ILLINOIS STATE BAR ASSOCIATION

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Bench & Bar

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

Addressing the challenge of pro bono legal service

BY DEANE B. BROWN, PARTNER, HUGHES SOCOL PIERS RESNICK DYM, LTD.

As you may recall from my previous column, I proudly serve as Chair of the Bench and Bar Section Council of the Illinois State Bar Association for the 2017-2018 bar year. In my last Chair's Column, entitled, "The Challenge of Pro Bono Legal Services," I reported on our Council's discussion about the many impediments to doing pro bono work, which have resulted in only approximately one-third of the lawyers in Illinois actually performing pro bono work, according to the Attorney Registration and Disciplinary Commission. These challenges included: (a) the expense of performing pro bono matters at the cost of billable work; (b) time constraints in doing non-billable, pro bono work in the face of minimum billable hour requirements; (c) the concerns of

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Celebrate pro bono – October 22-28, 2017

BY MICHAEL G. BERGMANN

Coordinated by the American Bar Association's Standing Committee on Pro Bono and Public Service, Pro Bono Week is intended to inspire even greater pro bono participation by lawyers throughout the nation. This initiative provides an opportunity for legal organizations across the country to collaboratively commemorate the vitally important contributions of America's lawyers and to recruit and train the many additional volunteers required to meet the growing demand. The Standing Committee on Pro Bono and Public Service undertook this initiative to provide a format for showcasing the incredible difference that pro bono lawyers make to our nation, to our system of justice, to our communities and, most of all, to the clients they serve. For more information, visit www.celebrateprobono.org.

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Addressing the challenge of pro bono legal service

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many lawyers that they do not have the expertise in the subject areas in which pro bono work is often needed, such as immigration and domestic relations; and (d) the failure to inform lawyers of various pro bono opportunities.

After discussing the many challenges to pro bono service, the Council members debated a number of possible solutions to these obstacles. The Council briefly addressed and dismissed the idea of making pro bono work mandatory for all Illinois lawyers. The Council concluded that the Illinois Supreme Court should not mandate lawyers to "do good" and that forcing a lawyer to help a client who he or she does not wish to assist is a bad idea. One Council member reminded the group that involuntary servitude was abolished in the 13th Amendment to the U.S. Constitution and another pointed out that there is no state jurisdiction in the U.S. which requires attorneys to perform pro bono work.

Many courts, however, have required attorneys who wish to serve on compensated, court-appointed panels or as a court-appointed Guardian Ad Litem, to handle a certain number of cases on a pro bono basis before they are eligible for such paid assignments. This wisely serves the dual purpose of providing pro bono services to litigants who cannot afford to pay a lawyer while giving attorneys the experience they need be effective in these roles.

Likewise, the federal trial bar requires its lawyer members to handle pro bono cases assigned to them by federal judges from time to time as a condition of membership in the trial bar. And many of the judges on our Council observed that they have often asked attorneys to serve as a "friend of the court" to litigants who cannot afford lawyers. The judges reported that no lawyers have ever turned down their requests. Perhaps judges need to make such requests more frequently.

Another important tool discussed by the Council in encouraging pro bono representation is the modification to the Illinois Rules of Professional Conduct ("**RPC**") and the Illinois Supreme Court Rules to allow for limited scope representation. Effective July 1, 2013, RPC 1.2(c) has provided that a "lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Comment 6 to RPC 1.2(c) elaborates that limited scope representation "may be appropriate because the client has limited objectives for the representation" and that the terms of the limited representation "may exclude specific means that might otherwise be used to accomplish the client's objectives." Thus, limited scope representation may enable lawyers to perform pro bono work in reduced amount of time on a circumscribed aspect of a case to alleviate the lawyers' concerns about the cost of providing free services at the expense of billable work. Council members noted an increased need for judicial education on limited scope representation.

Further, Comment 7 to RPC 1.2(c) states that "[a]lthough an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Accordingly, limited scope representation may serve to address the concerns of many lawyers that they do not have the expertise needed to perform pro bono work in certain subject areas.

Another possibility discussed by the Council was for bar associations, including the ISBA, to serve as a "clearinghouse" of sorts, wherein legal aid agencies could advise the bar associations of their specific needs for pro bono counsel, and the bar associations could then notify their members of the various pro bono opportunities. This would address the problem identified by Council members that many attorneys are unaware of pro bono opportunities. Additionally, Council members opined that bar associations

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could incentivize their members to perform pro bono work by offering free continuing legal education training seminars to those who agree to undertake pro bono representation.

There are no simple solutions to the challenges of performing pro bono work, but I hope that some of the ideas presented in this column will enable lawyers to increase the delivery of legal services directly to persons of limited means, which is an important responsibility of the legal profession. ■

Celebrate pro bono – October 22-28, 2017

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The ISBA has commemorated this national celebration each year by encouraging its members to do pro bono and by recognizing those who meet the call. Two years ago, the ISBA launched its Pro Bono Partner initiative, through which members commit to: (1) seek out the local pro bono legal services being supplied to individuals or charitable, religious or civic organizations in their community; (2) attend or support a recognition ceremony for those who participate in pro bono services in their community; (3) consider attending training provided to lawyers who provide pro bono services; and (4) commit to joining the efforts to increase access to the legal system. You can learn more about this initiative at www.isba.org/probono/partner.

The ISBA Delivery of Legal Services Committee has also organized two webinars in the month of October geared towards those interested in helping low-income individuals with their legal needs. "Working Effectively with Interpreters" will be held on Wednesday, October 11th at 2:00 CT and this program is available at no cost for the first 26 registrants who agree to take a pro bono case in the next year. "Working with Low Income Clients" will be held on Wednesday, October 25th at noon CT and this program is available at no cost for the first 30 registrants who agree to take a pro bono case in the next year. More information about this program is available at www.isba.org/cle/upcoming.

There are also a lot of great programs and events happening around the state during this year's celebration of Pro Bono Week. Many of these events are being organized by the Public Interest Law Initiative (PILI) through Judicial Circuit Pro Bono Committees that it has organized around the state, and are in partnership with Land of Lincoln Legal Assistance Foundation or Prairie State Legal Services, Inc.

1. Wednesday, October 18th, 11:45 am – Child Support Income Shares CLE Program

Macon County Courthouse, 253 Wood Street in Decatur.

The Sixth Judicial Circuit Pro Bono Committee will hold a complimentary CLE will cover the new child support rules, the rationale behind these rules and directions on how to calculate income shares in different situations.

2. Monday, October 23rd, 5:30 pm – Tenth Judicial Circuit Celebrate Pro Bono Reception

Caterpillar Visitors Center, 110 SW Washington Street in Peoria

The Tenth Judicial Circuit Pro Bono Committee will recognize the efforts of Pro Bono Pledge Signatories and Pro Bono Service Award Recipients to expand and enhance access to justice in the Tenth Judicial Circuit. Illinois Supreme Court Justice Thomas Kilbride will be our special guest speaker.

3. Tuesday, October 24th, 12:00 pm – Third Judicial Circuit Celebrate Pro Bono Luncheon

Leclaire Room at Lewis and Clark Community College, 600 Troy Road in Edwardsville

The Third Judicial Circuit Pro Bono Committee will recognize the efforts of Pro Bono Pledge Signatories and Pro Bono Service Award Recipients to expand and enhance access to justice in the Third Judicial Circuit. The Honorable Michael A. Fiello of the Supreme Court Commission on Access to Justice and the Honorable Lloyd A. Karmeier, Chief Justice of the Illinois Supreme Court will be our special guest speakers.

4. Wednesday, October 25th, 5:00 pm – Fourteenth Judicial Circuit Pro Bono Reception

Deere & Company World Headquarters in Moline

The Fourteenth Judicial Circuit Pro Bono Committee will host a reception at John Deere. Pro bono volunteers who have worked to expand and enhance pro bono in the Fourteenth Judicial Circuit will be recognized at the event.

5. Thursday, October 26th, 11:30 am – Sixth Judicial Circuit CLE Program & Awards Presentation

Regent Ballroom, 1406 Regency Drive West in Savoy

The Sixth Judicial Circuit Pro Bono Committee is presenting a complimentary CLE entitled "The Fate of the Orphan in Law and Literature" as well as its Community Legal Services Award at this program.

6. Saturday, October 28th, 8:45 am – Eleventh Judicial Circuit Legal Advice Fair

Mid Central Community Action, 1301 West Washington Street in Bloomington

The Eleventh Judicial Circuit Pro Bono Committee is once again co-sponsoring a Legal Advice Fair in Bloomington, where volunteer attorneys were available to give

one-time legal advice concerning family issues, housing disputes, debt concerns and more.

7. Thursday, November 2nd, 5:30 pm – Fifth Judicial Circuit Pro Bono Celebration Dinner

Mattoon Country Club, 6700 N Country Club Road in Mattoon

The Fifth Judicial Circuit Pro Bono Committee will recognize the efforts of Pro Bono Pledge Signatories and Pro Bono Service Award Recipients to expand and enhance access to justice in the Fifth Judicial Circuit. Curtis Lovelace of The Lovelace Center for Criminal Defense will be the special guest speaker.

Visit <www.pili.org/pro-bono/pro-bono-week> to learn more about any of these events or PILI's Judicial Circuit Pro Bono Committees. Information about the Illinois Pro Bono Pledge, which has been launched in six of these Judicial Circuits and has over 120 signatories statewide, can be found at <www.ILProBonoPledge.org>. ■

Michael G. Bergmann is the Executive Director of the Public Interest Law Initiative (PILI). He is also a member of the ISBA Standing Committee on the Delivery of Legal Services, the Bench and Bar Section Council, and the Assembly.

Social media and judicial ethics

BY STEVE PACEY, CIRCUIT JUDGE, RETIRED

I am not now, nor have I ever been a fan of social media. When I receive a LinkedIn email, it's usually deleted. "Connections" do get congratulated on anniversaries or new positions; my profile gets updated with changes; and I look at the profiles of unknown persons wanting to "connect." I am not associated with any other social media accounts. Being technologically challenged, I am unfamiliar with Facebook settings, but it seems some people don't learn who their true (or more likely untrue) "friends" are until it's too late.

A presence on social media poses potential disciplinary hazards for attorneys and perhaps more so for attorneys who are judges.

While few states have judicial codes of conduct provisions regarding use of social media, more than a dozen states have issued advisory opinions on such use. Many of those opinions caution the use of social media by judges, referring to the appearance created by a social network connection and distinguishing between attorney "friends" who are likely to appear and those not likely to appear before the judge. One advisory opinion bluntly observed that the use of social media by a judge is "fraught with peril".

A similar number of states have publicly or privately disciplined judges for misuse of social media, including comments on pending matters, ex parte communications, criticism of attorneys or other judges, fund raising activities, endorsement of candidates for public office, inappropriate or sexually explicit messages and offensive comments about political opponents.

At least thirteen states have imposed discipline or issued advisory opinions regarding judicial campaigns and social media. In Illinois candidates for judicial office are subject to the Code of Judicial Conduct.

While some factual situations are clearly problems (exchanging sexually explicit messages from chambers, during office hours, with someone the judge met in an official capacity), less blatant misconduct, as well as differing views from the several states, are worth a closer look.

A Florida judge (Inquiry Concerning Krause, 166 So. 3d 176 Florida, 2015) was suspended 30 days without pay for using social media to ask friends to help the judge's spouse (a judicial candidate) correct perceived misstatements of the spouse's opponent.

The Georgia Judicial Qualifications Commission (In re Bass, March 13, 2013) reprimanded and suspended for 60 days without pay, a judge who had a private Facebook chat with an individual who contacted the judge about a relative with a criminal charge and gave advice on how to get the case before the judge and failed to recuse.

A Texas judge (In re Slaughter, Texas Special Court of Review, September 30, 2015) was held not to have violated the Code of Judicial Conduct for Facebook comments on pending cases.

California Judges Association Advisory Opinion 66 (2010) indicates that a judge may be socially networked with attorneys who might appear before the judge, but not with ones that have pending cases before the judge.

Florida Supreme Court Ethics Advisory Opinions 2009-20 and 2012-12 hold that a judge may not be "friends" on a social networking site with attorneys who may appear before the judge and may not allow such attorneys to add the judge as a "friend."

Kentucky Judicial Ethics Opinion JE 119 (2010) however, states that a judge may be social networking "friends" with attorneys, social workers or law enforcement officials that may appear before the judge.

Massachusetts Committee on Judicial Ethics Opinions 2016-1, 2016-8 and 2016-9 indicate that a judge may not "friend" or be "LinkedIn" with any attorney likely to appear before the judge and may not use Twitter other than for educational or informational purposes.

The Illinois Judicial Inquiry Board has

no reported complaints or orders that have specifically dealt with social media and judicial ethics. In addition, the Illinois Judges Association has no published ethics opinions regarding social media.

Links to all of the opinions or cases mentioned, as well as many others, can be found at the National Center for State Courts - Center for Judicial Ethics website: www.ncsc.org/cje - Social Media and Judicial Ethics.

Attorneys and attorneys serving as judges are well advised to be alert for current rulings, advisory opinions or cases involving the slippery slope of social media. ■

Trial lawyers make bad jurors and I can prove it

BY CHARLES SHIFLEY

Common lawyer wisdom is to eliminate lawyers from being jurors. The common wisdom seems to be that the "regular" other jurors will defer in their decision making to any lawyer-juror, and the parties will get the decision of one person, the lawyer-juror, not a jury. That may or may not be true, but I've heard it. It's beside the point, however, as lawyers make bad jurors. At least trial lawyers. I can prove it. I can so testify.

I can do that because recently, I was selected as an alternate juror, and heard a case in that role. The case concerned medical malpractice alleged against a doctor, and a medical care facility.[1] I was shocked when I was selected to the jury, even as an alternate. I told the courtroom in voir dire that I was a lawyer in trial practice, a jury trial practice, albeit of patent, trademark, and copyright cases, and in federal courts, not the state court I was in. But I was not only a jury trial lawyer, I had a degree in science too, specifically engineering. I also told the room that my son was a lawyer, and my daughter was an emergency room doctor. My mother, I said, had also been taken by ambulance to an emergency room, word I had learned the night before my voir dire, for a condition at issue in the case. All true.

Still, I was not dismissed. I was seated as the second alternate juror, and the first day, I became the only alternate juror. I heard the opening statements, eight days of medical, patient, and family testimony, closing arguments, and jury instructions. Then I was excused, my jury service complete. I did not deliberate. I left.

But from the day of selection through the day I left, I passed every morning arrival, break, lunch, and evening departure from the jury room with 12 other jurors. We all became friends, from the effect of being selected, detained, and confined in the jury room together. We were somewhat stuffed in the room, as the table in the room seated 10, with barely room to walk around the people seated. The room had a side table, and a water cooler, and with 13 of us, we had to swap seats and maneuver around each other. One juror reported that a friend asked, "Which juror do you hate already?" And we all agreed we were not like that, we were an agreeable group of people. We were even fun loving. We laughed at each other's jokes, and did silly things, like saying loudly, slowly, and in practiced unison, "Good morning, Miss Bitsy," to our kindergarten school teacher juror when she arrived.

And I almost became a full juror. One juror's coughing became so severe and prolonged, during testimony, that we waited on a break while the judge quizzed the juror whether he could even continue. It was in doubt. He did, still coughing. Another day, we all waited in the morning as one juror called in with stomach issues, as from food poisoning, but soon soldiered on by coming in, albeit late, and visibly a bit ill.

We jurors did not discuss the case. So I have no insights into what the other jurors' reactions and reasoning were as they heard all that I heard. Still, reading bumps on heads,[2] I thought I knew my fellow jurors. We had eight women and five men, an ethnic, socioeconomic, and geographical mix, all but one of the 13 of us appearing to be optimists, with stories of family, friends, events to go to, such as White Sox games—happy people. We brought each other cold medications, chocolates, farmer's market strawberries, and a power strip for recharging our phones. (Our one "pessimist" lived at home, smoked, swore, wanted the trial to be over with every day, and had other "interesting" characteristics.) We heard emotional testimony for the person who had lost their life while in medical care from several children, and a spouse. They cried on the witness stand, they cried in the courtroom for their loved one. They told stories of a loving, caring person, and we all cried, and tried not to cry, with them. We jurors dabbed tears together and were in silence together on breaks after these witnesses.

We heard the testimony of the doctor-defendant, care facility nurses, a care facility executive, the emergency room doctor who tended to the cardiac arrests of the lost person, the radiologist who examined x-rays to eliminate some causes of death other than as the plaintiff alleged, the pathologist who did the autopsy after death, and numerous medical expert witnesses, for all of the plaintiff, the doctor-defendant, and the care-facility-defendant. (More on them later.) In total, we heard more than 20 witnesses. I would like to think that the other jurors heard what I heard, the honesty and forthrightness from some witnesses, and the defensiveness,

prevarications, contradictions, and admissions from others.

You see, as a trial lawyer, I knew the rule that I was present as a juror to test the testimony, to judge the credibility of the witnesses, to expect witnesses to contradict each other, especially the experts, and to make the decision who to believe, and why, based on the evidence. And I did my job during the evidence. I noted immediately when the first witness, a care facility nurse, did two things. The nurse was called as a hostile witness. First, he/she[3] was instantly, strongly defensive, quarreling with the cross-examining lawyer. The defensiveness was extended. It reflected, to me, untrustworthiness in the testimony.

Second, the nurse also took a position that laws regulating the care facility and the care they gave at that facility were "guidelines." He had to admit, however, that even if the nurses and facility saw the law as guidelines, not regulations or the law, the nurses and the facility were obligated to follow and meet the "guidelines." (More on this later.)

I also noted quickly, when the doctor-defendant was the next witness, the import of the testimony. He admitted that a few select choices were available for a diagnosis for the later-deceased plaintiff, while that person was in the care facility on the day of death, and he the doctor was not present. The choices all called for the person to be transferred from the facility to an emergency room. The facility did not have available tests and treatments for serious conditions except by sending out for them, and waiting hours for returns. The emergency room, of course, had tests and emergency care, including fast-acting, life-saving drugs, readily and immediately available, "stat."

Shortly, I noted more defensive witness answers on the law and "guidelines." The plaintiff called the care facility executive, who repeated the witness testimony that the law that applied to the facility, both federal law, and state law, constituted "guidelines." Again, he was contradicted by his admission parallel to those of the nurse that the "guidelines" set standards that had to be followed. I had to ponder, had the defense lawyers directed this testimony, had the care facility planned it for all their witnesses, or was the corporation of this facility a business that viewed regulation by "Washington" and "the state house" to be overregulation that could be ignored, should be repealed, and they trained their staff so? I eliminated only defense lawyer direction.

I heard and watched the plaintiff's lawyers build a case with 18 witnesses. Witness by witness, topic by topic, question by question, brick by brick, they laid up their case. It was not torn down by cross-examination. It stood, solid. I have to say, I marveled to myself at the end that I had become convinced of the plaintiff's case, that it was a solid "wall." I had expected less strength, and more doubt. Still, I held myself in check, knowing that contradiction, doubt, and possible reversals of opinions, were to come. I resolved that I was in a great case, one where the plaintiff's case had merit, and no doubt, the defendants' case would, too. A clash of cases with merit was the point of worthy trials. I looked forward to the defense testimony.

But then odd things happened. The doctor-defendant did not testify again, this time without being confronted at the beginning by the hostile questioning of the plaintiffs' lawyers, as before. Where was the build-up of the doctor as personal, warm, and caring, by direct testimony by her own lawyer? It did not happen.

Instead, the doctor's case was two medical expert witnesses. And in my opinion, they blew up on both the doctor and the care facility. I pondered why they allowed that the deceased had symptoms and signs for 12 hours, from first onset, that were not explained adequately by what the doctor was diagnosing, having tests run for, doing—and most importantly, not doing. Why did someone not testify that the doctor spoke to the care facility more than once, and more than briefly, on the day of death? Why did no one testify that the doctor checked in on the patient later? Spoke directly to the patient? The family calling for care? Why did the care facility not consult the doctor as patient conditions deteriorated through the day? They had left a voicemail for the doctor once, at the onset of symptoms, that had provoked the doctor speaking to them early, once, briefly. Why did they not call again? The law, we were told by testimony—a procedural surprise to a lawyer, to get testimony stating the law—was that with a significant change of patient conditions, the care facility was obligated to "immediately" "consult" the doctor. The patient had symptoms that could be associated with life-threatening risks. Where was the care by the doctor, and by the facility? Where the "immediacy"? Where the "consultation"?

And then, the first of the doctor's medical experts, in cross-examination, admitted facts that gave rise to liability of the doctor. Speaking for a diagnosis that was not diagnosing the condition that led to death, but was the alternate diagnosis the doctor had, the expert stated that the alternate diagnosis was also a diagnosis of a quick-acting, life-threatening condition, that also deserved immediate, attentive care and a quick transfer to an emergency room for ER care.

Then the second of the doctor's medical experts, in that expert's cross-examination, admitted facts that gave rise to the liability of the care facility. Speaking of the care at the facility in the hours that set the deceased's fate, the expert sold out the care facility as having failed to meet the requirements of the law, to immediately—or ever in the relevant time—even attempt to contact the treating defendant-doctor.

These were bombshells to me, my analysis of the facts, and their consequences. And they exploded during the beginning of the defense case. The care facility lawyers did not even cross-examine the doctor's second expert on the adverse opinion. The doctor's redirect didn't either.

And then the defense case was truncated. Next came the testimony of one, and only one, witness for the care facility, another medical expert. He/she freely admitted testifying in over a thousand cases over 25 years, to gain most of his income, three-quarters of the time for the defense, and nearly 20 times for the very lawyer representing the care facility. I was skeptical; I suspected I knew who this expert was and where the testimony was coming from. I knew experts could say what they were paid to say.

But more happened. The care facility expert used facts to support an opinion

against liability in their direct examination. The facts used were numerical facts. But when cross-examined, the expert denied the same facts, denied the numbers, and did so to support a point he/she wanted to make to contradict the direction the questioner was leading. I practically looked around the room to see if anyone else was noting the direct contradiction I had just heard between direct and cross examinations. I resolved there and then to judge the credibility of this witness. He didn't have any.

After this last witness, closing arguments came, and were followed by jury instructions. The law of the care facility staff needing to "immediately" "consult" the doctor was officially stated. The possible liability of other medical actors who were not part of the case, such as the ER and its doctor, where the plaintiff actually died by cardiac arrest, was eliminated from consideration.

Nothing had changed by the instructions. The law fit the facts, the facts fit the law. If I had been on the jury, instead of being dismissed as an alternate, I would have voted for liability, with full requested damages, and stuck to my opinion. I had many reasons I could explain for doing so. I had judged the credibility of the witnesses; I had applied the law as stated to the evidence, i.e., the credible testimony, that remained after my credibility assessments. I was a plaintiff's juror as a matter of strict following of the jury instructions and weighing the evidence. I could explain my views in detail. I had notes that quoted the testimony. I'm a trained listener; my notes were accurate. I could remember—and my notes could corroborate me—as to who had said what, when, why some were believable, and why some were not. I could explain that the care facility nurse and executive had taken mutually-reinforcing and wrong positions on "guidelines" that cut into their credibility and the credibility of their corporation in its overall defense. I could explain that the doctor's medical experts had admitted facts that established liability for both the doctor and the care facility. I could explain the direct contradiction in the care facility's expert testimony that eliminated his testimony as not credible.

But I was dismissed, admittedly rightly, as only an alternate.

The jury, people I trusted, insofar as you can build trust in people in just over a week, took about four hours to reach a verdict. It was unanimous. It contradicted my analysis 100 percent. The verdict was for the doctor and the care facility: no liability, no damages.

I have not contacted the jurors, not one. I have their names and telephone numbers. We exchanged them with each other. I could call them. But I will not. They did their service. They go back to their privacy.

I love our country's jury trial system. I believe in juries. I am not someone who believes juries disregard the law and the evidence. I have tried cases to juries and seen their work. I trust them, and as I have said, I trust the people of the jury I almost deliberated with. The upshot of my experience is not to rail against juries, or this jury. The upshot is to think about 12 reasonable, trustworthy people reaching a unanimous result that is the opposite of the one I thought was compelled. I can admit I missed the import of at least one bit of testimony as it occurred. A lawyer brought up that testimony in the trial in cross-examination of a later witness. I looked back in my notes, and saw the import that I had missed. So what else did I miss that the 12 of the jury did not? Or did they defer to the medical profession as doing its best in difficult circumstances, a deference that is respectful and worthy? What do I learn?

I learn at least that I as a lawyer, and probably more narrowly, a trial lawyer, was not a good juror in the subject case. I had an opinion that contradicted the opinion of 12 reasonable, trustworthy people by 100 percent. More broadly, and probably justified, I learn that trial lawyers are not good jurors, in not just one case or one type of case, but all cases. I learn that trial lawyers as jurors develop analyses based on their training and experience that are convincing to them and can completely contradict the analyses of large groups of lay people, i.e., our juries, whose reasoning and decisions are to be trusted if we believe in the jury system. I believe. My evidence is that trial lawyers are not good jurors. My evidence is an anecdote of one, but an anecdote is evidence. I can so testify, and I do. ■

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1. I use "care facility" to mask the true parties. I do the same "fuzzing" with some of the facts, to protect the privacy interests of all those involved.
2. https://en.wikipedia.org/wiki/Phrenology
3. Again, privacy. It makes no difference whether the witness was male or female. I will mix "he," him," "she," "her," and "he/she" without regard to actual gender.

Illinois Supreme Court homes in on "at home"

BY JOY ANDERSON AND KEVIN M. O'HARA

Merely doing business, even if continuous and systematic, is not enough to comport with federal due process and subject a nonresident defendant to general personal jurisdiction in Illinois. The Illinois Supreme Court recently denied jurisdiction over a nonresident defendant in an insurance dispute that gained widespread attention from major corporations and the Illinois Trial Bar. On September 21, 2017, the Court issued its opinion in *Aspen American Insurance Company v. Interstate Warehouse, Inc.*, reversing the First District Appellate Court and holding that the plaintiff failed to meet its burden of establishing a *prima facie* basis to exercise personal jurisdiction over the defendant. 2017 IL 121281, ¶ 18.

Aspen American Insurance (Aspen) sued Interstate Warehousing, Inc. (Interstate) in Illinois state court, alleging that the roof of Interstate's Michigan warehouse collapsed and caused damage to Aspen's insured. *Id.* at ¶ 1. Like many plaintiffs before it, Aspen argued that because the defendant was operating and registered to do business in Illinois, it could be sued on causes of action unrelated to its activities in Illinois. *Id.* at ¶ 8. Interstate, an Indiana Corporation, moved to dismiss for lack of personal jurisdiction under *Daimler AG v. Bauman*, 134 S. Ct. 746, 748 (2014), asserting that its operation of a warehouse in Joliet was insufficient to subject it to general personal jurisdiction in Illinois. *Id.* at ¶ 6. In response, Aspen presented evidence of Interstate's corporate registration to do business in Illinois and argued on appeal that Interstate's continuous and substantial business in Illinois establishes a *prima facie* case of general jurisdiction. *Id.* at ¶ 8, 15.

The Court rejected Aspen's contention that an Illinois court may exercise general jurisdiction under the Illinois "long arm" statute pursuant to either subsection (c) or (b)(4). 735 ILCS 5/2-209. In so doing, the Court recognized:

> …[T]o comport with the federal due process standards laid out in *Daimler* …plaintiff must make a *prima facie* showing that defendant is essentially at home in Illinois. This means that plaintiff must show that defendant is incorporated or has its principal place of business in Illinois or that defendant's contacts with Illinois are so substantial as to render this an exceptional case.

Id. at ¶ 20.

The Court also specifically noted that although Aspen established that Interstate was doing business in Illinois through its Joliet warehouse, that fact alone fell "far short of showing that Illinois is a surrogate home for [Interstate]." *Id.* at ¶ 19. The Court recognized that *Daimler* instructs that the test for general jurisdiction is whether a defendant is "essentially at home," while rejecting a test based simply on whether a defendant's in-state contacts are "continuous and systematic." *Id.* at ¶ 16. Accordingly, Illinois litigants can no longer rely entirely on subsection (b)(4) of the long-arm statute, authorizing a court to exercise jurisdiction over a defendant "doing business within this State." *Id.* at ¶ 21.

Finally, the Court found that jurisdiction could not be established under the Illinois Business Corporation Act (Act). 805 ILCS 5/1.01 et seq. The Court reasoned that the Act does not require (or make any mention of) foreign corporations consenting to general jurisdiction, but rather gives authority to transact business in Illinois.

Overall, the holding in *Aspen* gives clarity to the application of *Daimler* in contesting personal jurisdiction in Illinois. With its latest decision, Illinois Supreme Court jurisprudence aligns with other jurisdictions holding that the test for general jurisdiction is whether the corporation is "essentially at home" in the forum state. ■

Recent appointments and retirements

1. Pursuant to its Constitutional authority, the Supreme Court has appointed the following to be Circuit Judge:
   - Tiffany E. Davis, 22nd Circuit, 1st Subcircuit, September 5, 2017
   - Charles S. Beech, II, Cook County Circuit, 6th Subcircuit, September 15, 2017
   - Robert F. Harris, Cook County Circuit, 5th Subcircuit, September 21, 2017
   - Preston Jones, Jr., Cook County Circuit, September 25, 2017

2. Pursuant to its Constitutional authority, the Supreme Court has assigned the following to the Appellate Court:
   - Hon. Craig H. DeArmond, 5th Circuit, to the Appellate Court, 4th District, September 1, 2017

3. The Circuit Judges have appointed the following to be Associate Judge:
   - John J. Kane, 15th Circuit, September 5, 2017
   - Sean W. Donahue, 10th Circuit, September 11, 2017
   - Christine T. Cody, 18th Circuit, September 18, 2017

4. The following judges have retired:
   - Hon. Richard D. McCoy, Associate Judge, 10th Circuit, September 1, 2017
   - Hon. Charles P. Weech, 22nd Circuit, 1st Subcircuit, September 1, 2017
   - Hon. Thomas J. O'Hara, Associate Judge, Cook County Circuit September 6, 2017
   - Hon. Robert J. Morrow, Associate Judge, 16th Circuit, September 29, 2017
   - Hon. Lynn M. Egan, Cook County Circuit, September 30, 2017
   - Hon. Rodolfo Garcia, Cook County Circuit, 14th Subcircuit, September 30, 2017
   - Hon. Phillip G. Palmer, Sr., 1st Circuit, September 30, 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.

November

Wednesday, 11-01-17 – ISBA Chicago Regional Office—Anatomy of a Medical Negligence Trial. Presented by Tort Law. All Day. 8:45 - 5:15.

Thursday, 11-02-17 - 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, 11-03-17 – NIU Naperville— Real Estate Law Update – Fall 2017. Presented by Real Estate. 8:15 am – 4:45 pm.

Thursday, 11-09-17 - Webinar— Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

Friday, 11-10-17 – Chicago, ISBA Regional Office—The Causes of Stress in the Legal Profession and How to Better Cope. Presented by Civil Practice and Procedure. 8:50 am-4:45 pm.

Tuesday, 11-14-17 – Webinar—Speech Recognition. Practice Toolbox Series. 12:00 -1:00 p.m.

Wednesday, 11-15-17 – Chicago, ISBA Regional Office—Microsoft Word in the Law Office: ISBA's Tech Competency Series. Master Series with Barron Henley. All Day.

Thursday, 11-16, 2017 – Chicago, ISBA Regional Office—Microsoft Excel In the Law Office: ISBA's Technology Competency Series. Master Series with Barron Henley. Half Day.

Thursday, 11-16, 2017 – Chicago, ISBA Regional Office—Adobe Acrobat and PDF Files in the Law Office: ISBA's Technology Competency Series. Master Series with Barron Henley. Half Day.

Thursday, 11-16-17 - Webinar— Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

Friday, 11-17-17 – Webcast—Obtaining and Using Social Media Evidence at Trial. Presented by Young Lawyers Division. 12:00-1:30 pm.

Tuesday, 11-28-17 - Webcast—Ethics Questions: Multi-Party Representation – Conflicts of Interest, Joint Representation and Privilege. Presented by Labor and Employment. 2:00-4:00 pm.

Tuesday, 11-28-17 – Webinar— Understanding Process Mapping. Practice Toolbox Series. 12:00 -1:00 p.m.

Thursday, 11-30-17 – Webcast—Nuts and Bolts of the Tax Tribunal. Presented by SALT. 9am – 12:45 pm

Thursday, 11-30-17 – ISBA Chicago Regional Office—Nuts and Bolts of the Tax Tribunal. Presented by SALT. 9am – 12:45 pm

December

Wednesday, 12-06-17 - Webcast— Defense Strategies for Health Care Fraud Cases. Presented by Health Care. 12:00-1:30 pm.

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

Tuesday, 12-12-17 – ISBA Mutual—E-Filing in Illinois. Presented by ISBA and ISBA Mutual. 1-2:30 (lunch from 12-1).

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

Thursday, 12-14-17 – Chicago, ISBA Regional Office—Vulnerable Students: A Review of Student Rights. Presented by Education Law. 9:00 am – 12:30 pm.

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

Friday, 12-15-17 – LIVE Webcast— Guardianship Boot Camp. Presented by Trusts and Estates. 8:30 – 4:30.

January

Wednesday, 01-10-18 – LIVE Webcast—On My Own: Starting Your Solo Practice as a Female Attorney. Presented by WATL. 12-2 PM.

Thursday, 01-11-18 – ISBA Chicago Regional Office—Six Months to GDPR – Ready or Not? Presented by Intellectual Property. 8:45 AM – 12:30 PM.

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.

Wednesday, 01-24-18 – ISBA Chicago Regional Office—Mentoring Luncheon.

Thursday, 01-25-18 – ISBA Chicago Regional Office—Starting Your Law Practice. Presented by General Practice. 8:50 AM – 4:45 PM.

February

Friday, 02-02-18 – Normal, IL— Hot Topics in Agriculture Law – 2018. Presented by Agriculture Law. All-day.

Monday, 02-05 to Friday, 02-09—ISBA Chicago Regional Office—40 Hour Mediation/Arbitration Training. Master Series, presented by the ISBA—WILL NOT BE ARCHIVED. 8:30 -5:45 daily. ■

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