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TORT TRENDS

The newsletter of the Illinois State Bar Association's Section on Tort Law

Editor's note

By John L. Nisivaco, Boudreau & Nisivaco, Chicago

The first article of this edition was written by Brian Murphy. This article outlines and explains the elements that must be present for a trial court to give the missing witness instruction under Illinois Pattern Jury Instruction 5.01. Further, the article advises attorneys on how to explain the instruction during his or her closing argument at trial.

The second article was authored by Thomas Tobin, III. The article discusses Illinois law regarding the admissibility of prior felony and misdemeanor convictions in civil proceedings. First, it summarizes the requirements under Illinois evidence rules and Illinois case law for admitting prior convictions. Then, the article looks at the effect that the type of crime and the type of witness has on the admissibility of prior convictions.

Thank you to all the contributors. The articles are excellent and we hope you find the material helpful. ■

IPI 5.01: The Missing Witness Instruction

By Brian Murphy, Hofeld and Schaffner, Chicago

During discovery, you learn that a supervisor employed by defendant has investigated an accident—and the supervisor's conclusions are terrible for the defendant. You make mincemeat of one of plaintiff's experts during deposition and you know at the time of trial, the jury is going to agree—mincemeat. You should also understand that in these situations, your opponents agree with your assessments and damage control is first and foremost on their mind. Trial comes and you learn: The Supervisor … the damaged expert, neither is going to be called as a witness. Are you entitled to the missing witness instruction? It all depends.

Illinois Pattern Jury Instruction 5.01 states:

> If a party to this case has failed to produce a witness within his power to produce, you may infer that the testimony of the witness would be adverse to that party if you believe each of the following elements:
>
> 1. The witness was under the control of the party and could have been produced by the exercise of reasonable diligence;
> 2. The witness was not equally available to an adverse party;
> 3. A reasonably prudent person under the same or similar circumstances would have produced the witness if he believed the testimony would be favorable to him;
> 4. No reasonable excuse for the failure has been shown.

Whether to give a missing witness instruction is left to the sound discretion of the trial court and will not be overturned absent an abuse of discretion. *Chuhak v. Chicago Transit Auth.*, 152 Ill. App.3d 480, 105 Ill. Dec. 590, 504 N.E.2d 875 (1st Dist. 1987).

Was the witness under the control of the party: Where a witness is an employee of a party, that witness is under the control of that party. *Nassar v. Cnty. of Cook*, 333 Ill.App.3d 289, 775

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IPI 5.01: The Missing Witness Instruction

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N.E.2d 154 (1st Dist. 2002). Where a witness is a retained expert of a party, that witness is under the control of the party so retaining her. *Kersey v. Red Arrow Corp.*, 344 Ill. App. 3d 690, 800 N.E.2d 847 (2nd Dist. 2003). A former employee is not necessarily under the control of a party. *Chuhak v. Chi. Transit Auth.*, 152 Ill. App. 3d 480, 504 N.E.2d 875 (1st Dist. 1987).

Could the witness be produced by the exercise of reasonable diligence: Where a party learned of an August trial date in May, but waited to advise her expert until a week before trial and the witness was not available, that party failed to exhibit reasonable diligence in producing the witness at trial. *Dugan v. Weber*, 175 Ill. App. 3d 1088, 530 N.E.2d 1007 (1st Dist. 1988).

Was the witness equally available to the opponent: Generally, where the witness is a retained expert, that witness is not equally available to the adverse party. *Montgomery v. Blas*, 359 Ill.App.3d 83, 833 N.E.2d 39 (1st Dist. 2005). In the circumstance where the witness was retained by defendant to perform an independent medical exam of the plaintiff, that witness is not "equally available" to the plaintiff. *Hollembaek v. Dominick's Finer Foods, Inc.*, 137 Ill.App.3d 773, 484 N.E.2d 1237 (1st Dist. 1985).

A reasonably prudent person would have produced the witness if testimony were favorable to that person: Looking at this conversely, a party would likely have produced the witness unless the testimony was unfavorable to the party. An Illinois court held that I.P.I. 5.01 was appropriate even though the witness had offered opinions favorable to the defendant because there were key opinions he offered which favored the plaintiff, as well. See, *Dugan v. Weber*, 175 Ill. App. 3d 1088, 530 N.E.2d 1007 (1st Dist. 1988).

No reasonable excuse for the failure to produce the witness was shown: In *Kersey v. Red Arrow Corp.*, a defendant failed to call a retained expert in a traffic case, arguing that the only reason the expert would be called was to criticize the findings of plaintiff's expert. Defense counsel argued that the witness was not needed because counsel effectively neutralized the plaintiff's expert at cross. The trial court disagreed and the appellate court upheld, noting that the defense expert also testified to his own analysis of the accident and, therefore, his testimony would not be cumulative. *Kersey v. Red Arrow Corp.*, 344 Ill. App. 3d 690, 800 N.E.2d 847 (2nd Dist. 2003). Where the party can show, though, that testimony would be merely cumulative, or would unnecessarily prolong the trial, the failure to call the witness is reasonable. *Montgomery v. Blas*, 359 Ill. App. 3d 83, 833 N.E.2d 39 (1st Dist. 2005); *Chuhak v. Chi. Transit Auth.*, 152 Ill. App. 3d 480, 504 N.E.2d 875 (1st Dist. 1987).

PRACTICE NOTE:

Read I.P.I. 5.01 aloud and it can be somewhat confusing. The court does not instruct the jury on precisely what the missing witness said—or would have said—it simply instructs the jury that an inference can be drawn that the party's own witness would have provided damaging testimony. Further, often times it is not necessarily clear who the witness is; the connection to the party abandoning the witness; and why the damaging testimony is important. If the court gives this instruction, in closing argument, the instruction must be explained and the import of the missing witness and her testimony made manifest.

For example, recently this instruction was given at a trial where a defense expert was withdrawn just after plaintiff rested her case in chief. The court found the witness was a retained expert who had performed a medical examination of the plaintiff (**under the control of the defendant and not equally available to plaintiff**). The witness had testified that the plaintiff's injuries were caused by the negligence of the defendant but opined that the damages were not as severe as plaintiff claimed (**the witness likely would have been called but for the unfavorable testimony**). While the defendant claimed that others were testifying that the plaintiff's injuries were caused by the negligence and therefore his testimony was cumulative, the defense expert also had other contentions and it was clear the defendant was trying to avoid the bad effect of his expert's testimony (**no reasonable basis for not calling the witness**).

In this circumstance, a discussion was had with the court before closing argument to understand precisely what type of argument plaintiff's counsel could make when explain-

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ing the instruction and explaining the inference the jury could make. While plaintiff's counsel was not permitted to state exactly what the expert would have said if called to testify, counsel was permitted to argue that the court had found that all of the elements for the instruction had been met, the expert was retained by defendant, examined the plaintiff, made certain findings and would have offered opinions concerning causation. By doing this before closing, plaintiff's counsel was able to argue the instruction effectively without generating an objection. ■

The admissibility of prior convictions in civil proceedings

By Thomas F. Tobin, III, Chicago

I have found that a review of things that I thought I already knew is usually most helpful. This helps ensure that my interpretation of the law is accurate and up to date.

In civil litigation, prior convictions can be admitted to impeach parties and/or witnesses under certain circumstances. Generally, prior convictions are only admitted if they occurred within 10 years of the trial date. Additionally, a judge may consider admitting any prior conviction which is a felony but is limited to misdemeanor convictions involving dishonesty.

Illinois Rule of Evidence 609 codifies the federal rule as well as the case called *People v. Montgomery*, 47 Ill.2d 510, 268 N.E.2d 695 (1971). This is the most important case regarding this issue. The Montgomery rule applies to all witnesses at a trial, whether it is civil or criminal. *People v. Blackwell*, 76 Ill. App.3d 371, 379, 394 N.E.2d 1329 (1979). Subsequent case law, describes how the Montgomery rule is to be applied.

> Under Montgomery, evidence of a prior conviction is admissible for impeachment purposes if: (1) the witness'(s) crime was punishable by death or imprisonment for more than one year, or the crime involved dishonesty or false statement regardless of the punishment; (2) the witness'(s) conviction or release from confinement, whichever date is later, occurred less than ten years from the date of the trial; and (3) the danger of unfair prejudice does not substantially outweigh the probative value of the conviction.

People v. Harvey, 211 Ill.2d 368, 383 813 N.E.2d 181 (2004). The third requirement compels the judge to conduct a balancing test on the issue of unfair prejudice versus the probative value of the conviction. Significantly, the unfair prejudice must "substantially outweigh" the probative value in order to justify finding the prior conviction to be inadmissible. The balancing test is only conducted where the first two prongs of the standard are met.

Misdemeanor convictions are only admissible in limited circumstances. Besides the time deadlines that must be met, the impeaching party must show that the misdemeanor crime involved dishonesty and/or false statement. Dishonesty and false statement type of crimes refer to misconduct such as perjury, subornation of perjury, false pretenses, false statement, criminal fraud, embezzlement, theft and other offenses in the nature or crimen falsi. *People v. Atkinson*, 186 Ill.2d 450, 465, 713 N.E.2d 532 (1999). Basically, any misdemeanor involving lying, cheating, deceiving and/or stealing would be considered a crime involving dishonesty.

In making this determination regarding misdemeanor convictions, the court is not to view the facts surrounding the prior conviction but rather to only look at the crime as defined by the statute. *Knowles v. Panopoulos*, 66 Ill.2d 585, 590 363 N.E.2d 805 (1977).

Illinois courts have placed different interpretations on the admissibility of prior misdemeanor convictions depending on the status of the person to be impeached. In *Torres v. The Irving Press, Inc.*, the plaintiff, Miguel Torres, was injured in an automobile collision. 303 Ill.App.3d 151, 707 N.E.2d 248 (1st Dist. 1999). The defendant found an occurrence witness to testify at trial. Prior to the witness' testimony, plaintiff's counsel presented a certified copy of the witness' prior misdemeanor theft conviction. After hearing argument, the trial court barred the admission of this conviction. The appellate court noted that misdemeanor is a crime involving dishonesty which may be used for impeachment purposes. *Id.* at 256. The appellate court further criticized the trial court for not conducting the balancing test and ultimately reversed and remanded this case.

In *Travaglini v. Ingalls Health System*, a medical malpractice case, the decedents' roommate was Lamont Carrel. Mr. Carrel testified that he witnessed the decedent choking in his hospital room. 396 Ill.App.3d 387, 919 N.E.2d 445 (1st Dist. 2009). A major issue in the case was whether or not the hospital personnel reacted appropriately to this incident.

In *Travaglini*, Lamont Carrel had a misdemeanor conviction entered against him two years after he gave his deposition in the case, but before the trial. The fact that Carrel was a disinterested party in the lawsuit was clearly a major fact in the trial court's decision to prevent the introduction of his prior misdemeanor conviction. It is within the sound discretion of the trial court to balance the probative value of a prior conviction against its prejudicial impact. In the *Travaglini* case, the appellate court decided that the trial court properly took into consideration the balancing test and found no abuse of discretion. The jury verdict was upheld.

In *Stokes v. City of Chi.*, plaintiff was injured when falling on a defective sidewalk. 333 Ill. App.3d 272, 775 N.E.2d 72 (1st Dist. 2002). He had been convicted of burglaries on three occasions within the ten year period before the trial of this case. The trial court found there was no issue regarding the plaintiff's honesty. The trial court found that the prejudicial effect of the prior convictions outweighed their probative value. The appellate court emphasized that the balancing test should not be applied mechanically. *Stokes*, 775 N.E.2d 78. The appellate court found that the trial court should have admitted the prior convictions and reversed and remanded the case.

Illinois courts are reluctant to admit prior convictions for drug related offenses in civil litigation. In *Baldwin v. Huffman Towing*, the plaintiff had previously been convicted of

felony heroin possession and the defendant wanted to use it to impeach the plaintiff in a personal injury action. 51 Ill.App.3d 861 366 N.E.2d 980 (5th Dist. 1977). The *Baldwin* court decided that the probative value was outweighed by the prejudicial effect of the heroin conviction. In *Housh v. Bowers*, the trial court allowed the defendant to impeach the plaintiff for a five-year-old felony conviction for possession of a controlled substance with intent to deliver. 271 Ill.App.3d 104, 649 N.E.2d 505 (3rd Dist. 1995). The appellate court reversed that decision and found that the trial court had abused its discretion in admitting the prior conviction, because its probative value was substantially outweighed by unfair prejudice. Once again, in *O'Bryan v. Sandrock*, the appellate court found that the admission of a prior felony cocaine possession conviction had little probative value and was substantially outweighed by its prejudicial effect. 276 Ill.App.3d 194, 658 N.E.2d 471 (3rd Dist. 1995). The court stated,

> We believe that a felony drug conviction bears little, if any, relation to veracity and is thus only remotely probative, if at all, of truthfulness. On the other hand, the danger of unfair prejudice in admitting such evidence looms large.

Id. at 472, 473. The apparent exception to the use of prior convictions in civil litigation is drug convictions. Illinois courts appear to be more willing to overlook those types of felony convictions as compared to others. Thus, Illinois Courts do not mechanically apply the rule, but rather use a more nuanced approach. ■

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Friday, 9/4/15- Teleseminar—Rights of First Refusal/Rights of First Offer in Transactions. Presented by the ISBA. 12-1.

Tuesday, 9/8/15- Teleseminar—Ethics and Pre-Trial Investigations. Presented by the ISBA. 12-1.

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Tuesday, 9/8/15- Tuesday, 1/19/15- CRO—Trial Techniques Institute. 5:15-6:45—every Tuesday except 9/15 and 9/29.

Thursday, 9/10/15- Teleseminar—Selling Closely-Held Companies to Employees, Part 1- LIVE REPLAY. Presented by the ISBA. 12-1.

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Friday, 9/11/15- Teleseminar—Selling Closely-Held Companies to Employees, Part 2- LIVE REPLAY. Presented by the ISBA. 12-1.

Thursday, 9/10/15- CRO and LIVE WEBCAST—Mining Data and Privacy: A Primer. Presented by the ISBA Intellectual Property Section. 8:30 am -12:30 pm.

Friday, 9/11/15- Fairview Heights, Four Points Sheraton—Solo and Small Firm Practice Institute Series. Presented by the ISBA. ALL DAY.

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Wednesday, 9/16/15- Teleseminar—Duress & Undue Influence in Estate and Trust Planning- LIVE REPLAY. Presented by the ISBA. 12-1.

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Wednesday, 9/16/15- CRO and LIVE WEBCAST—Welcome to the Jungle: LLC Members and Their Rights and Interests in Bankruptcy—A Primer for the Business Counselor. Presented by the ISBA Business & Securities Law Section. 1:30-5 pm.

Thursday, 9/17/15- CRO and LIVE WEBCAST—Complex Asset Recovery: Fraudulent Transfers, Offshore Assets & Charging Orders. Presented by ISBA Commercial Banking, Collections and Bankruptcy Section. 8:45-12:15 pm.

Friday, 9/18/15- East Peoria, Embassy Suites—Family Law Financial Litigation. Presented by the ISBA Family Law Section. 8:20-5:00.

Monday, 9/21/15- Teleseminar—Attorney Ethics in Transactional & Litigation Negotiations- LIVE REPLAY. Presented by the ISBA. 12-1. ■

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