Share Them with Others. Practice Toolbox Series. 12:00 -1:00 p.m.

Wednesday, 03-29-17- Chicago, ISBA Regional Office & Live Webcast—Professional Responsibility and Ethics—

Spring 2017. Presented by General Practice. 12:50 p.m. – 5:00 p.m.

Friday, 03-31-2016 – iWireless Center, Moline—Solo and Small Firm Practice Institute Series: A Balancing Act: Technology Tips and Maximizing Your Profit. ALL DAY.

April

Thursday, 04-06-17- Chicago, ISBA Regional Office—Housing Justice v. Housing Injustice: How Unfair Housing Practices Keep Segregation Intact. Part 4: Resources for Rebuilding. Presented by REM; multiple cosponsors (see agenda). 1:00 – 5:00 p.m. (program). 5:00 – 6:00 p.m. (reception).

Friday, 04-07-17—NIU, Hoffman Estates—DUI and Traffic Law Updates—Spring 2017. Presented by Traffic Law and Courts. 8:55 – 4:00.

Tuesday, 04-11-17- Webinar—TBD. Practice Toolbox Series. 12:00 -1:00 p.m.

Wednesday, 04-12-17 – Chicago Regional Office—Nuts and Bolts of Illinois Administrative Hearings. Presented by the Administrative Law Section. 12:45 – 4:00 pm.

Wednesday, 04-12-17 – Live Webcast—Nuts and Bolts of Illinois Administrative Hearings. Presented by the Administrative Law Section. 12:45 – 4:00 pm.

Wednesday, 04-12-17 – Chicago Regional Office—Nuts and Bolts of Illinois Administrative Hearings. Presented by the Administrative Law Section. 12:45 – 4:00 pm.

Wednesday, 04-12-17 – Live Webcast—Nuts and Bolts of Illinois Administrative Hearings. Presented by the Administrative Law Section. 12:45 – 4:00 pm.

Thursday, 04-13-17 – Chicago Regional Office—2017 Amendments to the Illinois Limited Liability Company Act: What You Need to Know. Presented by the Business & Securities Section; co-sponsored by the Institute of Illinois Business Law. 12:45 – 5:00 pm.

Thursday, 04-13-17 – Live Webcast—2017 Amendments to the Illinois Limited Liability Company Act: What You Need to Know. Presented by the Business & Securities Section; co-sponsored by the Institute of Illinois Business Law. 12:45 – 5:00 pm.

Thursday, 04-13-17 – Chicago Regional Office—IJC/ISBA/CCBA Joint CLE Program. 5:30-7:00 p.m.

Wednesday, 04-19 to Friday, 04-21—Starved Rock State Park—Allerton Conference—Title TBD. Presented by Civil Practice and Procedure. Wednesday: 12:00 p.m. – TBD. Thursday: TBD. Friday: TBD-12:00 p.m.

Tuesday, 04-25-17- Webinar. TBD. Practice Toolbox Series. 12:00 -1:00 p.m.

Thursday – Friday, 04-27-28 – Chicago, ISBA Regional Office—4th Annual Elder Law Bootcamp: Basics and Beyond. Presented by the Elder Law Section, Co-sponsored by the Employee Benefits Section, the General Practice Section, the International & Immigration Law Section, the Labor & Employment Section, the Legal Technology Committee, the Military Affairs Committee, the Real Estate Law Section and the Senior Lawyers Section. 8:45 a.m. – 4:45 p.m. each day.

May

Wednesday, 05-03-17 Chicago, ISBA Regional Office Live Webcast—The First Hundred Days and Beyond: Labor & Employment Law Developments Under 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.

Tuesday, 05-09-17- Webinar—TBD. Practice Toolbox Series. 12:00 -1:00 p.m.

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

Friday, 05-12-17— Chicago, ISBA Regional Office—Civil Practice & Procedure: Trial Practice 2017. Presented by the Civil Practice & Procedure Section. 8:50 am – 5:00 pm.

Friday, 05-12-17— Live Webcast—Civil Practice & Procedure: Trial Practice 2017. Presented by the Civil Practice & Procedure Section. 8:50 am – 5:00 pm.

Wednesday, 05-17-17 – Chicago, ISBA Regional Office (Room C only)—Innovations in Mental Health Law. Presented by the Mental Health Section. 9:00 a.m. – 12:30 p.m.

Wednesday, 05-17-17 – Chicago, ISBA Regional Office WEBCAST—Innovations in Mental Health Law. Presented by the Mental Health Section. 9:00 a.m. – 12:30 p.m. ■



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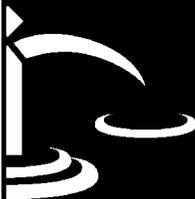
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