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Lawyer Lincoln: A lesson in character

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

On March 24, 1836, the clerk of the Sangamon County Circuit Court deemed Abraham Lincoln "a man of good moral character," then the basic requirement for bar admission. No exam or test of qualifications. A good moral character was the sole criterion.

Lincoln's legal career has inspired generations of lawyers, especially Illinois lawyers, as to how we should behave and interact with others. Lincoln followed his keen inner moral compass, at a time when there were no codes or rules of professional

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Cook County Judge Debra Walker is first judge to receive NCBF Excellence Award

BY DAVID M. ANDERSON, EXECUTIVE DIRECTOR, ILLINOIS BAR FOUNDATION

Cook County Circuit Judge Debra Walker received the 2017 National Conference of Bar Foundations (NCBF) Excellence Award at the NCBF midyear meeting in Miami in February. Judge Walker is the third person and first judge to receive this award, which recognizes an individual who has made an outstanding contribution to law-related philanthropy.

The NCBF is an association of professional staff and volunteer board members from bar foundations across the country that convenes regularly to share programming ideas and best practices. The NCBF hosts bi-annual meetings held in conjunction with the American Bar Association.

In 2008, Judge Walker was elected to the Cook County Circuit Court. She serves in the Domestic Relations Division. Prior to being elected to the bench, she was a partner at Clausen Miller, P.C., where she concentrated on professional liability matters.

Judge Walker has a long record of

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Lawyer Lincoln: A lesson in character

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conduct. So assured was Lincoln's moral nature that he developed the reputation of being trustworthy, truthful, and principled before he became a lawyer. As Lincoln said, "I would rather be a little nobody, than be an evil somebody."

Lincoln valued doing what fairness required. As the authors of an article on Lincoln's legal practice put it, "[W]here most lawyers would object, he would say he 'reckoned' it would be fair to let this in, or that; and sometimes when his adversary could not quite prove what Lincoln knew to be the truth, he 'reckoned' it would be fair to admit the truth to be so-and so." Similarly, Lincoln scholar Brian Dirck says Lincoln exemplified honesty in both his moral and ethical sense—he was "frank, unapologetic[,] and practical."

Lincoln would reject a case, even quitting in the midst of trial, if he believed the cause to be without merit. He saw trials as a means to promote morality, to achieve fairness and equity. Once, while trying a case out-of-town, he retired to the local hotel and sent the judge a message through a lawyer friend that he would not be returning. "My hands are dirty," Lincoln told the friend, "and I came over to clean them."

While Lincoln distinguished himself in the courtroom, he would not let deceit, unpleasantness, discord, and dishonor enter into his advocacy. Were he practicing in the 21st Century, Lincoln would disapprove of petty discovery battles or aggressive pretrial motion practice. As Lincoln said of his approach to practicing law, "I want no disputes and fusses with men about simple unimportant facts. I must conciliate."

Lincoln heeded his conscience whenever it conflicted with client loyalty. "No client ever had money enough to bribe my conscience or to stop its utterance against wrong and oppression," Lincoln told his partner William Herndon. "I will never sink the rights of mankind to the malice, wrong, or avarice of another's wishes, though those wishes come to me in the relation of client and attorney."

In addition, Lincoln saw himself as defending decency, as a guardian of public order and public morals. There are countless stories of Lincoln the selfless lawyer. He would go out of his way not to take advantage of a situation or a client. But should a client flat-out refuse to pay what Lincoln considered a fair fee, he would not hesitate to sue the client. (He never drew a retaliatory malpractice claim, but his were far different times). For instance, after successfully securing tax exempt status for the Illinois Central Railroad, he had to sue for his fee, and secured the largest fee he ever received, without jeopardizing his relationship with the Illinois Central, which continued to hire him.

For Lincoln, the cultivation of a good moral character was the standard by which he practiced law. It should be our ultimate standard as well.

Rehearing: "When the conduct of men is designed to be influenced, persuasion—kind, unassuming persuasion--should ever be adopted. It is an old and a true maxim, that a 'drop of honey catches more flies than a gallon of gall.'" A. Lincoln, Temperance Address, Feb. 22, 1842. ■

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public service and leadership in the legal profession. A regular attendee at NCBF meetings, she served one term on the NCBF Board of Trustees, which included her service as chair of the Awards Committee and as a member of the Program Committee. She also participated as a presenter at NCBF midyear and annual meetings. Judge Walker is a past President of the Illinois Bar Foundation. She served longer than any other board member in the 65-year history of the IBF, holding the offices of Secretary and Vice President, as well as Chair of the Fellows program. She was recently elected to the Illinois Judges Foundation board of directors.

In addition to her bar foundation service, Judge Walker is a past president of the Women's Bar Association of Illinois, and is an active member of the Illinois State Bar Association and the Bench & Bar Section Council. She has served on Illinois Supreme Court's Commission on Professionalism since its inception in 2005; she currently chairs that Commission. In 2012, she was appointed to the Court's newly created Access to Justice Commission on which she continues to serve.

"I've always sought to serve others and I saw the bench as a way to serve our fellow citizens," Judge Walker said. "I think it's the ultimate in public service for people to give up a law partnership and go on the bench." ■

More will come!

BY E. KENNETH WRIGHT, JR.

There are certain laws, rules, conventions and practices that most lawyers are aware of and follow - sometimes referred to as "Hornbook Law." One example is the 30-day limit for filing an appeal. Another example is the strict 35-day limit for filing for administrative review of administrative decisions. This time limit is often said to be so strict that it is jurisdictional, *i.e*. no exceptions, and not in any way subject to a due process examination. Courts normally do not look at these established tenets of the law. However, when they do all bets may be off.

So much for certainty: the Illinois Supreme Court recently upset Hornbook Law by allowing a late filing of a complaint for administrative review by applying a due process analysis. All involved parties, attorneys and judges agree the filing was one day late when the 35th day fell on a holiday (Labor Day Monday) and the complaint was filed the next day, Tuesday.[1]

The majority in the Supreme Court hinted that mercy would prevail under the label of "due process" when it viewed the filing as "less than 12 hours short" of the due day. *Grimm v. Calica*, 2017 IL 120105. *Grimm* is a lively and interesting case decided by the Illinois Supreme Court shortly after the first of the year, 2017. The court created some new exceptions to the 35 day filing rule for administrative review.

In *Grimm*, a school teacher, was investigated initially by DCFS as a result of a complaint of child abuse of their child filed by her husband. In 2012, DCFS indicated a finding of child abuse after Plaintiff's husband told the McHenry County sheriff's office that a day earlier she had struck their six-year-old son twice with a wooden spoon. This was also the day Grimm moved out of the marital residence. The sheriff's report noted a welt and bruise on the child's left buttock. Grimm, a teacher sought to expunge such report since she would be unemployable in her profession if such a report remained the State Central Register. In 2013 an administrative law judge conducted a hearing and issued a written opinion recommending that Grimm's request for expungement be denied.

DCFS issued a decision in a letter from its director, Richard Calica, bearing the date July 30, 2013, at the top and stating:

This represents the final administrative decision of the Department. If you disagree with any part of it, you may seek judicial review under the provision of the Administrative Review Law, 735 ILCS 5/3-101 *et seq*. (West 2010), within 35 days of the date this decision was served on you.

The letter did not state that under an Illinois statute the date on the letter is deemed the date of service. Plaintiff filed for administrative review on September 4, 2013, the Tuesday after a court holiday, Labor Day. Surprisingly, all parties agreed that Plaintiff filed on the 36th day and thus did not comply with the statute. The Appellate court stated that she missed her filing deadline by less than 24 hours because of the Labor Day holiday. 400 Ill. Dec. 687.

Unknown to Grimm, under the Administrative Procedures Act, the 35 day period begins on the day of mailing. Nowhere in the letter is the day of mailing stated. Further, the statute containing that information, 735 ILCS 5/3-103 is not stated in the letter or attached.

A DCFS hearing officer made a finding of "indicated" child abuse. Because such a finding would be accessible in the State Central Register it would have an extremely negative effect on her career as

a teacher. See, *Lyon v. Dep't of Children & Family Services*, 209 Ill. 2d 264, 273-274 (2004). Grimm sought to have that finding expunged and was refused by DCFS.

The Department conceded that Grimm had a constitutionally protected liberty or property interest impacted by the indicated ruling. *Grimm* at ¶25. Grimm then filed a complaint administratively to review the decision of DCFS that declined to expunge her "indicated" child-abuse finding. The trial court accepted jurisdiction although the complaint for administrative review was filed one day beyond the statutory deadline of 35 days stated in the Administrative Review Act. 735 ILCS 5/3-103. The trial court accepted jurisdiction and ruled that the Department's decision was "clearly erroneous" and reversed it. The Second District appellate court affirmed, finding that the letter from the Department was in effect misleading and not "well calculated to appraise" Grimm that the 35 day period began on July 30, 2013, when the letter was mailed. Although the letter contained a date, it appeared as nothing more than the date of the letter, not the date of mailing and not as the date of service. (*Grimm v. Calica*, 2015 IL App (2nd) 140820 ¶20). The appellate court noted that the Department could have removed any confusion by informing Grimm that the mailing date, as well as the service date, was the date of the letter. *Id*.

The Supreme Court affirmed holding that the Illinois Constitution does not guarantee due process under the Administrative Review Act since it is purely statutory and to be strictly construed; however, the court noted that due process is a flexible concept that depends upon the government action and the effect on a private interest of an individual. *Grimm,* 2017 IL 120105, *supra* at ¶21. Going further, the court stated that the agency has no constitutional obligation to inform a party affected by one of its decisions of the statutory right to judicial review or the time period for such review. On the contrary, the expiration of the 35 day period will not bar a plaintiff's complaint "where the agency fails to fairly and adequately inform a plaintiff of its decision." *Id*., citing *Bell v. Retirement Board of the Firemen's Annuity & Benefit Fund*, 398 Ill.App.3d 758, 763 (1st Dist. 2010).

Here the majority found a confusing letter that did not adequately divulge how to interpret and apply the 35 day period for filing a complaint for administrative review. The Supreme Court majority applies a comprehensive due process test. Three distinct factors are to be considered. First what is the private interest that is affected by the official action; second, what is the risk of erroneous deprivation through the process used; and, third what is the government's interest or cost of providing additional safeguards to avoid the same or similar consequences in the future.

The court answered these inquiries by adding that all the government, *i.e.* DCFS, was required to do was inform Grimm and others similarly situated that the mailing date was the start of the 35 day period. The mailing date could easily be stated in the transmittal letter or a certificate of mailing attached to the opinion.

Justice Thomas, joined by Chief Justice Karmeier, mounted a vigorous and compelling dissent. An overriding aspect of the dissent is a concern for precedent and the future ramifications of the majority opinion. Justice Thomas emphasized that judicial review of administrative decisions is not required by the due process clause and it "necessarily follows that an administrative agency is not required to notify a party of the statutory right to judicial review." *Grimm* at ¶38. Continuing, the dissent states that due process does not require the agency how to count the 35 days or to identify the exact day the complaint for administrative review is due. Calculating a due date is not an easy task. Grimm's attorney was also served with a copy of the opinion by certified mail dated July 30, 2013.

It should be added parenthetically that there is a need to address the fact that the complaint cannot be filed on a weekend or court holiday. The dissent would have the majority provide a due date, a list of court holidays, and, with copies of the statutes! The dissent was clearly concerned with the future aspects of the majority views.

The dissent calls the majority opinion a can of worms that should be obvious since it calls for challenging wording as incomplete or misleading when compared with a protected property interest, i.e. reputation, employment, etc. is at stake and thus mounts a due process challenge to the effect of the wording. ¶58.

Grimm is another legal case in which fairness and alleged due process clash with the rule of law. Interestingly, the notice letter challenged by Grimm is the type that has been used for a long time by DCFS (need cite or part of record) and not challenged in a higher court.

The future should be interesting to observe the offspring of the majority's view that places a heightened burden of agencies to better instruct litigants as to rights after an opinion or ruling has been made.

Similarly, we should wait to observe the ramifications of *Grimm* in the general litigation area. For example, must final orders specify the right to reconsideration, appeal, and the related time periods, fees and filing requirements? Do forms provided need sample pleadings attached for auto accidents, simple contracts, money owed, and the like? ■

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1. Interestingly, perhaps even sadly, the litigants and courts have ignored the Illinois Statute on Statutes that provides a method of counting days. 5 ILCS 70/1.11. The Statute provides that the first day shall be excluded, and if the last day is a court holiday it too shall be excluded and the last day shall be the next court day. The full text is provided. The statute is considered with the A/R statute that states the first day is the date of mailing. Thus, including July 30 as provided in the A/R statute as the date of service and counting out 35 days lands the due date on Monday, Labor Day, September 3, 2013, a court holiday. Now in applying the Statute on Statutes and excluding the court holiday, the filing deadline was in fact Tuesday, September 4, 2013 the precise day on which it was filed. See, *Carroll v. Dept. of Empl. Sec*., 389 Ill. App. 3d 404, 408 (2009).

5 ILCS 70/1.11 Computation of time]

The time within which any act provided by law is to be done shall be computed by excluding the first day and including the last, unless the last day is Saturday or Sunday or is a holiday as defined or fixed in any statute now or hereafter in force in this State, and then it shall also be excluded. If the day succeeding such Saturday, Sunday or holiday is also a holiday or a Saturday or Sunday then such succeeding day shall also be excluded.

Do corporations need an attorney in administrative review hearings?

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

On a record that was incomplete and where the City of Chicago had destroyed much of the hearing material, a divided Supreme Court reaffirmed the basic principle that due process in an administrative hearing specifically requires a definite charge, adequate notice, and a full and impartial hearing. *Stone Street Partners, LLC, v. The City of Chicago Department of Administrative Hearings*, 2017 IL 117720 ¶34. The divided Supreme Court, however, specifically declined to decide whether a corporation must be represented at an administrative hearing by a licensed attorney.

This case involved a 1999 administrative finding by the City that there were building code violations in one of Stone Street's buildings and imposed a monetary fine that eventually resulted in the City placing a lien on the property. Stone Street first asked the City's Department of Administrative Hearings in 2011 to vacate the 1999 order. The Department denied the request – saying it lacked jurisdiction to vacate an order that old. In a four-count complaint that sought: 1) administrative review of the denial; 2) a declaratory judgment that the City's judgment recorded in 2009 was void because the initial judgment had expired, and was not revived, was the product of proceedings involving unauthorized practice of law, and was entered against a non-existing entity; 3) slander of title, and 4) that the City acted maliciously and engaged in the unauthorized practice of law because the initial administrative complaint was neither drafted by nor prosecuted by a licensed attorney.[1]

The City held administrative hearings in August and September 1999. At the September hearing a man named Keith Johnson filed a written Appearance on behalf of Stone Street without checking any of the boxes on the form Appearance indicating his capacity of representation. Johnson was not an attorney and was neither employed by nor affiliated with Stone Street; rather he was the caretaker for the father of one of Stone Street's principals.

The Circuit Court dismissed the Complaint. A divided Appellate Court determined that Stone Street had not been afforded the necessary notice and opportunity to be heard. The Appellate Court also opined that Stone Street had not waived any objection to proper notice because the person who appeared at one of the initial hearings was not a licensed attorney.

Relying upon *Downtown Disposal Services, Inc., v. City of Chicago* (2012 IL 112040), "the Appellate Court held that nonattorneys (*sic*) cannot represent corporations in administrative hearings" particularly where there is testimony from sworn witnesses, interpretation of laws and ordinances, and where a punitive fine could be imposed. *Id*. The Appellate Court upheld the dismissal of Count I (lack of jurisdiction for the hearing panel to vacate the 1999 order) and Count III (Slander of Title). The Appellate Court reversed dismissal of Count II and held that the 1999 judgment was void because Stone Street had not received the requisite notice.

The sole issue before the Supreme Court was whether Count II should have been dismissed or whether Stone Street should have been allowed to proceed with its request for declaratory relief and to remove the cloud on title to its property.

The City urged the Supreme Court to reject the Appellate Court's holding that it had not provided Stone Street with proper notice and that the appearance of a lay person for Stone Street did not waive Stone Street's objection to notice. The City based its argument on its view that administrative hearings of this type did not require specialized legal skill or training. Alternatively, the City argued that even if Johnson's appearance constituted the unauthorized practice of law the Supreme Court should exercise its inherent authority to regulate the practice of law and find that corporations do not need to be represented in administrative hearings by licensed attorneys. As another alternative, the City argued that if lay representation of corporations should be prohibited in administrative hearings, that prohibition should be only prospective.

The Supreme Court agreed "that Johnson's status is central to the viability of the claims asserted by Stone Street in count II of its complaint." Even though it found Johnson's role in the case to be critical, the Supreme Court disagreed with the City's position that the viability of Stone Street's cause of action turns on whether laypersons may represent corporations in administrative proceedings without violating the prohibition of the unauthorized practice of law. The Supreme Court majority reasoned it need not consider the issue because "Johnson did not represent Stone Street in *any* capacity." (*Id*. emphasis in original). In an accompanying footnote, the Supreme Court "vacate[d] those portions of the appellate court's opinion which address that issue."

By the time of the Circuit Court proceedings both Johnson and his principal were deceased and not available to explain his appearance. The Supreme Court found nothing in the record to explain why Johnson appeared for Stone Street or any evidence that Stone Street granted any authority to Johnson.

The Supreme Court found the notice requirements were a jurisdictional prerequisite to conducting the initial hearing. Therefore, since Stone Street had not received any notice of the initial

hearing, it affirmed the Appellate Court's finding that the City had not obtained jurisdiction over Stone Street and the order finding a violation and imposing a fine was void. Additionally, the Supreme Court held the 2009 judgment recorded against Stone Street's property was null and void because the 1999 judgment on which it was based had expired and was no longer enforceable.

In a vigorous dissent, Justice Freeman (joined by Justices Burke and Theis) disagreed with the majority's decision to not address the unauthorized practice of law issue and the finding that the issue was immaterial to its ultimate decision. The dissent also criticized the majority's decision to invalidate a final administrative order "based on an incomplete and inadequate record." The dissent would "hold that the representation of a corporation at Department proceedings does not constitute the practice of law." The dissent argued the Court should pass on this issue when it was part of the Appellate Court's reasoning for invalidating the 1999 Order and because the parties addressed the issue. The dissent argued that his put the issue before the Court for resolution at this time with the prospect of needing to address the issue at some point in the future.

The dissent cited *Downtown Disposal* for the proposition that the Supreme Court has the inherent authority to regulate the practice of law. But, the dissent distinguished *Downtown Disposal* – a case where Downtown's non-attorney president had drafted and prosecuted a complaint in an administrative review proceeding filed in the Circuit Court. Looking at similar proceedings, the dissent noted that the City's Department has its own procedural rules and that the Illinois Administrative Practice Act, the Illinois Code of Criminal Procedure, and the Illinois Code of Civil Procedure "do not apply to Department proceedings." The dissent also noted significant differences between the City's rules and civil procedure: discovery and the issuance of subpoenas require leave from the hearing officer; prehearing and post-hearing motions and motions to set aside an order are limited. The formal and technical rules of evidence do not apply and hearsay evidence is allowed if it is of the type upon which people would normally rely. The dissent termed these rules and regulations as being "more akin to the rules that apply to small claims proceedings in the circuit court" where those Supreme Court Rules (281-288) allow a corporation to appear through certain non-attorney employees or officers, even where there may be a jury trial. A corporate defendant against municipal violations before the Department is in much the same position as a corporate defendant in a small claims proceeding "where it can be represented by a nonattorney (*sic*)."

The dissent would also find that Johnson's conduct at a hearing, even if he had presented photographic evidence on behalf of Stone Street, would not have required a lawyer's expertise. Accordingly, the dissent would not find Johnson guilty of the unauthorized practice of law.

More will likely come on this issue. ■

1. Count IV was not pursued on appeal.

There is no bright line test for the admission of alcohol in a civil case

BY DANIEL O'BRIEN

Alcohol is one of the most prejudicial pieces of evidence that can be inserted into any matter. If the Plaintiff finds evidence that the defendant has alcohol in his or her system the Plaintiff demands it be admitted. The counter is true if the Defendant finds the Plaintiff may have been under the influence of alcohol; it shows contributory fault.

The truth is, given its incredibly prejudicial effect courts and litigants need to analyze this issue very carefully before allowing alcohol to be inserted into any civil matter. The knee jerk reaction is to assume that if blood alcohol content (hereinafter "BAC") involved in an automobile case is a level above the statutory minimum it should be automatically admitted. Additionally, practitioners in other types of cases including premises and products cases attempt to bootstrap the statutory provisions of the Illinois Vehicle Code into an argument for admissibility of BAC: should the BAC be above the statutory limits in order to be admissible. The reality is the analysis is actually much deeper and more methodical than that. There simply is no bright line for the admission of alcohol or drugs into a case. When we hear BAC is beyond a certain level the reaction is the alcohol should automatically be admitted to show impairment. This rush to admit this evidence is not the law.

The threshold question is whether the evidence of alcohol is relevant or probative to the issues in the case. *Petraski v. Thedos*, 382 Ill.App.3d 22, 30. (1st Dist. 2008) (Hereinafter "*Petraski I*") Once the Court determines that the alcohol is relevant and reliable the court must then turn its attention to the determination of whether it is admissible. The court must conduct a balancing test to determine admissibility. *Id*. at 26. The court also reiterated the

long-standing proposition that "relevant evidence may be excluded if its probative value is substantially outweighed by the nature of the unfair prejudice." *Id.* at 31. The Court also found that "it must be shown that the intoxication resulted in an impairment of mental or physical abilities and a corresponding diminution in the ability to act with ordinary care." *Id*.

There is no statute, nor is there case law that provides that someone that is presumptively over the legal limit in an automobile case is also presumptively under the influence in other cases. It is not unusual for the argument to arise that a plaintiff or a defendant is over .08 and thus the triggering of a presumptive level of being under the influence of alcohol. This is a trap that is not supported by the case law. The presumption of "under the influence of alcohol" is only contained in the Illinois Vehicle Code. It does not necessarily lead to the assumptive conclusion that a party is intoxicated or impaired because he or she is over the statutory limit. Quite to the contrary, the Illinois Courts have held that the presumptive level only supports that a person is under the influence and not that they are presumptively impaired or intoxicated. *Petraski v. Thedos*, 2011 Ill.App (1st) 103218 (2011) (hereinafter "*Petraski II*"). The rationale for this is clear. Different people react to and metabolize alcohol differently, thus impairment must be proven even in the face of an elevated BAC.

There have been a numerous of cases over the years that have dealt with the admissibility of alcohol. Perhaps the most often cited cases are *Petraski I* and *Petraski II*. In Petraski I, the plaintiff, Margaret Petraski, was involved in a high-speed collision with a Sheriff's deputy. The collision took place at an intersection where the plaintiff had been stopped and began a left turn on a green arrow. The trial court barred the testimony of the expert based on the expert's speculative conclusions that at the time of the accident in question Margaret was impaired. The expert employed retrograde extrapolation in arriving at his conclusion. This is a process whereby the expert attempts to determine the BAC at the time of the occurrence by using the BAC at the time of the blood draw or breathalyzer, then extrapolating back in time using a rate of elimination, to determine the BAC at the time of the occurrence in question. In order to perform retrograde extrapolation the expert needs certain pieces of information. The threshold question for the expert is whether the party in question is in the absorption or elimination phase regarding the metabolization of the alcohol. Essentially, a determination must be made whether the body is still in process of absorbing the alcohol, thus the BAC is still rising, or whether the body is eliminating, thus the BAC is dropping. In order to make the determination the expert must know certain information such as the last time the person drank, what she was drinking, food intake, etc.

The expert in *Petraski I* conceded that he did not possess a number of foundational issues such as when she had her last drink, what she was drinking, food intake and a host of other issues. As such, the validity of the BAC was called into question. Additionally, the expert had no information as Margaret's actions leading up to the accident in the form of witness testimony such as erratic driving, speeding, swerving or the like. Due to of Margaret's injuries, she had no recollection of the accident. The lack of this foundation resulted in the expert having no opinions that Margaret was actually impaired. As a result the expert's testimony in *Petraski I* was barred.

The Appellate Court reversed in *Petraski I* stating that the evidence of BAC was relevant or probative to explain why Margaret turned left while a speeding squad car was headed towards her and that evidence should have been admitted. As such, while the expert's opinion that she was under the influence was relevant, it did not negate the need for a determination that Margaret was in fact impaired or intoxicated.

Petraski I and II are often misunderstood for the proposition that an expert can testify to a party's BAC based on a bright line test. Neither case made such an announcement. The court also did not announce that an expert would be prohibited from testifying about impairment should a party's BAC be extraordinarily high.

Petraski II recounted the re-trial of the matter. The trial court in the re-trial allowed the admission of the BAC testimony; however, the Defendant's expert was unable to provide a foundational basis for his opinion that Margaret was impaired at the time of the accident. The expert only testified as to generalities of people in similar circumstances. Following the verdict trial court in post-trial motions found that it had erred in allowing the expert testimony because the expert failed to opine as to Margaret's conduct. Rather he conceded that he could not talk about Margaret in particular. The Plaintiff in post-trial motions argued that the foundational basis was not provided to allow the admission of this alcohol evidence, specifically the issues of intoxication or impairment, with no foundation for doing so. The trial court agreed granting a new trial. The defense appealed the matter arguing the trial court abused its discretion and failed to follow the appellate court's ruling in *Petraski I*.

Petraski I and *Petraski II* provide a clear illustration of the prejudicial effect of alcohol evidence in a case. In Petraski I the jury awarded thirty-five million dollars reduced by twenty-five percent contributory fault attributed to Margaret. In *Petraski II* where the evidence of alcohol was allowed, the jury found the defendant not guilty. The jury instructions provide the likely reason for this result. The Jury instruction on the issue of alcohol and drug use is contained in the Illinois Pattern Jury instruction 12.01. This instruction was modified to its current language in 2009 and provides as follows:

12.01 Intoxication

> Intoxication is no excuse for failure to act as a reasonably careful person would act. An intoxicated person is held to the same standard of care as a sober person. If you find that [insert allegedly intoxicated person] was intoxicated at the time of the occurrence, you may consider that fact, together with other facts and circumstances

> in evidence, in determining whether [insert allegedly intoxicated person] conduct was [negligent] [willful and wanton] [or] [contributorily negligent].

This instruction is similar to the one that was given in Petraski although it has been somewhat reformatted to place the "intoxication is no excuse language" at the forefront.

The Appellate Court in *Petraski II* clarified the initial ruling regarding the alcohol testimony. While not negating the finding that the BAC was relevant, without more foundation, this could not and does not stand for the proposition that a BAC above the statutory presumptive limit allows an expert to testify unfettered regarding the impairment of the individual involved. The Defendants in *Petraski II* argued that once an individual's BAC is above the statutory presumption that individual is under the influence and it is also presumed they are intoxicated; however, the Illinois Vehicle Code 625 ILCS 5/11-501.2(b)(3) only provides a presumption that someone is under the influence of alcohol it does not presume intoxication. The Defendants argued *Wade v. City of Chicago Heights*, 216 Ill. App.3d 418 (1st Dist 1991), for this proposition, but the court in *Petraski II* noted that Wade specifically stated that "although one who is intoxicated can be said to be under the influence of alcohol, the converse is not necessarily true: one may be under the influence of alcohol in varying degrees without necessarily being considered intoxicated.: Petraski II at ¶115. As previously stated, neither section 11-501 nor section 11-501.2 of the Illinois Vehicle Code employs the term 'intoxicated.' Nor is the concept of being under the influence anywhere statutorily equated with being intoxicated." *Wade*, 216 Ill.App.3d at 434.

This issue was further discussed in *Logan v. US Bank*, 2016 Il.App (1st) 15249. *Logan* was a legal malpractice case addressed the level of narcotics in an individual that was 10-20 times the amount which would be customarily administered to a patient in moderate pain. Id. at ¶12. The Court clearly indicated that the Appellate Court in *Petraski II* did not announce a bright-line test, nor did they conclude that the admission of an expert's opinion of impairment would be an abuse of discretion based upon an unusually high BAC. *Id*. at ¶14. They reiterated that they found no authority for the proposition that an expert may testify to an individual's impairment solely based on the fact that her BAC was above the statutory limit. *Id*. at ¶14. The *Logan* court went on to state that "We believe that the admission of an expert witness's opinion that an individual was intoxicated or impaired based upon BAC depends on the level of alcohol in the individual's blood." *Id*. at ¶14 When the statutory level at which an individual is presumed to be under the influence is relatively low; a trial court does not abuse its discretion in barring an expert's opinion that the individual was intoxicated or impaired based solely on BAC. *Id*. at ¶14 Interestingly, the Logan Court went on to discuss that, while that case involved morphine rather than alcohol, the analysis is the same. *Id*. at ¶15.

The Court in Petraski II upheld the trial court's granting of a new trial finding that the expert had no evidence of Margaret's conduct leading up to the accident. There was no evidence she was speeding or otherwise driving erratically. There was no evidence to corroborate impairment. *Id.* As such the Appellate Court in Petraski II upheld the trial court's finding granting of a new trial based on the expert's testimony being unreliable as to her Margaret's intoxication.

It is axiomatic that extremely high levels of BAC could allow an expert to testify regarding an individual's level of impairment as medical science would dictate that an extremely high BAC would have definitive effects on any individual. *Petraski II* discussed that the Court in *Marshall v. Osborn*, 213 Ill.App.3d 134 allowed expert testimony regarding that a BAC of .320 would "have a profound effect on the decedent's perception, judgement and physical abilities." *Id.* However, even in the instance of extremely high BAC levels there must be some finding of causation. *Bielaga v. Mozdzeniak*, 328 Ill.App.3d 291, 298. Without this finding, the alcohol can only be offered to inflame or prejudice the jury.

The bottom line is that the admissibility of this potentially highly prejudicial evidence should not be allowed lightly. The analysis must not be limited to the BAC of the individual applying some bright line demarcation. An analysis of the foundational factors that play a role in the determination of the absorption and elimination of alcohol, evidence of actual impairment and a careful balancing of the relevance of the evidence, along with its prejudicial effect are all factors that must be reviewed prior to alcohol evidence being admitted into a case. ■

Recent Appointments and Retirements

1. Pursuant to its Constitutional authority, the Supreme Court has appointed the following to be Circuit Judge:
   - Travis Richardson, Cook County Circuit, 2nd Subcircuit, 2/142017
   - Carey C. Gill, 1st Circuit, 2/17/2017
   - Marina Amendola, Cook County Circuit, 2/27/2017

2. The Circuit Judges have appointed the following to be Associate Judge:
   - Frederick V. Harvey. 12th Circuit, 2/15/2017
   - Michael A. Fiello, 1st Circuit, 2/24/2017

3. Pursuant to its Constitutional authority, the Supreme Court has assigned the following to the Appellate Court:
   - Hon. David K. Overstreet, 5th District, 2/27/2017 ■

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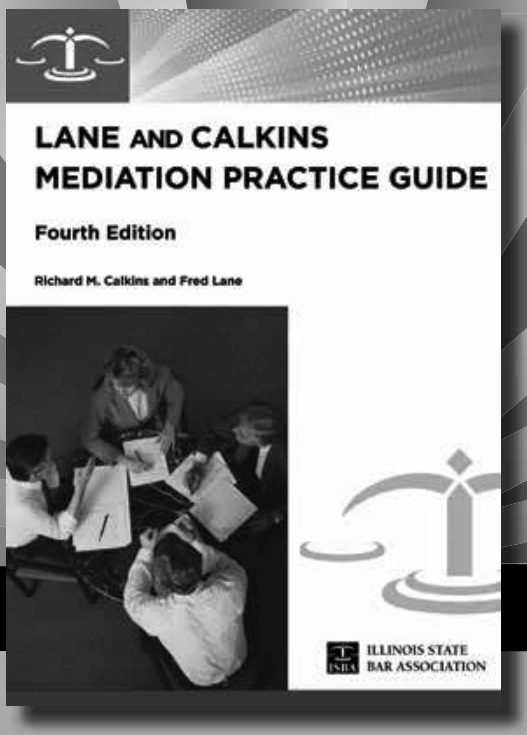

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April

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.

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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.

Wednesday, 04-19 to Friday, 04-21—Starved Rock State Park—Allerton Conference—The Changing Landscape of Civil Practice: Technology, Ethics & Economics. Presented by Civil Practice and Procedure. Wednesday: 5:30 p.m. – 7:00 p.m.. Thursday: 8:00 a.m. – 8:30 p.m. Friday: 8:00 a.m. –12:00 p.m.

Friday, 04-21 – Chicago Regional Office—Winding Down Your Practice. Presented by Senior Lawyers. 1:00 – 4:30 p.m.

Tuesday, 04-25-17- Webinar. Outlook Power Hour. 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 — 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.

Thursday, 05-18-17— Lombard, Lindner Conference Center—Litigation and the Real Estate Practitioner. Presented by the Real Estate Law Section. 8:30 am - 4:30 pm.

Tuesday, 05-09-17- Webinar—PDF Power Hour. 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.

Thursday, 05-11-17 – Bilandic Building, Chicago—Ethics Extravaganza 2017. Presented by the Government Lawyers Section. 12:30 – 4:45 p.m.

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 – Live Webcast—Innovations in Mental Health Law. Presented by the Mental Health Section. 9:00 a.m. – 12:30 p.m.

Thursday, 05-18-17— Lombard, Lindner Conference Center—Litigation and the Real Estate Practitioner. Presented by the Real Estate Law Section. 8:30 am - 4:30 pm.

Thursday, 05-18-17—Chicago, ISBA Regional Office—Family Law Table Clinic Series—Session 5. Presented by Family Law

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.

Tuesday, 05-23-17- Webinar—Power Point Power Hour. Practice Toolbox Series. 12:00 -1:00 p.m.

Wednesday, 05-24-17 -Chicago Regional Office—Transgender Students: Law and Practice. Presented by the Child Law Section, co-sponsored by the Human Rights Section, Committee on Women and the Law. General Practice Solo and Small Firm Section and Committee on Sexual Orientation and Gender Identity

1:30 p.m. – 5:00 p.m. with reception to follow until 6:00 pm

Thursday, 05-25-17 -Chicago Regional Office—Evidence: Before, During, and After Trial or After Settlement. Presented by the Tort Law Section. 8:45 am – 1:00 pm.

Wednesday, 05-31-17 – Chicago Regional Office—Master Series - The Code of Kryptonite: Ethical Limitations on Lawyers' Superpowers. 12:30 – 4:20 p.m.

June

Friday, 06-02-2016—NIU Conference Center, Naperville—Solo and Small Firm. Title TBD. ALL DAY.

Thursday, 06-08-17 – Chicago Regional Office—Commercial Loans/ Documenting For Success and Preparing For Failure. Presented by Commercial Banking, Collections & Bankruptcy. 9:00 a.m. – 4:30 p.m.

Thursday, 06-08-17 – LIVE Webcast—Commercial Loans/Documenting For Success and Preparing For Failure. Presented by Commercial Banking, Collections & Bankruptcy. 9:00 a.m. – 4:30 p.m.

Friday, 06-09-17 – Chicago Regional Office—Estate Administrative Issues: Are You Prepared to Handle Some of the Difficult Issues Facing Your Client? Presented by Trust and Estates. 9:00 a.m. – 4:15 p.m.

Friday, 06-09-17 – LIVE Webcast—Estate Administrative Issues: Are You Prepared to Handle Some of the Difficult Issues Facing Your Client? Presented by Trust and Estates. 9:00 a.m. – 4:15 p.m.

Tuesday, 06-13-17- Webinar—Excel Power Hour. Practice Toolbox Series. 12:00 -1:00 p.m.

Wednesday, 06-14-17 – Live Webcast—Implicit Bias: How it Impacts the Legal Workplace and Courtroom Dynamics. Presented by the ISBA Committee on Racial and Ethnic Minorities and the Law. 12:00 -2:00 pm.

Wednesday, 06-21-2017—Chicago, ISBA Regional Office—Title TBD- Marty Latz Negotiations. Master Series Presented by the ISBA. Time TBD.

Wednesday, 06-21-2017—Live Webcast—Title TBD- Marty Latz Negotiations. Master Series Presented by the ISBA. Time TBD.

Tuesday, 06-27-17- Webinar—Google Apps Power Hour. Practice Toolbox Series. 12:00 -1:00 p.m.

Thursday, 06-29-17, Chicago, ISBA Regional Office—How to Handle a Construction Case Mediation. Presented by the Construction Law Section, co-sponsored by the Alternative Dispute Resolution Section (tentative). 8:30 am – 5:00 pm.

Thursday, 06-29-17 – Live Webcast—How to Handle a Construction Case Mediation. Presented by the Construction Law Section, co-sponsored by the Alternative Dispute Resolution Section (tentative). 8:30 am – 5:00 pm. ■

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