ILLINOIS STATE BAR ASSOCIATION

MAY 2017 VOL 47 NO. 10

Bench & Bar

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

The Seventh Circuit's decision in *Hively* signals protection for transgender individuals

BY JULIET BERGER-WHITE AND CHARLIE WYSONG

Creating a split with courts of appeals around the country with its ruling in *Hively v. Ivy Tech Community College of Indiana,* the Seventh Circuit became the first circuit court to hold that Title VII's prohibition of sex discrimination applies to discrimination on the basis of sexual orientation. The reasoning of *Hively* shows that Title VII also prohibits discrimination against employees on the basis of gender identity and foreshadows that the Seventh Circuit will soon protect transgender students

Continued on next page

Rule 502: Something Illinois litigants can learn from federal courts

BY ELI LITOFF, KELLY WARNER, AND EDWARD CASMERE

Last month this newsletter discussed *Carlson v. Jerousek*, 2016 IL App (2d) 151248, a recent Illinois appellate court case that provides Illinois litigants with much-needed guidance on Supreme Court Rule 201's proportionality test. An equally important development in the rules is Illinois Rule of Evidence 502(d), which went into effect over four years ago, but has yet to be addressed by a reported appellate court decision, and is often not invoked by the parties. Rule 502 sets forth several significant provisions – including 502(d) – which can be implemented by the courts and parties to proactively address production and protection of privileged material.

Continued on page 4

If you're getting this newsletter by postal mail and would prefer electronic delivery, just send an e-mail to Ann Boucher at aboucher@isba.org

The Seventh Circuit's decision in *Hively* signals protection

CONTINUED FROM PAGE 1

under Title IX in *Whitaker v. Kenosha Unified School Dist. No. 1*, No. 16-3522 (7th Cir.).

Hively recognizes that sexual orientation discrimination is sex discrimination

In *Hively v. Ivy Tech Comm. Coll. of Indiana*, No. 15-1720, 2017 WL 1230393 (7th Cir. Apr. 4, 2017), the Seventh Circuit, sitting *en banc*, held that sexual orientation discrimination in employment is a subset of sex discrimination, and thus barred by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). The court revived the complaint of plaintiff Kimberly Hively in which she alleged she was fired from a part-time job and not hired for multiple full-time positions because she is a lesbian. The majority opinion, written by Judge Diane Wood, reasoned first that if all facts were the same but her sex—that is, if plaintiff had been a man married to a woman—she would have been hired, and thus had suffered "paradigmatic sex discrimination." *Hively* at *5. The court also concluded that sexual orientation discrimination "represents the ultimate case of failure to conform to the female stereotype," *Id.*, and that a claim of sexual orientation discrimination is a gender nonconformity case squarely within the logic of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that discrimination for failing to conform to a gender stereotype is sex discrimination).

The court in *Hively* further reasoned that Title VII bans associational discrimination (*i.e.* discrimination based on the trait of a person the employee associates with) under the logic of *Loving v. Virginia,* 388 U.S. 1 (1967), regardless whether the trait at issue is race, sex, or any other protected trait. *Hively,* at *6-7. From this view, sexual orientation discrimination is also "sex" discrimination because it turns on the sex of the employee's partner.

Hively indicates that Title VII also protects transgender employees against discrimination

Under the reasoning of the *Hively* opinion, "sex" discrimination also prohibits employment discrimination against transgender individuals. While *Hively* formally reserved the issue of gender identity discrimination, *Id.* at n.1, the court's reasoning leaves little doubt that Title VII protects transgender employees.

First, *Hively* abrogates the Seventh Circuit case that limited Title VII protection for transgender individuals: *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). *Hively* criticizes *Ulane*'s antiquated conclusion that Title VII only covers discrimination "against women because they are women and against men because they are men." *Hively*, at *1. The opinion also explicitly rejects *Ulane*'s core reasoning. Courts cannot look to the understanding of "sex" at the time Title VII was passed in 1964 or unsuccessful attempts to amend Title VII to limit the scope of "sex" claims. *Id.* at *3-5. They must instead consider what "sex" means in Title VII today, "not what someone thought it meant one, ten, or twenty years ago." *Id.* at *9.

Second, *Hively* instructs courts to identify sex discrimination by considering the situation: if everything else were the same but the sex of the plaintiff was different, would the employer have acted differently? In the case of a transgender employee, the answer is yes. Consider an employee whose sex assigned at birth was male, identifies as female, and was fired for being transgender. If her "sex" was changed such that her gender identity matched her sex assigned at birth, she would not have been fired. Because changing the sex changes the outcome, discrimination based on gender identity is sex discrimination.

Third, transgender individuals are protected by gender nonconformity cases stemming from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), because their

Bench & Bar

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

To subscribe, visit www.isba.org or call 217-525-1760.

OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS
Hon. Alfred M. Swanson, Jr. (ret).
Michele Jochner
Hon. E. Kenneth Wright, Jr.
Hon. Edward J. Schoenbaum (ret).

MANAGING EDITOR / PRODUCTION
Katie Underwood
kunderwood@isba.org

Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

sex assigned at birth does not match their gender identity. *Hively*, at *5.

Fourth, *Hively* recognizes that a person's sex, for purposes of Title VII, encompasses their gender identity, stating that sex discrimination occurs when the discriminatory behavior turns on "the victim's biological sex (either as observed or as modified, in the case of [transgender individuals])."

Moreover, the conclusion that Title VII bars discrimination against transgender employees is supported by the EEOC and cases from other circuits that prohibit gender identity discrimination as sex discrimination. *See, e.g.*, *Hively* at *8 (collecting cases); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

With *Ulane*'s reasoning replaced by that of *Hively*, Title VII should encompass claims of discrimination based on gender identity in the Seventh Circuit. Just as there is no "line" between sex discrimination and sexual orientation discrimination, there should be no line between sex discrimination and gender identity discrimination. *Hively*, at *5.

Hively's Implications for Schools and Title IX

In addition to providing protections in the employment context, the court's ruling in *Hively* sets the groundwork to extend Title IX to protections for transgender students. Title IX proscribes discrimination "on the basis of sex" in educational programs that receive federal funds. 20 U.S.C. § 1681(a). Months ago, it was recognized that *Hively* would likely "shed important new light on the questions of whether the term 'sex' as used in Title VII, and by implication in Title IX, encompasses gender identity." *Students and Parents for Privacy*, v. *United States Dep't of Educ.*, 16-cv-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016). This is unsurprising as courts routinely rely on Title VII cases to interpret the scope of Title IX. *See, e.g.*, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 617, n.1 (1999).

Although the United States Supreme Court—in *Gloucester County School Board v. G.G.*, No. 16-273—recently declined to decide whether Title IX's prohibition of sex discrimination includes discrimination based on gender identity, the issue is currently before the Seventh Circuit in *Whitaker v. Kenosha Unified School District No. 1*, No. 16-3522 (7th Cir. 2017). In *Whitaker*, a transgender student challenged his school's rule that he use the restroom that corresponds with the gender marker on his birth certificate under Title IX and the Equal Protection Clause.

When *Whitaker* was argued in the Seventh Circuit on March 29, 2017, the Court described the school district's position as a "separate but equal argument" and stated that the restroom ban had "everything to do with sex." Notably, *Whitaker* was heard by Judges Wood, Rovner, and Williams, all of whom signed onto the majority *en banc* opinion in *Hively.*

The Seventh Circuit could also rule in favor of the transgender student under the Equal Protection argument, as did a judge recently in Pennsylvania. In *Evancho v. Pine-Richland Sch. Dist.*, No. 2:16-01537, 2017 WL 770619 (W.D. Penn. Feb. 27, 2017), the court applied intermediate scrutiny and preliminarily enjoined under the Equal Protection Clause a school district's policy that required transgender students to use a single stall restroom or restrooms corresponding with their sex assigned at birth.

On the heels of *Hively,* the Seventh Circuit is poised to apply the same reasoning to conclude that sex discrimination in schools includes discrimination on the basis of gender identity under Title IX.

Between *Whitaker* and *Hively*, transgender and gender expansive students and employees in the Seventh Circuit should soon have a strong basis to assert under federal law that they cannot be treated differently from others on the basis of their sex, including their gender identity and nonconformity to sex stereotypes. ■

Rule 502

CONTINUED FROM PAGE 1

The Illinois Rule mirrors Federal Rule of Evidence 502, which was enacted in 2008 with two main purposes in mind: (1) to resolve a dispute among federal courts regarding the effect of inadvertent disclosure of privileged or protected information; and (2) to address the widespread concern that the cost to protect against waiver of the attorney-client privilege or work product protection had become prohibitive, especially in cases involving electronic discovery. Rule 502(b) addressed the former purpose by setting forth a three-pronged test to determine whether the inadvertent disclosure of protected information constitutes a waiver. Rule 502(d) addressed the latter purpose by allowing courts to order that intentional production of protected material does not result in waiver of a privilege or protection.

The benefits of a Rule 502(d) order are clear. The order can significantly reduce document review and production costs in appropriate cases. When entered, attorneys can rest easy knowing they will not waive privilege in any proceeding by producing a privileged document in their pending litigation. And in-house lawyers and business persons can more easily manage costs. Instead of paying an army of associates to pour through thousands of potentially privileged documents, they can take a more economical approach to privilege review knowing they have the protection of a 502(d) order in place.

It is for these reasons that 502(d) orders have become increasingly popular in the federal system. So why haven't they caught on in Illinois state courts? There are many possible reasons. Some litigators may simply be set in their ways and instinctively avoid the production of protected material. Some cases may not have facts appropriate for the disclosure of protected material. Some attorneys may fear that a 502(d) order will expand the scope of electronically-stored information that the party is required to produce. And some may fear that a judge would use the 502(d) order as an excuse to make litigants quickly produce all documents without conducting any privilege review.

On this last point, Magistrate Judge Andrew J. Peck of the United States District Court for the Southern District of New York has developed a solution. Judge Peck – perhaps the staunchest judicial proponent of 502(d) orders in the country – has developed his own model order that provides strong protection to litigants in just two simple paragraphs:

1. The production of privileged or work-product protected documents, electronically stored information ("ESI") or information, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case or in any other federal or state proceeding. This Order shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d).
2. Nothing contained herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI or information (including metadata) for relevance, responsiveness and/or segregation of privileged and/or protected information before production.[1]

Judge Peck's order is a sensible solution to guard against any hesitation litigants may have with respect to 502(d). It does nothing to limit a party's rights to conduct a thorough and comprehensive privilege review, yet it can save the attorneys the headache of inadvertent disclosure and save the parties the cost of extensive review of ESI.

The Seventh Circuit Pilot Program on Electronic Discovery offers a model case management order addressing the treatment of protected materials, which incorporates Rule 502(d).[2] Many other federal district courts, including the Northern District of California, have adopted similar model orders.

That the federal courts have embraced Rule 502(d) is unsurprising given the Rule's clear benefits. Illinois litigants should follow suit by at least considering whether entering into a Rule 502(d) order would be useful in their cases. ■

1. Judge Peck's model order is available at <http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=928>.

2. The Pilot Program's model order is available at <http://www.discoverypilot.com/content/model-discovery-plan-and-privilege-order>.

What federal Magistrate Judges do and why they can or can't do it

BY TOM SCHANZLE-HASKINS, UNITED STATES MAGISTRATE JUDGE, CENTRAL DISTRICT OF ILLINOIS, SPRINGFIELD DIVISION

Introduction

This article broadly examines the authority and duties of Magistrate Judges in civil litigation in the Federal Courts in Illinois. This article does not attempt an exhaustive review of all of the many and varied issues regarding jurisdiction of Magistrate Judges.[1]

Magistrate Judges serve as adjuncts to the District Judges of the United States District Courts and are appointed for eight-year terms by the District Court Judges of the District in which the Magistrate Judge serves. Congress established Magistrate Judges to assist Article III Judges, rather than serve as a lower tier court. The Judicial Conference of the United States has expressed the view that Congress should establish all causes of action in the District Court and avoid mandating the references of particular types of cases or proceedings to Magistrate Judges.

The statutory authority of the United States Magistrate Judges is set forth in the *Federal Magistrate Judges Act* of 1968 (Pub.L.No. 90-578), as amended (Magistrate Judges Act), codified at 28 U.S.C. §§ 631-39, and 18 U.S.C. §§ 3401-02.

Broadly speaking, Magistrate Judges may decide non-dispositive issues in civil cases, but may decide dispositive issues only with the consent of the parties. Specific matters in which a Magistrate Judge has jurisdiction are discussed more fully below.

The Magistrate Judges Act sets forth the authority of a Magistrate Judge at 28 U.S.C. §636 and in 18 U.S.C. §3401. Section 3401 addresses the criminal jurisdiction of a Magistrate Judge. While Magistrate Judges have a limited delegation of criminal jurisdiction, their criminal jurisdiction is not examined in this article.

In addition to the authority set forth in the Magistrate Judges Act, further duties of United States Magistrate Judges are set forth in the Local Rules of the District in which the Magistrate Judge presides, as well as in standing orders entered by the Article III Judges in that District.

Jurisdiction over dispositive and non-dispositive matters

The Magistrate Judges Act, 28 U.S.C. §636(b)(1), provides that a District Court Judge may designate a matter to a Magistrate Judge to hear and determine any pretrial matter pending before the Court with several exceptions.

A Magistrate Judge may not hear a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or permit maintenance of a class action, to dismiss for failure to state a claim from which relief can be granted, or involuntarily dismiss an action. In short, a Magistrate Judge may not make dispositive rulings in the instances set forth above without the consent of the parties to the litigation.

The District Court Judge may reconsider any non-dispositive pretrial decided by a Magistrate Judge where it has been shown that the Magistrate Judge's order is clearly erroneous or contrary to law. 28 U.S.C. §636(b)(1). Under Federal Rule of Civil Procedure 72, a party may serve and file objections to a non-dispositive order within 14 days after being served a copy of the order. A party may not raise any defect in the Magistrate Judge's order on appeal if timely objections are not filed in the District Court.

With regard to dispositive motions, the District Court may, without the consent of the parties, designate a Magistrate Judge to conduct hearings, including evidentiary hearings, and to submit to the District Judge proposed findings of fact and recommendations for disposition to the District Judge pursuant. 28 U.S.C. §636(b)(1)(B). The "proposed findings and recommendations," are generally referred to as Reports and Recommendations.

Any party may file written objections to proposed findings and recommendations of the Magistrate Judge within 14 days after being served with a copy of the Report and Recommendation. 28 U.S.C. §636(b)(1)(B); Fed. R. Civ. P. 72(b). The opposing party has 14 days to respond to the objection. The District Judge shall make a de novo determination of the portions of the Report and Recommendations to which an objection is made. The District Judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge. The District Judge also has the option to receive further evidence on a matter or to remand the matter to the Magistrate Judge with instructions.

Jurisdiction by Consent

Pursuant to Section 636(c)(1) a Magistrate Judge may conduct any or all proceedings in a jury or non-jury civil case and order the entry of judgment in the case with the consent of all the parties.

Parties are advised of their option to consent to permit a Magistrate Judge to determine the entire case. Various considerations may prompt parties to consent to the case being heard by the Magistrate Judge. In many instances, a trial setting before a Magistrate Judge may be earlier or more certain than a trial setting before the District Court Judge. Magistrate Judges do not have a felony criminal trial dockets because Magistrate Judges do not have jurisdiction to conduct criminal trials in felony cases. Likewise, most Magistrate Judges do not have a trial docket which is comparable to that of a District Court Judge due to a Magistrate Judges' limited jurisdiction to hear civil cases without consent. For these reasons, parties may consent to disposition of their civil case

by a Federal Magistrate Judge in order to expedite a trial in the case.

If the parties decide to consent to a Magistrate Judge, they should make sure that the consent to proceed before the Magistrate Judge is clear on the record. The Seventh Circuit has held that consent to a Magistrate Judge need not be in writing, but it must be on the record in a clear and unambiguous manner. *Stevo v. Frasor*, 662 F.3d 880, 883 (7th Cir. 2011). The Supreme Court has held that consent can also be implied from conduct of the parties during the proceedings, at least where the parties have notice of their right to refuse. *Roell v. Withrow*, 538 U.S. 580, 590 (2003). The Seventh Circuit has ruled that a lack of consent to a Magistrate Judge is a "jurisdictional defect that the parties cannot waive." If the Seventh Circuit finds a lack of consent to a Magistrate Judge on appeal, the Seventh Circuit would be without jurisdiction to hear the appeal and would be required to vacate and remand the case for additional proceedings in District Court. *Stevo*, 662 F.3d 884.

Under Rule 73 of the Federal Rules of Civil Procedure, an appeal from a judgment entered by a Magistrate Judge in a consent case may be taken to the Court of Appeals as with any other appeal from a District Court judgment. There is no requirement to object or appeal to the District Court Judge if the Magistrate's jurisdiction over the entire case is exercised with the consent of all parties.

Authority Delegated to Magistrate Judges Under Local Rules

The Magistrate Judges Act provides that a Magistrate Judge may be assigned such additional duties as are not inconsistent with the constitution or laws of the United States and provides that each District Court shall establish rules pursuant to which Magistrate Judges shall discharge their duties. Each of the districts located within the State of Illinois have promulgated Local Rules regarding Magistrate Judges. The local rules differ in scope and specificity depending upon the district.

Northern District of Illinois

Specific rules governing Magistrate Judges in the Northern District of Illinois are contained in Local Rule 72.1, Designated Magistrate Judges, Referrals, and Local Rule 73.1, Magistrate Judges Reassignment on Consent. Both rules are largely procedural.

The Northern District's Local Rule 72.1 deals with the procedure for the designation of a Magistrate Judge to a case assigned to a District Court Judge. The Rule sets specific procedures for the assignment of cases by District Court Judges and includes provisions regarding the assignment of Magistrate Judges in related cases. The Rule provides that the reassignment of a case from one District Judge to another District Judge shall not change the originally designated Magistrate Judge for that case.

Northern District's Local Rule 73.1 deals with procedures to be followed for a Magistrate Judge to hear an entire civil case by consent of the parties. The Rule specifies that when a case in which a consent has been filed is reassigned to a Magistrate Judge other than the Magistrate Judge designated pursuant to Local Rule 72.1, the parties may object within twenty-one (21) days to the reassignment and the case will be reassigned to the District Judge before whom it was last pending. If no objection is made to the transfer to a second Magistrate Judge, the parties will be deemed to have consented to the reassignment. Rule 73.1 also specifically provides that Magistrate Judges are authorized to enter final judgment for a sum certain if all parties have consented in writing or to enter a stipulated judgment of dismissal, provided the parties indicate their consent to the entry of the dismissal judgment by the Magistrate Judge either in writing or in open court. Finally, Local Rule 73.1(d) provides that the parties may make limited consents to transfer part of a proceeding to a Magistrate Judge pursuant to 28 U.S.C. §636(c). Upon notification and filing of a limited consent, the Executive Committee, in accordance with procedures adopted under the Northern District Local Rules may approve the reassignment and the motion may be reassigned to the calendar of the designated Magistrate Judge.

Southern District of Illinois

Southern District Local Rules 72.1, 72.2, and 72.3 deal with the duties of Magistrate Judges in the Southern District of Illinois.

Rule 72.1 provides for automatic referral of specific matters to a Magistrate Judge upon the filing of the case. Specifically, Rule 72.1(a) provides that all pretrial motions are referred to Magistrate Judges for a hearing and determination pursuant to the provisions of Federal Rule of Civil Procedure 72 governing the referral of non-dispositive matters to a Magistrate Judge. Local Rule 72.1 excludes referral of motions for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss, to remand, to permit maintenance of a class action, to dismiss for failure to state a claim on which relief can be granted, to involuntarily dismiss an action, for motions in limine regarding evidentiary matters, and for extensions of time with regard to matters pending before a District Court Judge. Southern District Rule 72.1 also provides that prisoner petitions, all requests for judicial review of decisions of the Commissioner of Social Security, and supplemental proceedings to discover assets or aid in executions of judgment shall be automatically referred to a Magistrate Judge. Finally, Southern District Rule 72.1 provides that with consent of the parties, a Magistrate Judge is authorized to conduct voir dire and select petit juries for a District Court Judge.

Southern District Local 72.2 sets forth specific procedures to be followed by the parties if they choose to consent to a Magistrate Judge conducting any or all proceedings in a case and order the entry of a final judgment. Southern District Local Rule 73.1 provides specific procedures to appeal Magistrate Judge's rulings on non-dispositive matters pursuant to 28 U.S.C. §636(b)(1)(A) and objections to a Magistrate Judge's proposed Report and Recommendation on dispositive matters. The Rule also provides that a party may seek review of any action on a special master report filed by the Magistrate Judge in accordance with Federal Rule of Civil Procedure 53(e).

Finally, Southern District Local Rule 73.1 provides that appeals from judgments

entered in a civil case disposed of by a Magistrate Judge on consent may be appealed directly to the Seventh Circuit in the same manner as an appeal from any other judgment of the Court.

Central District of Illinois

Central District of Illinois Local Rule 72.1 delegates several specific functions to Magistrate Judges in civil cases. The Rule delegates to a Magistrate Judge the supervision of proceedings conducted pursuant to 28 U.S.C. §1782 dealing with ordering persons found within the District to give testimony, a statement, or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The Rule also delegates to the Magistrate Judge the authority to determine a non-dispositive pretrial motion pursuant to 28 U.S.C. §636(b)(1)(A), to conduct hearings, including evidentiary hearings, and submit proposed findings of fact and recommendations for disposition of dispositive motions in accordance with 28 U.S.C. §636(b)(1)(B) and (C). The Rule repeats the provisions of 28 U.S.C. §636(c) that the Magistrate Judge may conduct any and all proceedings in a jury or non-jury civil matter upon consent of the parties. The Rule also gives Magistrate Judges the authority to exercise general supervision over the civil and criminal calendars of the Court and conduct status calls that determine motions to expedite or postpone trial in cases before the District Judges. Magistrate Judges are also delegated the authority to conduct pretrial conferences, settlement conferences, summary jury trials, omnibus hearings and related pretrial proceedings. Under the Rule, Magistrate Judges are given the authority to conduct voir dire and select petit juries on consent of the parties, to accept petit jury verdicts in civil cases in the absence of a District Judge, and the authority to issue subpoenas and writs of habeas corpus, or other orders necessary to obtain the presence of parties and witnesses or evidence needed for court proceedings. Magistrate Judges are also given the authority to conduct examinations of judgment debtors in accordance with Federal Rule of Civil Procedure 69, to impose sanctions under Federal Rules of Civil Procedure 11, 16, and 37, with the exception of dismissal or contempt, and to conduct scheduling conferences pursuant to Federal Rule of Civil Procedure 16, and to enter, vacate, or modify scheduling orders.

Contempt Powers of Magistrate Judges

The contempt authority of Magistrate Judges is set forth in the Magistrate Judges Act at 28 U.S.C. §636(e). The Magistrate Judge's criminal contempt authority in a non-consent case is limited to the power to punish summarily by fine or imprisonment, or both, only misbehavior in the Magistrate Judge's presence which obstructs the administration of justice.

In non-consent civil cases heard by the Magistrate Judge pursuant to § 636(b) of the Magistrate Judges Act, if the Magistrate Judge seeks civil contempt for misbehavior outside the presence of the Magistrate Judge, the Magistrate Judge shall certify the person to appear before the District Judge to show cause why the person should not be found in contempt by reason of the facts certified. Any criminal contempt order shall be issued under the Federal Rules of Criminal Procedure.

However, in a case in which the parties have consented for the Magistrate Judge to hear the case under § 636(c) of the Magistrate Judges Act, the Magistrate Judge may exercise the same contempt authority as the District Court. For instance, a Magistrate Judge has civil contempt authority to punish as contempt of court a party's failure to comply with an injunctive order entered by the Magistrate Judge presiding in a case under which consent had been given pursuant to § 636(c). *F.T.C. v. Think Achievement Corp.*, 144 F.Supp.2d 1029 (N.D.Ind. 2001) (Magistrate Judge ordered parties who had failed to comply with injunction incarcerated until they purged themselves of contemp.)

Jury Selection

In non-consent cases, a Magistrate Judge may conduct jury voir dire and selection when the District Court delegates the duty pursuant to § 636(b)(3) of the Magistrate Judges Act, and the parties consent. The Magistrate Judge is not authorized to conduct civil voir dire over the objection of the parties. *Olympia Hotel Corp. v. Johnson Wax Development Corp.*, 908 F.2d 1363 (7th Cir. 1990). As with the consent to a Magistrate Judge hearing an entire case, care should be taken to ensure that the record reflects the consent of the parties when a Magistrate Judge is conducting voir dire in a case to be tried by a District Judge.

Alternative Dispute Resolution

Magistrate Judges are often delegated the authority to conduct settlement conferences, mediations, and summary jury trials. Section 636(b)(3) of the Magistrate Judges Act does not require litigant consent for Magistrate Judges to perform these additional duties.

While Magistrate Judges can, and often do, conduct the alternative dispute resolution procedures set forth above, a Magistrate Judge cannot serve as an arbitrator. Magistrate Judges are not authorized to make an arbitration award. *DDI Seamless Cylinder Intern., Inc. v. General Fire Extinguisher Corp.*, 14 F.3d 1163 (7th Cir. 1994).

The Magistrate Judges Act specifically authorizes the appointment of Magistrate Judges as Special Masters under Rule 53 of the Federal Rules of Civil Procedure, and under Section §636(b)(2) of the Magistrate Judges Act. The duties of the Magistrate Judge as a Special Master are wide and varied and beyond the scope of this article.

Supervision of Discovery and Imposition of Sanctions

Among the primary duties of Magistrate Judges are scheduling and supervising discovery. Magistrate Judges may order scheduling conferences under Federal Rule of Civil Procedure 26(a) and require parties to submit discovery plans under Rule 26(f)(3). Likewise, Magistrate Judges may enter scheduling orders under Rule 16 after receiving the parties' report under Rule 26(f) or after consulting with the parties' attorneys or any unrepresented parties at a scheduling conference. Magistrate Judges may modify discovery schedules for good cause under Rule 16(a)(4).

The imposition of sanctions under

the Federal Rules of Civil Procedure has been the subject of several decisions in both the Seventh Circuit and in District Courts within Illinois. The Seventh Circuit has ruled that post dismissal sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure are dispositive determinations for a District Judge as to which a Magistrate Judge may only issue a Report and Recommendation. *Alpern v. Lieb*, 38 F.3d 933, 935 (7th Cir. 1994). Likewise, a pretrial request for sanctions under Rule 11 of the Federal Rules of Civil Procedure, and at 28 U.S.C. §1927 (liability for costs caused by unreasonable and vexatious conduct), are dispositive matters for which the Magistrate Judge may only to issue a Report and Recommendation pursuant to Section 636(b)(1)(B) or 636(b)(3) of the Magistrate Judges Act. A District Judge must review the Magistrate Judge's Report and Recommendations de novo and rule on the request for sanctions. *Retired Chicago Police Ass'n v. City of Chicago*, 76 F.3d 856, 868-69 (7th Cir. 1996). (Magistrate's award of sanctions remanded to District Court for review of proposed sanctions de novo.)

There has been some uncertainty in District Courts in the Seventh Circuit about whether a Magistrate Judge may assess fees and costs incurred in connection with bringing a motion to compel under Federal Rule of Civil Procedure 37(a)(5)(A) or whether the Magistrate Judge must issue a Report and Recommendation to the District Court Judge regarding Rule 37 awards. Federal Rule of Civil Procedure 37(a)(5)(A) provides:

> If the motion [to compel discovery] is granted, - or if the discovery issue or requested discovery is provided after the motion was filed - the court must, after giving the opportunity to be heard, require the party or deponent whose conduct necessitated the motion to pay movant's reasonable expenses incurred in making the motion, including attorney's fees.

Two opinions by Magistrate Judges in Illinois disagree on whether Magistrate Judges may assess fees and costs under the Rule. *Cleversafe, Inc. v. Amplidata, Inc.*, 287 F.R.D. 424 (N.D.Ill. 2012), and *Knapp v. Evgeros, Inc.*, 2016 WL 2755452 (N.D.Ill.).

In *Cleversafe, Inc. v. Amplidata, Inc.*, the Magistrate Judge reviewed both the Seventh Circuit law and the law of many other Circuits regarding the imposition of monetary sanctions for discovery violations under Rule 37. While noting that many other Circuits held that motions for monetary sanctions for Rule 37 discovery abuses are not dispositive, the court held that a Magistrate Judge in the Seventh Circuit must issue a Report and Recommendation to the District Court Judge rather than ruling on a motion for discovery sanctions under Rule 37 of the Federal Rules of Civil Procedure.

More recently, in *Knapp v. Evgeros, Inc.*, a Magistrate Judge, after noting the Seventh Circuit had not decided the issue, awarded attorney's fees to the prevailing party on a Rule 37 motion to compel. The court held that the 2015 Amendment to Rule 26(c)(1)(B) confirmed that an order shifting expenses in discovery is not dispositive and a Magistrate Judge may award attorney fees to the prevailing party on a Rule 37 motion to compel.

Conclusion

This article summarizes the basic rules regarding a Magistrate Judge's authority to rule on matters which are deemed dispositive or non-dispositive under the Magistrate Judges Act and the Federal Rules of Civil Procedure. Applications of those statutes and rules to specific issues are the subject of numerous cases decided in the Seventh Circuit and other Circuits. The rulings on specific issues are too numerous to be included in this article. The delineation of a specific issue to determine whether the Courts have viewed a particular issue as dispositive or non-dispositive must be undertaken on a case by case basis when the issue arises. ■

This article was originally published in the April 2017 issue of the ISBA's Federal Civil Practice newsletter.

1. For a comprehensive examination of the role and duties of Magistrate Judges, see Lee and Davis, *"NOTHING LESS THAN INDISPENSABLE": The Expansion of Federal Magistrate Judge Authority and Utilization in the Past Quarter Century*, 16 Nev. L. J. 845 (2016). Lee and Davis presented this article in the Nevada Law Journal's Symposium: Magistrate Judges and the Transformation of the Federal Judiciary.

Forensic tools solve new, cold cases

BY SANDRA BLAKE

Since before the advent of television shows such as the *CSI* dramas, DNA had been heralded as an unparalleled crime-solving tool. Unfortunately, as scientists, law enforcement and legal practitioners know, while the acquisition of a sample has become quite simple, the profile development and analysis remains complicated, time-consuming and expensive—certainly longer than an hour with commercials. Moreover, once a sample has been submitted for comparison to a state or national DNA database, it can be months or even years before a comparison is made and a perpetrator identified.

The backlogs encountered with national and state databases often hinder investigations and delay justice. In order to expedite the crime-solving efficacy of DNA, local police in more than four states--including Pennsylvania, California, Florida and Connecticut--are developing their own DNA databases. Law enforcement in those areas note that the local DNA databases have allowed them to avoid backlogs of national and state databases and solve some crimes much faster. For instance, one department cited the state lab taking nearly two years to process crime scene DNA, while a local private lab was able to complete the work in a month.

Accounting for some of the national and state backlogs are oversight and regulations. Some of those regulations govern where DNA samples come from and how long the profiles need to be maintained. The law hasn't quite caught up with local DNA databases. Although each sample in the local DNA databases is purported to be a voluntary one with no threats or coercion applied, many include samples taken for investigative purposes. These might consist of people never arrested or convicted of a crime and juveniles who consent prior to any parental contact. In the case of juveniles, some local police departments obtain the juvenile's consent, secure the DNA swab, then inform the juvenile's parent or guardian that a swab was collected. In fact, in February 2017, the American Civil Liberties Union (ACLU) filed a lawsuit against San Diego regarding the collection of DNA samples from juveniles.

While many recognize DNA as the crime-solving tool of the day, fingerprinting has been around for some 100 years, and since 1999, the FBI has been responsible for maintaining a national finger and palm print database with submissions from federal, state and local law enforcement agencies. The FBI has upgraded the system it uses to store and match prints; and, since mid-2013 the FBI has been notifying law enforcement agencies to resubmit crime scene prints that did not turn up matches.

New developments with examination of finger and palm prints are helping to solve cold cases around the country. Called Next Generation Identification (NGI), the upgraded system stores and more sensitively matches the swirls and ridges on latent or crime scene prints with prints collected during an arrest. The system's database also includes prints collected as part of employment and visa applications, as well as 45 million facial photos. With the upgraded system, the FBI claims matches are three times more likely. In fact, two unsolved rape cases were charged in Ohio, and a cold case project from the Oklahoma State Bureau of Investigation was able to identify some 150 crime scene prints. The number of charges and/or prosecutions was not reported.

While the new system may be able to solve some violent cold crimes, cash-strapped law enforcement agencies are faced with weighing the cost of re-opening and re-submitting the unsolved cases against unsure prosecutions in the face of statutes of limitations.

Finally, *Bones* fans will be happy to know that forensic anthropology is alive and well. While skeletal remains provide clues to a person's gender, ancestry and other information, age at the time of death has been somewhat elusive. This information is complicated by the wear and tear that individuals place on their bodies.

One particular bone, the *pubic symphysis*, has allowed anthropologists to subjectively estimate age based on their observations and experience. Recently, Stanford anthropologist Bridget Algee-Hewitt presented on a more precise analysis based on 3-D imaging. Her method examines three different aspects of the bone and incorporates the measurement of some 40,000 points per square inch. The results have been providing quantitative estimations that can be reproduced and are taking subjectivity out of the equation.

While more research and larger samples are necessary to increase statistical accuracy, experts are excited by this development, which could become an important tool in forensics to determining age at death. ■

Abraham Lincoln Presidential Library and Museum

BY HON. EDWARD J. SCHOENBAUM, A MUSEUM VOLUNTEER

From the start, Bob Rogers—founder and Chief Creative Officer of BRC Imagination Arts, the design and production firm that created the Abraham Lincoln Presidential Museum—was determined to "combine scholarship and showmanship to connect the public to Abraham Lincoln's life and times." With his creative team, Rogers designed the museum with interactive exhibits, theaters, a children's area, and a "Holavision" presentation using a ghost that interacts with the live audience. A panel of the world's top Lincoln historians and teachers worked closely with the exhibit designers to ensure that the stories told in the museum would be accurate.

Lincoln's Law Office is a center piece in the area that focuses on his legal and political career. That same area shows a map of the judicial circuit that he traveled by horseback for many years and how attorneys and the judge traveled together from one county courthouse to the next one and how they usually shared a bedroom and frequently shared a bed. This is right before the election of 1860, which was "covered" by the late Tim Russert, formerly of NBC. He is operating in the control room of a television studio showing the candidates.

On February 12, 2001, groundbreaking ceremonies launched construction first of the Library and the Museum a year later. Included in the new complex was the rehabilitation of the 100-year-old former passenger-train station directly west of the Museum to serve as a tourism gateway. The Library, which opened in 2004, is the former Illinois State Historical Library, and it houses an unparalleled collection of Lincoln-related papers and artifacts, as well as an unrivaled collection on Illinois history.

The Museum was dedicated on April 19, 2005, in a ceremony attended by President George W. Bush, First Lady Laura Bush, future President and then U.S. Senator Barack Obama, and about 25,000 guests from around the world who crowded Springfield's downtown for the occasion.

The public responded enthusiastically to the Museum, quickly making it the most visited presidential library and museum in the United States. Attendance reached one million visitors on January 6, 2007, and two million on July 4, 2009. No presidential library and museum in the United States had reached the two million visitor mark more quickly. The three-millionth visitor passed through the Museum's doors on August 21, 2012. The four-millionth visitor came in February 26, 2016.

Many people from all over the world love this experience. A number who have visited all the Presidential Museums have told me, this one is the best.

On March 24, 2017 the museum opened a special exhibit with material from the Chicago Cubs, the St. Louis Cardinals and the Baseball Hall of Fame. This exhibit will be open until the end of this year.

MUSEUM. 9 AM – 5 PM DAILY (Last ticket sold at 4 PM.). CLOSED—New Year's Day, Thanksgiving Day and Christmas Day. Cafe in-house dining (10 AM – 4 PM). ■

Recent appointments and retirements

1. Pursuant to its Constitutional authority, the Supreme Court has appointed the following to be Circuit Judge:
   - Bradford A. Rau, Sr., 6th Circuit, 4/3/2017
   - Hon. Rick A. Mason, 12th Circuit, 4/20/2017
   - Anthony Swanagan, Cook County Circuit, 15th Subcircuit, 4/24/2017

2. The Circuit Judges have appointed the following to be Associate Judge:
   - Clayton R. Lee, 14th Circuit, 4/28/2017

3. The following judges have retired:
   - Hon. Scott B. Diamond, Associate Judge, 6th Circuit, 4/6/2017

4. The following Judge is deceased:
   - Hon. Raymond Myles, Associate Judge, Cook County Circuit, 4/10/2017

5. The following Judge has resigned:
   - Hon. Richard C. Cooke, Cook County Circuit, 6th Subcircuit, 4/25/2017 ■

Upcoming CLE programs

TO REGISTER, GO TO WWW.ISBA.ORG/CLE OR CALL THE ISBA REGISTRAR AT 800-252-8908 OR 217-525-1760.

June

Thursday, 06-01-17 – Webinar— Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 – 1:00 pm.

Friday, 06-02-2016—NIU Conference Center, Naperville—Solo & Small Firm Practice Institute Series: A Balancing Act: Maximize Your Technology with Minimized Expense. 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.

Thursday, 6-08-17 – 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.

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.

Friday, 06-16-17 – The Abbey Resort in Fontana, Wisconsin—Moneyball for Lawyers: Using Data to Build a Major-League Practice. ■

Bench & Bar
Illinois Bar Center
Springfield, Illinois 62701-1779
May 2017
Vol. 47 No. 10

Non-Profit Org.
U.S. POSTAGE
PAID
Springfield, Ill.
Permit No. 820