

Bench & Bar

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

Editor's note

BY HON. EDWARD J. SCHOENBAUM (RET.)

Dear Readers of the Bench & Bar Newsletter:

We are trying something new in this month's newsletter. The lead article is from Chief Justice Zel Fischer of Missouri Supreme Court, who spoke with the Missouri Judges Association at the Annual Meeting of the Missouri Bar. As a member of the Missouri Bar, I thought Illinois Judges and Members of the Illinois Bar would enjoy this article. Also in this month's newsletter is an introduction to our new State Court Administrator, Marcia Meis, a discussion of professionalism

and civility by Jayne Reardon, a personal story of sexual harassment from Hon. Debra Walker, and an overview of the new Veterans Court, which is going statewide. And once again, we list retirements and new Judges.

We could not do this without all of our authors and especially Edward Casmere and Evan Bruno, our two Assistant editors.

We love hearing your feedback, so please send suggestions on how the Bench and Bar Newsletter could better meet your needs. Also PLEASE consider writing an article to share your knowledge, experience, and ideas. ■

What the bench and bar should do for justice

BY ZEL M. FISCHER

This is the written draft from which Zel M. Fischer, Chief Justice of the Supreme Court of Missouri, delivered his address during the opening luncheon of the joint annual meeting of The Missouri Bar and the Judicial Conference of Missouri September 14, 2017, in Kansas City.¹

President Cole's introduction reminds me of the headline in Missouri Lawyer's Weekly after I made the panel for the Supreme Court of Missouri – "Least

Known, Most Likely." I later learned, the paper's editorial staff used as a working title, "Who the hell is Zel?"

One of the more serious issues facing our legal system is attacks on the judiciary, by those who clearly do not understand or do not care about the difference between accountability and independence. These attacks on the judiciary by those willing to criticize the courts for their own political

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What the bench and bar should do for justice

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gain involve rhetoric specifically targeted to undermine confidence in the judicial system or influence judicial decisions.

As lawyers, we have been taught to honor a fair and impartial judiciary that carefully decides cases on the facts and in accordance with the law. For us, a good judge is one who can set aside personal philosophy regardless of the controversy. A good judge is one who makes their decision based upon the facts in accordance with time honored principles of law.

The function of courts is one of the most important in our society. Courts are where justice is meted out, where remedies are administered, the innocent are exonerated, and criminals are punished.

The courts are not just a place where judges and attorneys make their livelihood. Courts are living monuments to the preservation of our freedom, fairness, and justice that we hold so dear. President George Washington declared “the administration of justice – is the firmest pillar of government.”

Without courts that are capable of fairly adjudicating wrongs or addressing injuries, society’s sense of justice diminishes. When people no longer believe the society in which they live is capable of justice they are less likely to believe in – or follow – the law.

This concept may seem obvious to us, and it should. Neither individuals nor businesses feel safe when the rules are always changing, or when the rules don’t apply equally to everyone.

In 2012, I asked a law clerk to pull news articles of politicians criticizing the courts.

These quotes come from public officials elected to state or federal government, who we all know, have taken oaths to uphold the constitutions of the United States of America of their respective state. His search turned up the following results.

A Congressman said he would subpoena before Congress or seek to impeach justices he disagrees with.

Another Congressman said he would give voters the right to oust federal judges they didn’t like.

A Congresswoman said Congress

could pass laws to prohibit courts from considering controversial issues.

A governor, who later ran for president, said he favored a constitutional amendment to give Congress veto power over the Supreme Court and end lifetime tenure for federal judges.

In a public statement preceding the Supreme Court of the United States argument challenging the constitutional validity of the Affordable Care Act, commonly known as Obama Care, then-President Obama stated: “Ultimately I’m confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress.”

Obviously, the politicians who made these comments were trying to influence a court’s decision or undermine its legitimacy.

In preparation of my remarks today, I gave my current law clerk the same assignment. Regardless of where you get your news, you probably aren’t surprised that politicians have continued to criticize our courts. Things are no better now, and arguably worse.

President Trump has criticized the process of courts, implying judges solely make decisions for political reasons. He said: “Just cannot believe a judge would put our country in such peril. If something happens blame him and court system.”

On the senate floor, during the nomination process of Judge Neil Gorsuch, who received the American Bar Association’s highest judicial rating available, a democrat senator used the public spotlight to instead criticize the Supreme Court of the United States:

Recent Supreme Court decisions have made it easier for corporate giants who cheat their consumers to avoid responsibility. Recent Supreme Court decisions have let those same corporations and their billionaire investors spend unlimited amounts of money to influence elections and manipulate the political process. And recent Supreme Court decisions have made it easier for businesses

Bench & Bar

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

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to abuse and discriminate against their workers.

These types of comments are not just made on the national stage.

This spring the Missouri Senate President Pro Tem told media he was upset with the Supreme Court of Missouri over recent decisions. He was widely quoted as saying the Court had “gone rogue.”

These disparaging comments have been bipartisan and relentless. The public officials who made these comments could learn from one of my father’s rules to live by: “The world works better when everybody just tries to do their own job well.”

With public distrust of governmental institutions at an all-time high, many public officials and individual citizens have called on the courts to make rulings that reflect not the applicable law and precedent, but rather the public opinion of the day – and publicly opposed those jurists who refused to compromise their sworn duty to uphold the law.

The public is increasingly being asked to hold judges accountable for the outcomes of specific cases, rather than the appropriateness of the process used to reach those outcomes.

Unfortunately, many seem to forget that democracy concerns itself not only with accountability of government to the majority will, but also with protecting the rights of individual citizens and political minorities.

A judiciary that is free from influence by those who wish to sway its decision-making process is a concept everyone ought to support, regardless of political beliefs or critical issues of the day. I am not surprised that, throughout history, the judicial branch has enjoyed a higher favorability rating than the legislative and executive branches. Could it be that in our society the judiciary is the only branch of government that is not perceived as being bought and paid for? Can we all agree that is a concept worth fighting for?

In 1788, Alexander Hamilton wrote about the importance of preserving the integrity and the autonomy of the courts. He explained:

Whoever attentively considers the different departments of power must perceive, that ... the

judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in capacity to annoy or injure them. ... The judiciary ... has no influence over either the sword or the purse; no direction either of the strength or of the wealth of society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment

A court’s legitimacy does not depend on its structural prestige or the reputation of individual judges but on the strength of its published opinions, which can be read, debated, and analyzed by anyone.

The persuasiveness of our reasoning is the only power at our disposal. The reasons for our decisions legitimize our place in government. Our willingness to demonstrate the logic of our reasoning is our most important role. And that is how we are accountable.

But when politicians call for “more accountability” in the courts, you can bet there was a case that was resolved contrary to their interest or world view. Most often, those cases failed to reflect what those politicians have determined is the “public opinion of the day,” and the criticisms have no consideration of the legal analysis.

If you have been wronged, your remedy should not depend on your politics, your ideology, your religion, race, creed, gender, or financial status.

The legitimacy of the judiciary has never and should never be measured on the “public opinion of the day.” This mistake led to one of the most infamous decisions ever issued by the Supreme Court of Missouri. In 1852, in *Scott v. Emerson*, the Court overturned decades of Missouri state precedent to find Dred and Harriet Scott, and their children, were still legally slaves. In deciding the case, the majority gave in to the so-called “public opinion of the day.” The holding begins: “Times are not now as they were when the former decisions on this subject were made.”

Judge Duane Benton, formerly of the Supreme Court of Missouri and now of the United States Court of Appeals for the

Eighth Circuit, pointed out that the 1852 Supreme Court of Missouri made three major errors when it decided the case: 1) it ignored precedent, 2) it ignored the will of the legislature, and 3) it based its opinion on the judges’ personal biases. The majority opinion overruled case law that allowed slaves to sue for freedom once they had been taken by their owners into free territory.

Only the dissenting judge got it right. Although a slaveholder himself, Judge Hamilton Gamble said the court should follow prior law and recognize Scott’s freedom. Gamble wrote: “Times may have changed, public feeling may have changed, but principles have not and do not change; and, in my judgment, there can be no safe basis for judicial decision, but in those principles which are immutable.”

Public opinion is not limited by reason, precedent, or the facts presented to it. It is free to speculate and to let its premises run wild.

It is not our prerogative to change facts or law to suit a given outcome, though this is exactly what many of the people who call for judicial accountability would have us do. We have no purse, that is true – that is for the legislative branch; we have no sword, that is true – that is for the executive branch. Just because we are the least dangerous branch of government does not make us weak.

The Court’s accountability to the public is satisfied by openly publishing our opinions, which explain the reasons for our decisions. Any time our court reverses a prior case decision, institutional integrity is questioned. Were we correct when the decision was previously made, or are we correct now?

Keeping the integrity and impartiality of the courts is not a concept that should be defined by whether a person is a Republican or Democrat; a conservative, a liberal or anywhere in between.

I would rather see a competent judiciary, full of those with integrity, legal knowledge, and impartiality, than a court constantly shifting to satisfy the whims of popular opinion. I would rather courts get it right and be unpopular, than be perceived as right because they issued a decision designed to curry popular favor.

In Missouri, the nonpartisan merit selection plan has been the cornerstone of preserving the integrity of our appellate and urban courts. Combined with retention elections, the plan keeps judges accountable to the people while at the same time protecting them from undue influence of politics and special interests. More importantly, it has protected our judicial selection process from being taken hostage by the political-financial-consulting triad that currently dominates the other two branches of government.

The oath to support and uphold the constitutions of the United States and the State of Missouri is important, and we should hold accountable all those who have taken these oaths. As attorneys, you have taken the oath to uphold both. Being an advocate for a client's interests is just part of your professional responsibility. The preamble to the Rules of Professional Conduct provides lawyers are not only representatives of clients and officers of the legal system, but also are "public citizen[s]" having special responsibility for the quality

of justice." Your clients' impressions of the court, and the justice system begins with you.

How people are treated in any particular court determines how they perceive *all* Missouri courts. If they feel unjustly treated, or that the judge didn't listen to them, they may believe all courts are unjust. To each person, his or her case is *the* most important case.

This ties in directly with article 2, section 4 of the Missouri Constitution:

That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does

not confer this security, it fails in its chief design.

My personal message for the lawyers is simple: I recognize some people expect a small town solo practitioner to prove he is worthy of his position on the Supreme Court of Missouri every day. I understand my Court is almost always the Court of last resort for the people and legal issues involved. For that reason, I commit to always do what I think is right according to the law, and I will always do my best to explain clearly in the opinions I write why I think the law requires the result reached.

My message for my colleagues on the bench is a little more lighthearted. In fact, I have an attempt at poetry for you – "Thorns can hurt you, your man or woman desert you, your sunshine can turn to fog, but if you are a judge and want to make sure you are never friendless, do what I did and get yourself a dog."

Thank you. ■

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Marcia Meis – New Director of the Administrative Office

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

Marcia Meis was groomed for this position. Justice Mary Jane Theis refers to the new Director's background: "She has been involved. She has experience in many layers of the system." Chief Justice Lloyd Karmeier told me "she has the ability to move the court system forward, to stay ahead of issues, and see what issues are coming down the road." Ms. Meis describes herself as someone who really likes critical thinking and analysis.

So, who is Marcia Meis? After receiving a journalism degree from the University of Missouri, she graduated from DePaul University Law School and passed the Illinois Bar exam. Brief experience with a small general practice firm handling family law and personal injury matters taught her that she "did not want a trial practice."

She transitioned to clerking for various Appellate Court justices: Robert Cook in the 4th District, Michael Colwell in the 2nd District, and finally for Thomas Hoffman in the 1st District for three-and-a-half years. It was Justice Hoffman who suggested she apply for an attorney position at the Administrative Office. Justice Hoffman told me he recommended Ms. Meis for the position because "she is extremely bright and very thorough. Just what the Administrative Office needs."

Ms. Meis interviewed and was hired as a staff attorney in 1999. She was Secretary to the Supreme Court Rules Committee; she did contract and lease review. She was involved in designing and starting the MCLE program. She was involved in bringing back EdCon, the every other year week-long education program for all sitting judges. She eventually was promoted to Chief Legal Counsel and then to Deputy Director in 2014. Through those promotions, she became more involved in policy issues and putting critical thinking to use with ideas to assist the Court. What



Director Marcia M. Meis

she enjoyed most about the challenges was strategizing to achieve maximum positive effect to improve the court system.

She enjoys the challenge in statewide initiatives and the challenges in getting people used to new ideas. Finding the right way to communicate what will resonate with the stakeholders on any given issue.

Projects on her agenda include bringing civil e-filing to life statewide, the Judicial College. This is an especially difficult challenge in many rural counties downstate that lack the resources available in the urban areas.

Perhaps most important to her agenda are the necessary reforms to and improvement of pretrial practices in criminal matters. Among the reforms in pretrial practices is using evidence-based resources to provide bond court judges with solid information to assist them in exercising their discretion in determining whether a defendant should be released pending trial, retained in custody, or released with conditions. The goal is to detain defendants without bail for only a few offenses.

The Judicial College is not just for

judges. It will include courses for judicial education, trial court administrators, probation officers, circuit clerks, guardians *ad litem*, and judicial branch staff. This will be enhanced training in those areas. It will not take the place of EdCon.

Also on the radar is a strategic planning process to develop a long-term plan to take Illinois courts long into the future. The goal is the help the court system evolve and remain relevant while maintaining access to justice.

On a more visible note, look for a newly designed and more user-friendly Supreme Court website in the coming months. ■

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Civility matters

BY JAYNE REARDON, EXECUTIVE DIRECTOR, ILLINOIS SUPREME COURT COMMISSION ON PROFESSIONALISM

It's been a year since President Trump was elected. As expected, as an outsider to politics, he is not conducting business as usual. And his style? Decidedly "unpresidential" some would say. Others would say downright uncivil.

As Executive Director of the Illinois Supreme Court Commission on Professionalism, an organization created to promote civility and professionalism, I tend to separate professionalism from politics. We stay away from politics in promoting professionalism. As a lawyer, I have an obligation to uphold the legal system, the rule of law, and the office of the presidency. But I am troubled because incivility is increasingly a feature of the public discourse and seemingly is embraced by the current administration. Labeling anyone who has a different viewpoint as unpatriotic, or any other term designed to demean, diminish and/or silence, turns Americans against one another and has other real world consequences.

Research shows Incivility is at a Crisis Level

Surveys show the state of civility in our country continues to decline. As of December 2016, the *Civility in America Survey*¹ showed that three-quarters of Americans believe that incivility has risen to crisis levels, a rate that significantly increased since January 2016. The same proportion feels that the U.S. is losing stature as a civil nation (73%).

Almost nine out of ten Americans in the *Civility in America Survey* say that incivility leads to intimidation and threats, harassment, discrimination, violence, and cyber-bullying. We certainly see all of this reported in the news. A whopping 75% of respondents blame politicians for the erosion of civility.

Specifically with respect to the President, 97% believe it is important for the U.S. President to be civil; 86% say a president's tone and level of civility impacts

the reputation of the U.S.; 79% think the 2016 presidential election was uncivil; and 59% of people who did not vote for president in 2016 said that incivility played a role in that decision.

Andy Polansky, Chief Executive Officer of Weber Shandwick noted in the Report, "Without a doubt, public discourse was challenged in the 2016 U.S. presidential campaign and the public is divided about whether we will see an improving environment for thoughtful dialogue in the public sphere. We need to find common ground to ease our civility crisis."

Incivility Inhibits Civic Engagement

The *Civility in America Survey* confirms what I have heard reported by many over the past year: the tone and content of politics is distasteful and hurtful and leads many people to turn away from engaging. Our country is founded upon the notion that we have an engaged citizenry. Disengagement is a problem. It is a problem that lawyers are exhorted to counter-act in the Preamble to the Rules of Professional Conduct. The Preamble states, "...[A] lawyer should further the public's understanding of and confidence in the rule of law and the justice system *because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.*"

We in the legal system should not accept behavior that intimidates or bullies citizens from voting or otherwise participating in the legal system. Our democracy is complex and challenged regularly by controversies, complications. We should not allow the natural tendency to grab a headline or obtain a click, a retweet or retort, to undermine the need for thoughtful and respectful problem-solving. As members of the legal system, we have an obligation to uphold the Constitution and the ideals it memorializes such as making the legal system more inclusive and effective for the citizens.

Promote Civility as a Survival Tactic

Let's not just bemoan the lack of civility as if we have no role in the evolving social culture of our country. Let's actively promote civility and strengthen our democracy for the future. Wherever you are, here are some first steps:

1. Be self-aware

Think carefully about what might lead you to be less than civil. Do certain people push your buttons? Do you think you're gaining something by being uncivil? Do you find yourself less capable of managing your emotions at certain times of the day? Over certain devices? What are your triggers? Stress? Once you understand better when, where and how you're inclined to behave rudely, the forms such rudeness takes, you can be more mindful when you're in the danger zone--and better able to respond to incivility with civility.

2. Reprogram your mind to the positive

Like acts of kindness can have a ripple effect, so can acts of incivility. As Christine Porvath wrote in *Mastering Civility: A Manifesto for the Workplace*, nodes in our brain are activated by such acts—positive or negative—and then spread throughout our neural network to nearby nodes. (Hence that "sinking feeling" or spread of elation.) She suggests that after you witness or are a victim of rudeness or other incivility, you should "reprogram" your mind by purposefully exposing yourself to something positive.

3. Listen don't label

In this era of partisan hostility, it is more important than ever that we actually listen to one another with an open mind, open to the possibility that we might learn from one another. As David Brooks recently wrote,² quoting civility expert Stephen Carter, even when someone is espousing beliefs we find

abhorrent, we may learn something from them. And refuse to label someone with a different viewpoint. They are not their ideas. And neither are you.

4. Connect on a human level

Weird and simplistic though it may seem: smile. Smiling makes a huge difference. As Christine Porath wrote,³ Kids smile as often as 400 times a day; only 30% of adults smile more than 20 times a day. The act of smiling lifts your mood, boosts your immune system, decreases stress, lowers blood pressure and reduces risk of heart attack. It also forms a positive human connection that may defuse name calling and incivility.

Speak up and reframe. If you hear pejorative comments, slurs or statements you consider unfair, unjust or uncivil, say something. Lawyers are in positions of leadership across local, state and national organizations and community groups. Members of the public look to lawyers for guidance. This obligation is explicit of judges in Rule 63 Canon 3. A.(3) *“A judge should be patient, dignified and courteous to litigants, jurors witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to the judge’s direction and control.”* And (8) provides that *“proceedings in court should be conducted with fitting dignity, decorum, and without distraction.”*

5. Change your organization’s culture.

Because emotions can spread, so can civility. Everyone is in a position to change the tenor and content of interactions they have. Some people may be able to institutionalize those changes across the organization. Most companies’ and firms’ mission statements contain language about how employees should treat customers, but how many include language stating how employees should treat one another? A simple statement “we expect our employees (or everyone conducting business in this courtroom) to treat each other with respect” can set the tone. For example, Porvath wrote about:

- A large healthcare organization that

developed a policy designed to leverage the viral effects of civility. You smile and make eye contact if you’re within ten feet of someone and you say hello if you’re within five feet. When the policy went into effect, the organization saw civility spread. Patient satisfaction scores rose, as did patient referrals.

- An executive at Motley Fool issued a challenge to all 250 employees: In order to get the 20 percent annual bonus the company normally gave, each employee would need to know the name of every other employee by year’s end. Instead of issuing a proclamation about “treating one another like family” or the importance of collegiality, he focused on strengthening relationships between individuals. As a result, Motley Fool received Glassdoor’s number one culture rating in its class and boasts a turnover rate of less than 2%.
- Law Firm Bryan Cave went through a workshop that included asking them to identify rules/norms for which they were willing to hold one another accountable. In about an hour, employees agreed on ten. The firm embraced them and bound them into a “civility code” which they prominently displayed in their lobby. The managing partner reported⁴ that the civility code was directly responsible for the firm being ranked number one among Orange County’s Best Places to Work.

It would be nice for our children to grow up in a world where civil engagement is the norm, not the exception. But the pace of interactions has quickened. And the depth is shallow. Technology enables quick and casual communication. We have instant access to information. Often we are satisfied with a two second Google search rather than spending time in deep research and reflection.

The challenge for each of us, knowing all of this, is to continue being civil and to create more civility in our work and community environments. Try those individual civility strategies. Try those organizational civility strategies. Actively work toward more civil engagements. Because it is work, now more than ever.

That work may include holding your elected representatives accountable for uncivil behavior. Please speak up. Let’s be in a better place civility-wise at this time next year. As P.M. Forni wrote, “The crucial measure of our success in life is the way we treat one another every day of our lives.” ■

1. http://www.webershandwick.com/uploads/news/files/Civility_in_America_the_State_of_Civility.pdf

2. <https://www.nytimes.com/2017/10/23/opinion/engaging-fanatics.html>

3. https://www.amazon.com/dp/B01G1K1SFS/ref=dp-kindle-redirect?_encoding=UTF8&btcr=1

4. <https://hbr.org/2017/01/how-rudeness-stops-people-from-working-together>



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The ongoing saga of sexual harassment

BY HON. DEBRA B. WALKER

With all of the sexual harassment allegations flying around Hollywood and Springfield, and with the continued drumroll of the #MeToo movement, I recently paused to reflect and celebrate.

My reflections took me back to my young lawyer days as a litigator at the Daley Center. There was an elderly male judge who all of the law firms liked to use for settlement conferences. It was true that he had a pretty good track record for getting cases resolved. This judge would hold early pretrials in his chambers. He would frequently “hit on” me. One time, I was wearing a navy nautical-inspired jacket with gold buttons when he complimented me on same. I told him I was attending a “Nautical Night” cancer fundraiser at the Monroe Harbor Yacht Club that evening. The judge responded with a lecherous grin: “Nautical Night—does that mean you get to be naughty?” He then proceeded to also invite me to meet him for coffee early one morning. This was at least 25 years ago, but I remember it as if it were yesterday.

In those days, I was an associate

handling cases for my male supervising partners. Do you think they knew of this judge’s reputation for sexual harassment? The women of the firm had to keep subjecting ourselves to this treatment because it was the male partners or their male insurance clients who would select this judge for the settlement conferences.

This example does not even come close to what many of my female lawyer friends and even my female judicial colleagues have endured. And, I could share far worse examples of being sexually harassed by former legal colleagues, but those men are still alive, unlike the judge I described above. Isn’t it about time for this to end? What can you do to be an ally of those who are being tormented by sexual harassment? As the Chair of the Illinois Supreme Court Commission on Professionalism, I am endlessly looking for opportunities to educate lawyers and judges about professional behavior. I owe that to my young self and to all of those who have #MeToo stories to share.

Yet, I also wish to celebrate the many

achievements of women lawyers and the strides that are being made to achieve equality in law firms, in law schools and in government and corporate environments. I recently tried a very long financially complex divorce case. One day, the husband was not in attendance. One of his attorneys called to my attention that everyone in the courtroom on that day was female—the wife, the four attorneys, the court reporter, the court clerk and me. We all paused for just a moment with smiles on our faces, and then, we got back to work. This day was a far cry from so many days for so many of us, when we were the only one or two women present in the courtroom or the deposition.

With the Illinois legislature beginning to undergo sexual harassment training and apparently adopting legislation that would require all elected officials to be so educated, will this apply to the third branch of government? Sign me up as an educator for my colleagues! ■

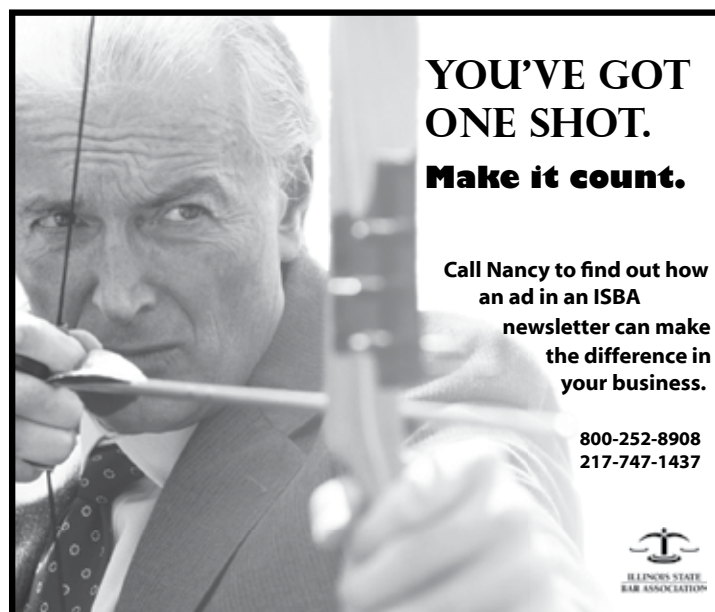
Sidebar on CLE at the mid-year meeting

Pretrial procedures and bond court is one of the segments in the 10:30 CLE scheduled for the Mid-Year meeting on December 8, 2017. The presenter will be Chief Judge Robbin Stuckert of the 23rd Circuit. She is chair of the Supreme Court Committee on pretrial procedures.

Other programs in the hot topics session at the 10:30 segment include a review of the Illinois Constitution as Illinois celebrates its 200th anniversary as a state next year and the impact of administrative adjudication programs on the judicial system.

The 9 a.m. CLE program deals with ethics and social media.

These programs are complimentary to registered Joint/Midyear Meeting attendees. Go to <https://www.isba.org/jointmeeting>. ■



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Madison County's Veterans Treatment Court: A model program

BY HON. RICHARD L. TOGNARELLI

The Madison County, Illinois Veterans Treatment Court ("Vet Court") was established in March of 2009 under the leadership of the Honorable Judge Charles V. Romani, a veteran of the United States Army and the Vietnam War. Continuing the vision of the Honorable Judge Robert Russell, who founded the first Veterans Treatment Court in Buffalo, New York in 2008, Judge Romani recognized the many benefits of Vet Court and saw the need for such a court in Madison County. I have had the honor of presiding over the Court since Judge Romani's retirement in November of 2012. Under the guidance of the Vet Court, hundreds of veterans have been assisted over the past eight and a half years. The court is thriving, continues to expand its resources and treatment options, and currently has 45 veterans enrolled.

The Mission of the Madison County Veterans Treatment Court is to ensure that justice-involved veterans are connected to the benefits and treatment they earned through their military service and to divert them from the traditional criminal justice system. The program provides support and rehabilitation through comprehensive substance abuse and/or mental health treatment opportunities, educational programs, peer support, as well as a variety of other services, all while being judicially monitored.

The court has a dedicated interdisciplinary team assigned to it including a Veterans Court Judge, Prosecutor, Public Defender, Probation Officer, Veterans Justice Outreach Specialist, and a Problem Solving Courts Coordinator. This team works together to provide support and guidance to all of the courts participants while providing accurate and real time information to the Veterans Court Judge at each status hearing.

Vet Court is both a pre and post-adjudicatory Problem Solving Court program that targets veterans in both felony

and misdemeanor court who have substance abuse or mental health disorders. It is a four-phase highly structured program that consists of two separate and defined tracks. The high-risk track accommodates veterans who are at a higher risk to reoffend, is a minimum of eighteen months in duration, and incorporates a more intensive level of supervision and judicial monitoring. The low-risk track which accommodates veterans who are at a lower risk to reoffend, is a minimum of 12 months in duration and incorporates a lower level of supervision and judicial monitoring. Successful completion of all phase requirements is mandatory in

both tracks before a veteran can graduate from the program.

All participants must have an honorable, or general under honorable conditions, discharge from the United States Armed Forces, must demonstrate a willingness to participate fully in the program, and must meet all of the court's eligibility requirements to be considered for placement. Referrals to the court can be made by anyone by contacting the Madison County Problem Solving Courts Office located in the Madison County Criminal Courts Building. ■



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Interpretation of recent amendments to FRCP 37(e) taking shape

BY PATRICIA MATHY

Significant amendments to Federal Rule of Civil Procedure 37(e) went into effect almost two years ago (December 1, 2015). Rule 37(e) governs the “Failure to Preserve Electronically Stored Information” and provides guidelines for the imposition of sanctions where spoliation of electronically stored information (“ESI”) has occurred. Regardless of whether a party is alleging or defending against claims of spoliation, the amended Rule has serious ramifications for those involved in the discovery of electronic information. Given the reality of the exponentially growing use of electronic systems in today’s world—resulting in more frequently occurring discovery disputes involving large volumes of electronic data—the amendments to Rule 37(e) and interpretive case law inform how attorneys and their clients may approach and address issues relating to the storage, preservation, and production of ESI.

Motivation Behind Revisions to Rule 37(e)

According to the Advisory Committee’s Notes accompanying the 2015 amendment, the decision to overhaul Rule 37(e) was the result of several factors. *See* Fed. R. Civ. P. 37 2015 amendment advisory committee’s notes. First, the prior iteration of the Rule failed to adequately address several issues resulting from the expanding volume of ESI at issue in many discovery disputes. *Id.* In addition, since the original adoption of Rule 37(e) in 2006, federal circuits had developed different standards “for imposing sanctions or curative measures on parties who fail to preserve electronically stored information.” *Id.* As a result, courts in one jurisdiction might grant an adverse inference instruction on a finding of negligence or gross negligence, for example, while the same conduct in

another jurisdiction would not result in such a sanction.

The combination of the exponential growth of ESI over the past decade, along with the uncertainty and inconsistency in the application of court-ordered sanctions across jurisdictions, resulted in the need for litigants “to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.” *See* Fed. R. Civ. P. 37 2015 amendment advisory committee’s notes. Rule 37(e) as amended seeks to standardize the application of sanctions across jurisdictions by enumerating the specific measures a court may take in response to the loss or destruction of ESI that cannot be recovered.

Revisions to Rule 37(e)

Prior to the 2015 amendment, Rule 37(e) stated: “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”

The amended version of the Rule provides that where electronically stored data that should have been preserved is lost and cannot be restored “because a party failed to take reasonable steps to preserve it,” the Court may: (1) order curative measures “no greater than necessary” to cure the prejudice suffered by the opposing party; or (2) if the Court finds that the party “acted with the intent to deprive” the opposing party of the information, it may enter an adverse inference, dismiss the action, or enter a default judgment. Fed. R. Civ. P. 37(e).

Snider v. Danfoss, LLC

In *Snider v. Danfoss, LLC*, the Northern District of Illinois provided helpful analysis

regarding the application of Rule 37(e) as amended. No. 15 CV 4748, 2017 WL 2973464 (N.D. Ill. July 12, 2017), *report and recommendation adopted*, No. 1:15-CV-04748, 2017 WL 3268891 (N.D. Ill. Aug. 1, 2017). In *Snider*, the plaintiff brought suit against her former employer, alleging that she was demoted and retaliated against for filing a sexual harassment complaint. *Id.* at *1. Shortly after the plaintiff’s attorney sent the defendant a preservation letter, the plaintiff left her job working for the defendant. *Id.* Pursuant to the defendant’s internal policies, the company deleted the plaintiff’s email account 90 days after she left her job. *Id.* It was subsequently discovered that some emails belonging to another key employee in the dispute were also deleted. The plaintiff filed a motion seeking sanctions for the destruction of the emails at issue. *Id.*

The Court began its analysis under amended Rule 37(e) with a “five-part winnowing process” that must occur before courts “can even consider imposing sanctions”:

1. The information must be ESI.
2. There must be anticipated or actual litigation.
3. Because of anticipated or current litigation, the ESI “should have been preserved.”
4. The ESI must have been (a) lost because (b) a party failed to take (c) reasonable steps to preserve it.
5. The lost ESI must be unable to be restored or replaced through additional discovery.

Id. at *4, *6.

Only if all five considerations are answered in the affirmative does the Court then consider whether the receiving party was prejudiced by the absence of the

ESI, and whether the deletions occurred “with intent to deprive.” *Id.* at *5. If the receiving party was prejudiced by the loss of the ESI, the Court may order curative measures no greater than necessary to cure the prejudice suffered. *Id.* If, however, the Court finds that the party “intended to deprive” the opposing party of the use of the ESI, prejudice is presumed, and the court may impose “the harsher sanctions available, including presuming that lost ESI was unfavorable, instructing the jury that it may or must presume the information was unfavorable, or entering default or dismissal.” *Id.*

In *Snider*, after finding that the fifth prerequisite under amended Rule 37(e) (“[t]he lost ESI must be unable to be restored or replaced through additional discovery”) was not satisfied, the Court denied the plaintiff’s motion for sanctions. *Id.* at *6-7. The Court further reasoned that “no prejudice exist[ed]” as to plaintiff’s emails, as she had first-hand knowledge of such emails and could provide testimony about them as needed. *Id.* at *7. The Court similarly found that plaintiff was not prejudiced by the deletion of the key employee’s emails, as it was “pure speculation that the lost ESI would benefit Plaintiff under these circumstances.” *Id.* The Court further noted that the plaintiff presented no evidence to suggest that the defendant destroyed the emails in question “with the intent to deprive Plaintiff of this ESI.” *Id.* at *8. As a result, the Court concluded that no sanctions were warranted under amended Rule 37(e), as “Defendant’s admitted and erroneous destruction of electronically stored information (ESI), which does not appear to be relevant, has not prejudiced Plaintiff.” *Id.*

What We Know and Open Questions

As with any amended Rule shortly after implementation, several open questions remain as to how the new Rule 37(e) will be interpreted and applied. For example, when deciding whether ESI has been “lost because a party failed to take reasonable steps to preserve” the information, the types of conduct courts will deem to be

“reasonable” is unknown. In addition, the advisory committee’s notes to the 2015 amendment state that the Rule “does not place a burden of proving or disproving prejudice on one party or the other,” instead leaving “judges with discretion to determine how best to assess prejudice in particular cases.” See Fed. R. Civ. P. 37 2015 amendment advisory committee’s notes. The Rule is also silent as to the burden of proof with respect to the intent to deprive. As a result, it is unclear which party will be required to show prejudice or intent to deprive—or lack thereof—in order to satisfy the standards enumerated under Rule 37(e).

Nevertheless, cases applying amended Rule 37(e) since the Rule took effect in late 2015, such as the *Snider* case outline above, provide some guidance as to factors courts are likely to consider in applying the Rule’s provisions. For example, for spoliation that occurs prior to litigation, courts may consider whether the party had reason to believe that litigation might occur, as well as whether a party should have known

that the lost or destroyed data could be discoverable.

In addition, the text of the rule itself provides that the “reasonableness” of a party’s preservation efforts must be considered—further emphasizing the importance of the proper imposition of litigation holds as soon as a party is aware that litigation may occur. Similarly, the 2015 Advisory Committee’s Notes address the proportionality of any such preservation efforts, by noting that “[a] party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms.” See Fed. R. Civ. P. 37 2015 amendment advisory committee’s notes.

Finally, parties should consider the contours of the amended Rule within the context of other intersecting Federal Rules of Civil Procedure, such as Rule 26’s limitations on the production of ESI, as well as the proportionality limitations on the scope of discovery in general. See Fed. R. Civ. P. 26(b). ■

Recent appointments and retirements

1. The Circuit Judges have appointed the following to be Associate Judge:
 - Sandra T. Parga, 16th Circuit, October 2, 2017
2. The following judges have retired:
 - Hon. Deborah Mary Dooling, Cook County Circuit, October 13, 2017
 - Hon. Teresa K. Righter, 5th Circuit, October 31, 2017 ■

The First District affirms sanctions against a judgment debtor raising frivolous defenses

BY ALISSA KELSO AND RODNEY PERRY

On October 27, 2017, the Illinois Appellate Court for the First Judicial District (the “First District”), affirmed in part a circuit court’s grant of sanctions against a judgment debtor, an affiliated LLC and their attorney, for attempting to hide assets from a judgment creditor. See *Williams Montgomery & John Limited v. Bret Broaddus*, 2017 IL App (1st) 161063 (Oct. 27, 2017). While the First District affirmed the circuit court’s imposition of sanctions in favor of the judgment creditor, it vacated the amount of attorney’s fees awarded by the circuit court, and remanded the matter for an evidentiary hearing on the judgment creditor’s fee petition, while dismissing other aspects of the appeal. *Id.*

Facts and Procedural Background

The motion for sanctions stemmed from a lawsuit involving a partnership dispute in the Northern District of Illinois, in which the defendant, Bret Broaddus (“Broaddus”), sued a third-party, Kevin Shields (“Shields”), alleging that Shields had breached his fiduciary duty in the sale of Broaddus’ ownership interest in an entity called Will Partners, LLC (“*Shields*” or the “*Shields* Litigation”). *Broaddus v. Shields*, No. 08 C 4220, 2010 WL 3516110, at *7 (N.D. Ill. Sept. 1, 2010), *aff’d*, 665 F.3d 846 (7th Cir. 2011).

The federal district court rejected Broaddus’ claim, granted Shields’ motions for summary judgment as to Broaddus’ claim and Shields’ counterclaims for indemnification, and entered a judgment against Broaddus for \$798,619.16.

Following the district court’s ruling on the motions for summary judgment, but before the court entered an order of judgment, Broaddus created the BRN Revocable Trust (“BRN”), from which Broaddus retained all income and had sole discretion over the distribution of assets. Additionally, Broaddus could revoke the

trust at any time. Soon after creating BRN, Broaddus formed a new entity, Stanley, LLC (“Stanley”), in which BRN held a 99% interest and Broaddus’ daughter held the remaining 1% interest.

When Shields attempted to collect his judgment against assets held by and for the benefit of Broaddus, Broaddus responded that those assets were unavailable to satisfy his judgment debt to Shields. The district court rejected that argument, holding that Broaddus’ transfer of assets to BRN and then to Stanley shortly before the court entered judgment was a fraudulent transfer under Section 5 of the Illinois Uniform Fraudulent Transfer Act (“UFTA”). 740 ILCS 160/5 (2010). In relevant part, Section 5 of the Illinois UFTA states that a transfer is fraudulent if the transfer is made with the “actual intent to hinder, delay, or defraud any creditor of the debtor” or if the debtor transfers property “without receiving a reasonably equivalent value in exchange,” and the debtor knows or should know that he or she will incur a debt which is beyond the debtor’s ability to pay. 740 ILCS 160/5 (a). The district court held that Broaddus’ transfer of substantial assets to a trust over which he had full control and access, when he knew that the court would soon impose a monetary judgment against him, was a fraudulent transfer under the Illinois UFTA.

Subsequently, Williams Montgomery and John Ltd. (“WMJ”) filed a complaint against Broaddus in the instant case in the Circuit Court of Cook County seeking to recover unpaid legal fees amounting to \$129,538.39. It is unclear from the opinion whether WMJ’s action was related to the Shields Litigation. WMJ issued a citation to discover assets to Bradley Associates, LLC (“Bradley”), a real estate investment company that held assets belonging to Broaddus, and subsequently filed a motion to require turnover of assets directed at

Bradley. Bradley confirmed that the assets it held belonged to Broaddus, while Stanley and Broaddus claimed that the assets held by Bradley belonged to Stanley and were therefore outside the reach of WMJ. Bradley further claimed that it was prohibited from transferring assets to Stanley as requested by Broaddus because the request came after the federal district court’s grant of summary judgment in the Shields Litigation. Bradley was willing to turnover assets to WMJ if required by the court. Stanley and Broaddus objected to Bradley turning over any assets, arguing, among other things, that even if Broaddus’ transfer of assets had been fraudulent as pertained to Shields, the transfer was not fraudulent in relation to WMJ’s claims. WMJ argued that Broaddus’ transfers had already been deemed fraudulent in the Shields Litigation and any additional determination was unnecessary as Broaddus’ arguments were barred by *collateral estoppel*.

WMJ also filed a motion seeking sanctions against Stanley and the attorney representing Stanley and Broaddus pursuant to Illinois Supreme Court Rule 137 on the grounds that Stanley’s arguments that Broaddus’ transfer of assets was not fraudulent, were frivolous given the court’s findings in *Shields*. Similarly, Bradley moved for sanctions against Stanley and Broaddus on the same grounds. The circuit court first granted WMJ’s petition for turnover of the assets held by Bradley, and then later granted WMJ’s motion for sanctions and its petition for attorney’s fees. The circuit court awarded WMJ fees against Broaddus, Stanley and their attorney in the amount of \$74,578. The circuit court also granted Bradley’s motion for sanctions, but did not enter an award of any specific amount of money to Bradley.

Broaddus, Stanley and the attorney appealed the circuit court’s orders granting:

(1) WMJ’s motion for turnover

regarding certain assets that Bradley held for Broaddus' benefit,

- (2) WMJ's motion for sanctions, and
- (3) Bradley's motion for sanctions.

Broaddus, 2017 IL App (1st) 161063, ¶ 31.

Appellate Decision

The First District affirmed the circuit court's grant of WMJ's motion for sanctions, but vacated the circuit court's award of attorney's fees in favor of WMJ and remanded with instructions for the court to hold an evidentiary hearing to determine the appropriateness of WMJ's fee petition. It dismissed the appeal of the order granting WMJ's motion for turnover as untimely. It also dismissed the appeal of the order granting Bradley's motion for sanctions because it was not a final, appealable order.

In so ruling, the First District noted that a party may only appeal a case once "the trial court has resolved all claims against all parties." *Id.* at ¶ 33 (internal citations omitted). However, the court noted that Illinois Supreme Court Rule 304 (a) allows an appeal where the trial court has made a final judgment as to one or more, but less than all parties in a case. *Id.* Under Rule 304, Stanley and Broaddus could have appealed the order granting turnover to WMJ, but the appeal was not filed until more than two years after the circuit court's order granting turnover and thus was dismissed as untimely.

The appellate court held that the circuit court's order granting Bradley's motion for sanctions was not a final, appealable order and dismissed the appeal on the grounds that no specific monetary amount had been entered in Bradley's favor and, therefore, there was no judgment upon which it could collect.

The court held that the order granting sanctions to WMJ, on the other hand, became final and appealable once the circuit court awarded WMJ a fixed amount in attorney's fees and costs. The court concluded that there was sufficient evidence for the circuit court to impose sanctions against Broaddus, Stanley, and

their attorney under Rule 137. The court ruled that the circuit court's imposition of sanctions was proper based on ample evidence that Broaddus' and Stanley's filings were objectively frivolous and brought for the sole purpose of delaying the proceedings. Neither Broaddus nor Stanley made any genuine attempt to seek evidence necessary to substantiate their claims. Additionally, the court found that Broaddus, Stanley, and their attorney had made numerous factual misrepresentations to the court that were "demonstrably false" and had not made any attempts to resolve these misrepresentations. Based on these facts, the court concluded that Broaddus' and Stanley's petitions were not well-grounded in fact and thus sanctions were appropriate. *Broaddus*, 2017 IL App (1st) 161063, ¶ 45-47.

However, the court held that the circuit court erred in refusing Broaddus, Stanley, and their attorney's request for an evidentiary hearing on WMJ's fee petition to determine the appropriate amount of the sanctions. It pointed out that, under Illinois law, the party seeking an award of attorney fees has the burden to present sufficient evidence to enable a trial court to determine the reasonableness of the request. Notably, the court held that:

Simply presenting the bills issued to the client or listing work hours multiplied by an hourly rate will not justify a fee award. Instead, the fee petition must *specify* the services performed, as well as the attorney who performed the services, the time expended, and the hourly rate charged. An evidentiary hearing is not always necessary in order to determine reasonable attorney fees if the trier of fact can determine a reasonable amount from the evidence presented, "including a detailed breakdown to fees and expenses," and the party opposing the award is not denied an opportunity to present evidence.

Broaddus, 2017 IL App (1st) 161063, ¶

49 (internal citations and parentheticals omitted) (emphasis in original).

Here, the appellate court reasoned that WMJ's petition for fees was an inadequate basis for the circuit court's award of attorney's fees because some of the entries were vague, including language such as "Attention to status and strategy" and "Attend to status of turnover," and many of the entries referred to work performed outside of the circuit court's presence. Thus, the court remanded with instructions for the trial court to hold an evidentiary hearing as to the appropriateness of WMJ's request for fees.

Conclusion

The Broaddus opinion shows that Illinois courts are willing to grant sanctions against parties who repeatedly raise the same non-meritorious claims and/or defenses and make misrepresentations in court filings. Additionally, the opinion underscores the importance of counsel being detailed and specific in their billing entry practices and ever so vigilant in preparing evidentiary materials to support a fee petition. ■

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Tuesday, 12-12-17 – Webinar—Driving Profitability in your Firm. Practice Toolbox Series. 12:00 -1:00 p.m.

Wednesday, 12-13-17— Chicago, ISBA Regional Office. Children and Mental Health Law. Presented by Mental Health. 9-12:15.

Wednesday, 12-13-17 – LIVE Webcast—Children and Mental Health Law. Presented by Mental Health. 9-12:15.

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Friday, 12-15-17 – Chicago, ISBA Regional Office—Guardianship Boot Camp. Presented by Trusts and Estates. 8:30 – 4:30.

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Thursday, 01-18-18 – ISBA Chicago Regional Office—Closely Held Business Owner Separations, Marital and Non-Marital. Presented by Business and Securities. 9AM - 12:30 PM.

Tuesday, 01-23-18 Webinar—Before the Technology Buy, Understand the Why. Practice Toolbox Series. 12:00-1:00 PM.

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Tuesday, 01-30-18 LIVE Webcast—Concerted Activity in the Age of Social Media and Online Systems: Employee Rights, Employer Pitfalls, Remedies and Penalties. Presented by Labor and Employment. 2-4 PM.

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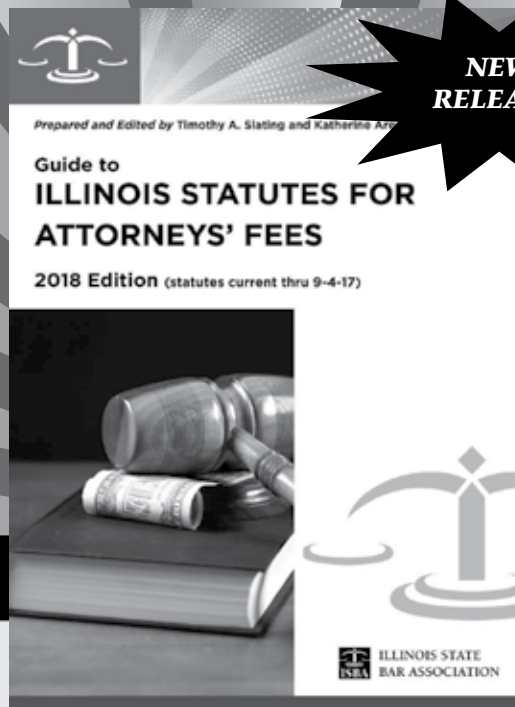
Wednesday, 02-07-18 – Webinar—TITLE INSURANCE 101: HOW TO HANDLE COMMON TITLE INSURANCE AND COVERAGE ISSUES IN RESIDENTIAL REAL ESTATE TRANSACTIONS—A Primer for New Attorneys and Those 'New' to Real Estate Law Practice. Presented by Real Estate. Time: 2-3 PM.

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Monday, 02-19-18 – Chicago, ISBA Regional Office—Workers' Compensation Update – Spring 2018. Presented by Workers' Compensation. Time: 9:00 am – 4:00 pm.

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