ILLINOIS STATE BAR ASSOCIATION

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Bench & Bar

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

Judge's side of the bench

BY HON. ILANA DIAMOND ROVNER, U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Am I alone in wondering how it would be if somehow my long ago Philadelphia neighbors could be exhumed? Why such a thought? It would be so that I could thank them.

I would say thank you for calling me Portia before there were any Portias in that part of town and before I had ever heard the name Shakespeare. I would most of all say thank you for not laughing at a seven-year-old who said quite forcefully and quite often that someday she would be a lawyer.

Lawyers. We are members of a profession that has gone through a myriad of difficult changes in the last, let us say, 32 years. I use that number as a benchmark, for this year marks my 32nd year on the bench. But there are constants. One is that we are part of an honorable profession, notwithstanding the fact that we are perennially held in disrepute. Read

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I know it when I see it

BY EMILY M. JOHNS

Sexual harassment is a very broad topic that encompasses a broad spectrum of possibilities, infractions, remedies and tests. When one thinks of sexual harassment the obvious man-to-woman scenario comes to mind. However, society often forgets that the roles of harasser and victim are not set in stone and those we imagine as typical victims are ever-changing. Although Illinois has anti-sexual harassment legislation in place, due to society's recent awareness of the transgender community there is a rising tide of sexual harassment issues that are becoming more prevalent and need to be addressed.

In 2015, Caitlyn Jenner, formerly known as Bruce Jenner, winner of a gold medal in the 1976 Olympics, transitioned into a transgender female and sparked inspiration for many people to reveal themselves as transgender.[1] With an increased number of people openly identifying as transgender there is a concern about the type of sexual harassment issues they may confront. While many issues in sexual harassment are blatant and obvious, some may be more subtle and identified as subjective sexual harassment, which depends upon the victim's perception and interpretation at the time of the action.[2]

Subjective sexual harassment is not

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Judge's side of the bench

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the newspapers. Listen to the radio. Read Shakespeare.

The law and our freedoms are inextricably bound. Indeed, tyrants dispose of the law as their first act ("The first thing we do, let's kill all the lawyers."—Henry the Sixth, Part 2, Act 4, Scene 2, 71-78). I became a lawyer because instead of bedtime stories, my father of blessed memory would explain to me that if the laws had been upheld in Europe, we would not have had to flee, and our family and friends would not have met the tragic, dreadful end that was theirs. I was taught always that lawyers were the guardians of the law, and thus that lawyers were noble. And when we act as guardians of the law, we perform noble tasks. It sounds lofty, but it is a very basic truth.

The law evolves. It lives. And we are all intelligent enough to know that the law is not a creature of even near perfection. Neither are lawyers. Nor are judges. There is an ongoing parade and process.

We lawyers and judges are so fortunate to have enshrined in our governing documents the understanding that it is in our own best interest to live ethical and moral lives, to practice our craft ethically and morally, and to trust in the power of decency.

Life after all is a series of days in which we try to do our best. We are people who must, if we are to live successful lives, learn the arts of compromise and empathy and compassion. Each one of us has seen injustice in both its smallest and its largest incarnations.

As lawyers, as judges, we have a duty never to remain silent in the face of what we perceive as unjust. Since its inception, the members of the Decalogue Society as a group have tried to live up to that duty. Above all, let us never forget that proud tradition. ■

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I know it when I see it

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blatant or out-in-the-open and clear to see; it is subtle, indirect, and not pronounced.[3] However, when examined in context, a violation of sexual harassment policy or law may be determined. Frequently, with subjective sexual harassment, it is difficult to decipher between conduct that constitutes sexual harassment and conduct that makes a person uncomfortable but is not quite sexual harassment.[4]

Subjective sexual harassment is based on a "reasonable person" standard.[5] In such cases, the court looks at the situation from the view point of a "reasonable person" and then decides whether something is sexual harassment in the eyes of a "reasonable person."[6] A "reasonable person" is a hypothetical person in society who exercises average care, skill, and judgment and who serves as a comparative standard for determining liability.[7]

When subjective sexual harassment takes place, it may create a hostile work environment.[8] A hostile work environment is created when an employee is uncomfortable or scared to the point where the sexual harassment interferes with his or her work performance.[9] For an uncomfortable environment to specifically qualify for being an illegal hostile work environment, there are certain criteria that must be addressed.[10] The actions or behaviors must: discriminate against a protected class; must be common and long-lasting; and be severe to the point that an employee's work is disrupted.[11]

Often, people who are transgender are afraid to reveal themselves at work. This is especially true for men who become transgender women, because in the workplace women are not treated the same as men. A transgender woman voiced her concerns that "due to gender stereotyping, women are thought of as less useful in work… After trans women have transitioned, we are somehow seen as less able, skillful, or worth listening to."[12] These stereotypes faced by women are making transgender women fearful to reveal themselves because they do not want to be viewed as less able or less skillful.[13] Many make the assumption that when transitioning, a person's personality changes in accordance with the person's preferred gender, whereas in reality their personality never changes.[14] In the workplace, when men are assertive and have leadership qualities it is viewed as respectable; however, when a woman shows these same qualities, it is "seen as aggressive, bossy, and nagging."[15] Because women with these qualities are viewed this way in the workplace, they are more likely to be sidelined in a meeting, be spoken over, and thought to be less capable.[16] Unfortunately, this makes for a hostile work environment for transgender women.

With the recent awareness of the transgender community, there are more people comfortable in revealing themselves as being transgender and later transitioning. When a person reveals the secret and burden of being transgender, after many years, the people in the person's life might not know how to handle themselves in front of them. There may be issues with how to refer to someone who is transgender. Unknowingly, a supervisor or employee may refer to a transgender person other than what they would like to be called. For instance, a transgender person who was born as a man, but identifies as a woman, might accidentally be referred to by male titles, such as Mr. or Sir. A person in this situation would be upset being referred to as a man when in actuality she is a woman. Scenarios similar to this are unprecedented and will require a learning curve for everyone to adapt to new issues that surely will be arising.

Without constant awareness, one might end up unknowingly saying something that could be considered subjective sexual harassment to someone who is transgender. With this issue, as with any sensitive issue, a simple comment can be hurtful or can be easily taken the wrong way. A comment that was intended as innocent may be interpreted as teasing and malicious, in turn creating a hostile work environment for the transgender person. Little things like comments can be the most hurtful sometimes. It is important to be aware of what one is saying and to watch out for the little things.

On the other hand, purposeful and vicious commentary is also an immense problem for the transgender community. Comments that are intended to degrade, make fun of or belittle a person are unacceptable and should not be tolerated in the workplace. A comment that would be considered unacceptable would be an insult disguised as a compliment. Examples include a co-worker pretending to compliment the way a transgender woman looks, but in reality intending to make fun of the transgender woman.

Hurtful commentary is not the only problematic issue pertaining to subjective sexual harassment confronting the transgender community. Conversations between co-workers, generally referred to as locker room talk, had in "good-fun" are often at the expense of a person or group in order to elicit a laugh. Locker room talk is "discussion using foul language, or of a sexual or otherwise offensive nature."[17] People could be talking and making derogatory gender related jokes, or more specifically jokes about the transgender community, not knowing there could be someone around them who is transgender who has not revealed themselves yet. These conversations are meant to be harmless but in actuality they can be hurtful and offensive to someone who is transgender.

Illinois has laws that are in place to protect people from sexual harassment.[18] The employment provisions of the Civil Rights Violations statute are put in place to hold the employer responsible for any sexual harassment which occurs under their employ, regardless of whether the employer was aware of the sexual harassment or not.[19] One can reasonably infer that if the employer is being

held accountable for the actions of its employees, it will be less likely to tolerate sexual harassment in the workplace; thus, the statute encourages stricter sexual harassment guidelines to be adopted at work.

Illinois has tailored the Illinois Human Rights Act to protect transgender men and women from discrimination and sexual harassment.[20] More specifically, employers cannot discriminate against transgender men and women in any terms and conditions of employment, including hiring, selection, promotion, transfer, pay, tenure, discharge, discipline and sexual harassment.[21] As a matter a fact, Illinois is only one of a few states that has laws in place to protect transgender men and women.[22]

In the event of subjective sexual harassment, the victim or a witness could report the sexual harassment to their company's Human Resources department. The person also has the option of filing a report with the Illinois Department of Human Resources (IDHR). The IDHR requires that a charge of discrimination be filed within 180 days following the alleged discriminatory action.[23] The department will begin by permitting the option of mediation instead of the investigation; if the mediation does not deliver a result. the IDHR will continue on to the investigation portion of the action.[24] After the investigation is complete, the IDHR will come to a conclusion regarding the action and determine if there was a violation of the law.[25] If the IDHR determines there was a violation, they may draft a charge against the harasser; alternatively, the victim has an opportunity forgo the IDHR charges and to sue the harasser on his or her own.[26]

The Equal Employment Opportunity Commission (EEOC) provides the same service as the IDHR; however, the EEOC provides this service nationwide. The "EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation."[27] While these resources are in place to prevent harassment and offer the victim some solace, because of the indirect and subtle nature of subjective sexual harassment, it is often difficult for both the harasser and bystanders to recognize the nature of their actions. In turn, it is imperative that people be aware of their comments, actions and surroundings, as well that bystanders be conscientious of purposeful harassment, at all times so as to not unintentionally or intentionally offend or sexually harass their co-workers.

Due to the awareness of the transgender community, now and in the future it will be common to hear there is an increase of subjective sexual harassment that the transgender community is encountering. There will be people that hope to reveal themselves but are unwilling to do what others have done because transgender women and men are likely to encounter sexual harassment at work. By reason of that, it is important to be aware of the little things that can be misinterpreted. While there are many instances where the harassment is purposeful, there are also instances where innocent actions and words can be interpreted and perceived in a way that might seem to be injurious. We must all observe a new awareness of the changing scope of sexual harassment. ■

Ms. Johns served as an Extern in the Office of Presiding Judge E. Kenneth Wright, Jr. of the First Municipal District of the Circuit Court of Cook County during the summer of 2016. She is currently enrolled in St. Ignatius College Prep High School in Chicago.

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Criminal trials in Britain

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

> "Witness A testified that…." "Witness B testified that the defendant….." "Witness C testified …." "Witness D testified to the ……"

That was not what I expected to hear the Judge tell the jury as he instructed them prior to sending them out to consider and determine whether the defendant in a sexual molestation trial should be found guilty or acquitted of the charges he faced. I listened to those instructions when I visited the courthouse in Oxford as I took a break this summer from accompanying our church's Bach Cantata Choir on a concert tour to England and Germany.

After the jury was escorted by two bailiffs dressed in robes and wearing wigs to deliberate, I went to another courtroom to observe the conclusion of another sexual assault trial. There, the prosecutor was finishing his cross examination of the defendant. Next came the low-key, matter-of-fact summations from the prosecutor and defense lawyer. Garbed in their robes and wigs and with references to their laptop computers, the lawyers described in a very dispassionate manner their respective theories of their cases. There was no emotion, no passion, no raised voices, no histrionics. Just a straight-forward recitation of the evidence, as each interpreted the facts before the jury.

Just then, the first judge's clerk summoned me; the judge could spare me a few minutes to chat. She escorted me to chambers where, for more time than I expected, Judge Ian Pringle and I discussed the British justice system and its differences from our system in Illinois.

Some judges summarize the evidence for the jury; others do not. It is a matter of discretion. But, a judge's summary of the testimony and evidence is not uncommon and is accepted. In Britain, it is not viewed as intruding on the province of the jury for the judge to determine which facts to believe and which facts to rely upon in deciding whether the defendant is guilty of the charges.

Jury instructions also may include a roadmap to the ultimate decision. One example of the roadmap is posing a series of questions for the jurors to consider. Answer "yes" to a question, move on to the next question. Answer "no" to any question and acquit the defendant.

Before the Criminal Evidence Act in 1998, defendants were not allowed to testify. However, even after this Act permitted such testimony, defendants rarely testified until another change in the law in 2003. Now a defendant's testimony, while not required, is expected. If the defendant does not testify and remains silent, the jury can draw an adverse inference from that silence unless the defendant is said to be following the advice of counsel. And, the jury is instructed it must decide whether to believe that statement is made in good faith. If the jury decides it is not, the jury is told to hold that against the defendant, as well.

Here is one judge's instruction to the jury about a defendant's failure to mention facts when charged or questioned:

1. Before being interviewed about the allegations against him the defendant was cautioned. He was first told that he need not say anything. It was therefore his right to remain silent. However, he was also told that it might harm his defence if he did not mention when questioned something which he later relied on in court and that anything he did say might be given in evidence.

2. As a central part of his defence, the defendant in his evidence denied ever sexually touching Miss xxxx, claiming that the contact between them was purely accidental and that the suggestion that he tried to kiss Miss xxxx was utterly outrageous. Of course, he failed to mention these matters when he was interviewed. This failure may count against him. This is because you may draw the conclusion from his failure to answer questions that he had no answers that he then believed would stand up to scrutiny and has since settled on this account in order to meet the prosecution case. If you do draw that conclusion, you must not convict him wholly or mainly on the strength of it, but you may take it into account as some additional support for the prosecution's case and when deciding whether his evidence about these allegations is actually true.

3. However, you may draw such a conclusion against him only if you think it is a fair and proper conclusion, and you are satisfied about three things: first, that when he was interviewed he could reasonable have been expected to mention the facts on which he now relies; second, that the only sensible explanation for his failure to do so is that he had no answer at the time or none that would stand up to scrutiny; third, that apart from his failure to mention those facts, the prosecution's case against him was so strong that it clearly called for an answer by him.

4. The defendant has given evidence that he did not answer questions put to him by the police on the advice of his legal representative. If you accept the evidence that he was so advised, this is obviously an important consideration, but it does not automatically prevent you from drawing any conclusion from his silence. Bear in mind,

members of the jury, that a person given legal advice has a choice whether to accept or reject it; and that the defendant was warned that any failure to mention facts which he later relied on at his trial might harm his defence. Accordingly, decide whether the defendant could reasonably have been expected to mention the facts on which he now relies. If, for example, you considered that he had or may have had answers to give, but genuinely and reasonably relied on the legal advice to remain silent, you should not draw any conclusion against him. However, if you are sure that the defendant remained silent not because of any legal advice but because he had no answer or no satisfactory answer to give at the time and merely latched onto the legal advice as a convenient shield behind which to hide, you would be entitled to draw a conclusion against him, subject to the direction I have given you under this heading.

Another fundamental difference between the United States and Britain is how judges are chosen. Judge Pringle's path to the bench was typical. A native of Scotland, Judge Pringle read law at Cambridge, passed his examinations, and served four years in pupilage in London. He then practiced for more than 32 years in Bristol; much of his practice was in litigation, both civil and criminal. In 2003, he was selected as Queen's Counsel. From that selection until 2012, he tried only serious criminal cases – about half for the prosecution and half for the defendant.

In 2012, he applied to become a judge. He passed an examination. He read a fact scenario for 30-minutes and was then interviewed by a Justice. He passed and was assigned to preside in Oxford. He now oversees the courthouse I visited—what we could call the presiding judge of the Oxford courthouse. In that role, he supervises four criminal, one civil, one family, and five other judges as well as the facility.

Judge Pringle and his judicial colleagues use sophisticated electronic assistance to manage their calls. An electronic docket system, which he demonstrated, lets him pull up an entire case: the indictment, case history and summary of the case, all witness statements and testimony, and all exhibits.

Another difference caught me by surprise: after Judge Pringle left the bench, I attempted to approach his courtroom clerk to ask for an interview. I was quickly and summarily stopped and prohibited from approaching court staff without permission. I was firmly told to remain in the public seats. After a few minutes wait, the clerk approached me where I stated my wish to be able to speak with the Judge. I found it to be a formal and regulated atmosphere, even when the court was not in session. ■

The Second District avoids causing new ripples in the common law "test the waters" doctrine

BY EDWARD CASMERE, RILEY SAFER HOLMES & CANCILA LLP, AND KAITLIN KLAMANN, SCHIFF HARDIN LLP

In some Illinois courts, the common law "test the waters" doctrine serves as a basis for denying otherwise timely motions for substitution of judge under Section 2-1001 of the Illinois Code of Civil Procedure. The Second District recently avoided creating more waves in the doctrine when it distinguished recent Illinois Supreme Court precedent and side-stepped its application altogether. In *Village of East Dundee v. Village of Carpentersville*, 2016 IL App (2d) 151084, the Second District found the Illinois Supreme Court's 2015 decision in *Bowman v. Ottney* (2015 IL 119000) distinguishable, determined that the "test the waters" doctrine did not apply, and rejected the invitation to expand the doctrine further. The appellate court's decision nevertheless provides guidance as to how the "test the waters" doctrine interacts with the provisions of Section 2-1001.

Section 2-1001 of the Code provides a party the right to a substitution of a judge if it files a motion (1) before the trial or hearing begins, and (2) before the judge to whom it is presented has ruled on any substantial issue in the case. The "test the waters" doctrine, however, provides that a judge has discretion to deny an otherwise timely motion for substitution if the moving party had an opportunity to "test the waters" and form an opinion as to the judge's likely disposition of an issue.

This newsletter previously discussed the status of the "test the waters" doctrine and the Illinois Supreme Court's 2015 decision in *Bowman v. Ottney*.[1] The First, Second, Third, and Fifth District Illinois Appellate Courts have upheld the doctrine, but the Fourth District has rejected it. Despite this conflict, the Illinois Supreme Court decided *Bowman* on statutory interpretation grounds and did not weigh-in on the doctrine's ultimate viability. In *Village of East Dundee*, the Second District followed suit, basing its ruling on statutory interpretation grounds, rather than on the common law doctrine.

The *Village of East Dundee v. Village of Carpentersville* suit arose from a dispute between the two municipalities over the relocation of a Wal-Mart and the proper use of the Tax Increment Allocation Redevelopment Act ("the Act") to facilitate the move. 65 ILCS 5/11-74.4-1 *et seq.* The Act was designed to combat blight and permits municipalities to designate a redevelopment project area and pay certain redevelopment costs of retailers willing to build in the area. A municipality cannot, however, pay retailers redevelopment costs without first making specific findings set out in the Act.

The Village of Carpentersville designated a redevelopment area under the Act, and Wal-Mart planned to close its retail store in East Dundee and open a Wal-Mart Supercenter on the newly designated land. The Village of East Dundee sued Wal-Mart and Carpentersville, seeking a declaratory judgment that Carpentersville could not pay relocation costs for Wal-Mart without first making certain findings under the Act, which it had failed to do. *Village of East Dundee,* 2016 IL App (2d) 151084, ¶ 1. Because Carpentersville had not yet made its findings, the trial court could not determine whether it had violated the Act, and involuntarily dismissed the action for lack of ripeness. *Id.* Its order stated that "the [a]mended [c]omplaint [was] dismissed subject to being refiled" in the event that the matter became ripe. *Id.* at ¶ 7. The Second District affirmed the dismissal. *Id.* at ¶ 1, *citing East Dundee I*, 2014, IL App (2d) 131006-U, ¶ 31.

Carpentersville eventually made the required findings under the Act and East Dundee filed suit once again. 2016 IL App (2d) 151084 at ¶ 2. The case was assigned to the same judge who presided over the prior action. *Id.* at ¶ 7. East Dundee filed a motion for substitution of judge as of right pursuant to Section 2-1001 of the Illinois Code of Civil Procedure. *Id.* Defendants argued that plaintiff had no right to substitution of judge because the judge had made a previous substantial ruling when it granted the defendants' motion to dismiss in the prior action. *Id.* For that reason, the trial court denied East Dundee's motion and shortly thereafter granted the defendants' motion to dismiss for lack of standing. *Id.* at ¶ 8.

On appeal, East Dundee asserted that the trial court erred in denying its motion for substitution of judge as a matter of right because the motion was timely and complied with the elements of Section 2-1001. The defendants did not object to the timeliness of the motion in the trial court, rather, they asserted that the second complaint was a continuation of the previous litigation for the purposes of the substitution-of-judge statute. Relying on the language in the prior dismissal of the identical claim, the defendants argued that because the two pleadings concerned the same cause of action, the second pleading was essentially a refiling, giving the court discretion to deny the motion for substitution of judge. While the Supreme Court had not yet decided *Bowman* when Carpentersville argued its motion to the trial court, the defendants did rely on the

appellate court's decision in *Bowman* that was later affirmed.

"The issue," according to the Second District, "is whether *Bowman v. Ottney* [] upon which defendants rely, is dispositive." *Id.* at ¶ 12. The court noted that in *Bowman,* one of the Supreme Court's concerns was judge-shopping and gamesmanship by the plaintiff. *Id.* at ¶ 16. The plaintiff in *Bowman* had voluntarily dismissed her action and thus "had control over the procedural posture of the case." *Id.* East Dundee's first suit was, however, *involuntarily* dismissed - - a key distinction for the Second District. *Id.* at ¶ 17. "*Bowman* is inapplicable" the court held, because in that case "our supreme court decided a narrow issue involving the relationship between section 2-1001(a)(2)(ii) and the sections of the Code governing voluntary dismissals and refiling." *Id.* at ¶15. "In contrast," the court said, "East Dundee's previous complaint was *involuntarily* dismissed [and] East Dundee could not, and did not, use the refiling provisions of the Code." *Id.* at ¶17.

The Second District ultimately reversed, holding that the trial court erred when it denied East Dundee's motion for substitution of judge. *Id.* at ¶ 19. The appellate court determined that East Dundee's second-filed action, while essentially identical to the first, was a new and distinct action and the motion for substitution was timely filed in compliance with the Code. East Dundee did not voluntarily dismiss and then refile its action in a tactical move designed to create a right to a substitution of judge. *Bowman* was thus inapposite, and the "test the waters" doctrine inapplicable.

While the Second District explicitly found that *Bowman* not controlling, the appellate court's decision is, nonetheless, consistent with *Bowman*. In *Bowman*, the Supreme Court based its decision, in part, on the purpose of Section 2-1001—to prevent judge shopping. It held that a motion for substitution of judge brought under Section 2-1001 should be denied when to grant it would facilitate or encourage gamesmanship. So, too, was the Second District guided by the purpose of Section 2-1001 when it determined that a motion for substitution of judge should be liberally granted when there is no indication that the plaintiff is judge shopping. While neither court addressed the viability of the "test the waters" doctrine as a basis for denial of a motion for substitution of judge, both courts helped further refine how it interacts with the provisions of Section 2-1001.

Thus, while the Illinois appellate courts continue to disagree as to whether the "test the waters" doctrine may serve as a basis for denying a motion for substitution of judge, both the Supreme Court and the Second District have signaled that, when considering a Section 2-1001 motion, trial court judges should consider whether the circumstances indicate that a party is seeking to gain a tactical advantage through gamesmanship and judge-shopping. ■

1. Kaitlin Klamann, "The Status of the 'Test the Waters' Doctrine After the Illinois Supreme Court's Decision in *Bowman v. Ottney,*" Illinois State Bar Association Bench & Bar Section Newsletter (Feb. 2016).

To be or not to be—Is that the question?

BY JUDGE BARB CROWDER, EDWARDSVILLE

"We are letting you know that your card may have been part of a compromise at an undisclosed merchant. That doesn't mean that fraud has or will occur on your account." That information came by letter and e-mail in mid-August. The chills that came with this letter and email are surpassed only by those caused by the phone calls from a different credit card's "fraud team" in March inquiring whether it was me currently shopping in Arizona and New Mexico since I was answering my home phone in southern Illinois. And these chills were surpassed only by the ones caused by the letter from the Internal Revenue Service in late January or early February saying that either I, or someone pretending to be me, had filed a 1040EZ online seeking a refund and the IRS wondered if that was in fact me. They kindly gave time to object before they would process the electronic refund. Since, in reality, I have been filing a joint return with my spouse for 34 years and cannot recall ever filing an EZ return (or ever getting a refund), the IRS had indeed been contacted by someone pretending to be me. How can this happen, asks this and potentially other judges, lawyers, or perhaps clients who do not take major risks gambling, putting personal information on social media, or otherwise inviting the outside world to try to steal?

Of course, who among us has not received letters over the years from Target, Schnuck's (local grocery chain), a medical provider's office and others that "your information may have been compromised" and offering to pay for a year of credit monitoring? (I concede I never took advantage of any of those offers.) But this year has been serious. What gives? I wanted to share what I experienced with others who may have my luck in the future and tell you what 2016 has been like for me. The goal is to give you information, a laugh, a scare, and some advice. It may be useful to the readers personally or to at least be able to give immediate practical advice to a client who has become a victim of identity theft.

It wasn't about me

First, emphasize that the victim is not alone in being picked as a target. According to the U.S. Department of Justice's *Bureau of Justice Statistics* published in September 2015, 17.6 million Americans suffered identity theft in 2014. So roughly 7% of U.S. residents over the age of 16 have been victims. The Bureau of Justice breaks the statistics for identity theft down into categories so that the 17 million of us may feel better:

- 86% suffered from misuse of their credit cards or bank accounts;
- 4% had their personal information stolen and actual fraudulent activity occurred (such as opening a new account or perhaps trying to file an IRS EZ return online);
- 7% were the stars who suffered more than one type of identity theft (so nice to be in that group of sufferers, of course).[1]

While not being the only victim will not cause one to be reassured, at least it helps people to learn what steps can be taken to resolve the issues.

Additionally, it may be helpful to point out that some people can actually solve the problem in a day. The Bureau of Justice Statistics found that 52% of the victims were able to find out about the misuse of their identities and correct all the problems that quickly. Most of those were the ones with a credit card or bank account that was compromised because it was a simple matter of cancelling the card or contacting the bank and getting the thief shut out. Of course, 9% of the people who had their identities stolen needed more than a month. Not surprisingly, those with more than one type of identity theft needed longer to try to fix the problems (39%). The longer it takes the more difficulties the victims encounter—identity theft victims who took 6 months or more to resolve the financial and credit problems caused by the identity theft also reported that they experienced severe emotional distress (29%). The Justice Department comfortingly notes in its report that victims of violent crime more often felt severe emotional distress than did victims of identity theft. *Id.* (That last observation may not be useful to communicate if you are assisting an actual client with resolving their financial and credit problems caused by the identity theft.) So let's forge ahead to figure out what the victim can do.

The Internal Revenue Service

Dealing with the Internal Revenue Service identity theft issue was a priority, of course. Apparently, at least according to Consumer Reports, the most destructive type of ID theft is having your name, birth date, and Social Security number used to open credit accounts, tap your health insurance, or *file a tax return in your name to steal your refund*. Kudos to the IRS for having software programs that red-flag unusual filings. That letter from the IRS telling about the potentially false 1040EZ directs the recipient either to call a phone number that will eventually be answered or to go on-line to deal with the problem. Except when going on-line and putting in the code numbers on the letter, some recipients are informed they must telephone.[2] And telephone repeatedly. Eventually, someone answers the phone. The caller must have the letter and his or her most recent tax return in hand when making the call so that you can answer background questions correctly and have all the information straightened out, according to the IRS Web site. Seems like once the agency answers and the caller is holding the required information for reference it would be a simple conversation: "I got the letter. Here are the code numbers on the letter to find me in your system. I did not file a 1040 EZ. Please reject that

return and do whatever it is you do to find the culprits." Of course it is not. Perhaps the wrinkle was that this particular caller is not the "primary taxpayer" on the joint return. When filing our first joint return after we got married, we put my husband's name first. Then each successive joint tax return is always filed by listing the taxpayers in the same order. Perhaps the wrinkle was that he and I do not have the same last name.[3] Perhaps I answered something in a tone of voice that caused it. Who knows?

Whatever the cause, the end result of my phone call experience was that I was required to visit an IRS office in person with two forms of identification, one a photo id, in order to convince them that I did not file the 1040 EZ that *they* had red-flagged and written me about. Here in southern Illinois, we are not lucky enough to have an IRS office in every county. The nearest one, when called for an appointment, advised it is open Monday through Friday from 8:30 am to 4:30 pm and is closed from 11:30 am to 12:30 pm each day. At least I can take vacation days a half-day at a time. So I made my appointment on an afternoon when no hearings were scheduled and visited the IRS in person. I produced my two forms of identification and my letter from the IRS. I had our most recent tax return with me. The agency's employee couldn't have been nicer and agreed to remove the offending return from my account to be placed into their 'fraud' pile for investigation less than ten minutes from my arrival. I did express to the agent that one explanation for my required personal visit could be that the IRS computer system is sexist since the phone agent had seemed disturbed that I was not the primary taxpayer on our joint returns and so it is not my social security number that comes first and that my last name was different. The agent smiled and offered to include that observation in my file folder. I declined. Finally, I was advised my husband and I would have to file a paper return and that I could get an Identity Protection Personal PIN Number to use when we file the return to increase our safety. The agent told me to get that on-line on the IRS website. Ironically, when I went on the website to get my PIN number, the website told me there had been a security problem and they were not currently providing Identity Protection Personal PIN Numbers. The area of the website advised to just file a paper return with a copy of the letter that told about the fake return. Hopefully, if a reader or client of a reader experiences the fraudulent tax return problem in the future, the IRS will have the ability to provide the personal PIN number.

There is an entire website (at least one) dedicated to identity theft. The IRS gives recommendations on actions to take that will be listed later in this communique.

Credit Cards

The credit card experiences really can be lumped together whether one experiences fraudulent charges or the problem is a data breach but no charges have occurred. For fraudulent charges, first, bless the companies for having fraud teams who get suspicious when credit cards are shopping in out-of-the-usual ways or locations. These teams have been around for years. I know.

My first experience with a credit card fraud-alert team happened while I was at 'New Judge School' in 1999. My wallet was either lost or stolen Sunday evening at dinner on the first night of my arrival in Chicago for the week-long training of new judges. The restaurant where I had my wallet said to report it to building security and they would keep looking via a cleaning crew. Security said they would call the hotel if they found the wallet and if the cleaning crew had not found it by the next afternoon they recommended the police and told me I could then assume it was probably stolen and not lost. I went off to my first classes the following morning. At mid-afternoon break, there was a post-it note on the bulletin board outside the room to call my husband. (Yes, this was before cell phone usage in my area of the world and life.) My home phone had been called and my husband was asked if the credit cards being used in the Chicago area were valid charges or should be blocked. His first question was "Where?" He tells me if it had been Macy's or Bloomingdale's he would have said of course it was me. But it turns out the cards were buying televisions in some suburbs. He was pretty sure new judge school was not going to allow that kind of latitude, plus I had flown up to Chicago on Southwest Airlines so I really could not pack a bunch of TVs.

So we immediately cancelled my cards and had one company mail me a replacement one on an expedited basis to the hotel so I could check out at the end of the week, and a kind and thoughtful co-worker (Judge Clarence Harrison) endeared himself to me forever by covering for my lack of cash and credit.[4] I had to fill out and send affidavits to the cards that had been used and get verification that I had reported the missing cards to a security desk in the building where the restaurant was housed. It took some time to scrutinize bills to make sure that the only charges we paid were ours.

Anyway, back to our current story. Not long after the IRS issue, a credit card team called and we reviewed some charges from out west that were not mine but were very tiny amounts. I learned from the card company that thieves will sometimes start with small charges to see if anyone notices. If those small charges go unchallenged, then larger ones will be made. I had my card in my possession (because I have been more alert since all those years ago). I had, however, used the card at a hotel. Apparently 'scammers' can be everywhere. Or maybe the card fraud was done by the same thief who had filed the fake tax return. There is no way to be sure. The company did not argue about the charges that were not mine, I filled out a form on those and a new credit card arrived in the mail. A companion card was also cancelled and re-issued, I think just to be safe.

Again, there are recommendations to be made about taking steps when a card has been subjected to fraudulent charges. I followed up with some of those. Several months have gone by without any credit upheaval to my knowledge until this week's letter. It of course advises me to be watchful and that a new card is on its way. When there is a data breach at a place a potential victim shops, the credit card company will often just close out the card that could be at risk and issue a new one. Some merchants offer to pay for a credit-monitoring company to watch out for the

potential victim. While having no personal experience with one of those companies other than seeing commercials, this author will accept the credit-monitoring the next time it is offered.

Be afraid, be very afraid, but take action!

There are things an individual can do besides sitting at home afraid to go anywhere. Just avoiding charge cards is probably impossible, and anyway the IRS identity theft was different than the credit card problems, so taking steps to prevent or deal with identity theft is the preferable route. A victim should consider some or all of these suggestions compiled primarily from the IRS and the Federal Trade Commission sites.

Request a free annual credit report from each of the three major credit-reporting bureaus—Equifax, Experian, and TransUnion—by going to www.annualcreditreport.com. Experts suggest you ask for one report every four months by rotating among the three bureaus. If you need one faster because you are in that lucky hot zone of fraud along with me, a victim is also entitled to a free credit report from each bureau after he or she places a 90-day fraud alert with one of them (remember, one bureau immediately tells the others for you). The fraud alert should be activated upon being notified of a security breach, or if one's wallet has been stolen or lost, or if one detects other red flags of ID theft such as small charges on a card that were not placed there by the cardholder. Again, once there is an alert made to one of the three bureaus, that bureau will tell the other two. The fraud alert warns lenders and card issuers to verify applicants with a little more care. A person can place a new fraud alert every 90 days or every time word of a problem is received. If the reader or client is like me, that just means every 90 days. I recommend noting on a calendar when the first fraud alert is filed because it is hard to remember the date of the first one when it turns out identity theft or data breaches happen constantly! The information to make these reports follows:

- File paperwork with the Federal Trade Commission at www.consumer.ftc.gov or the FTC Identity Theft hotline at 877-438-4338 or TTY 866-653-4261. That website will also help with a plan for repairing any credit or other issues.
- Contact one of the three major credit bureaus to place a "fraud alert' on a victim's accounts:
  - Equifax – www.equifax.com 800-525-6285
  - Experian – www.experian.com 888-397-3742
  - TransUnion – www.transunion.com 800-680-7289.
- Close any accounts that have been tampered with or opened fraudulently.
- All victims of identity theft should consider following the recommendations of the Federal Trade Commission including to file a report with the local police.

Professionals will also tell all persons to shred junk mail and any important documents, to have really good computer passwords on bank and credit card accounts, to monitor credit scores and credit reports regularly, and maybe invest in one of the services that claim to protect you. This victim may consider doing all of this. Undoing identity theft can be hard. Your effort to protect and repair your financial history can range from the simplest data breach one-day to cancel accounts through more than six months of effort to contest charges and file affidavits. This author and victim wishes everyone luck. I may not be positive of the correct question to ask to avoid identity theft. One thing is certain. To be vigilant is the only answer. ■

"To be or not to be, that is the question" are words from Shakespeare's *Hamlet*. As to the context here, the events are true. The opinions are the author's and not to be inferred as critical to any entities except actual identity thieves.

1. Bureau of Justice Statistics, "Victims of Identity Theft", 2014, Summary, NCJ 248991, September 2015

2. I am a little hazy on some of the IRS occurrences since this was the January/February letter. Had I known the whole year's theme was going to be identity theft I would have started a journal and logged in information regularly. But I believe I have the order of the events recalled accurately.

3. Okay, I met my incredibly wonderful spouse in law school. We became engaged at a time when most of my friends and I were keeping our original names. And I have a sister who changed her name when marrying…more than once. And I used to make fun of her. I was, am, and always will be happy I met and married my husband. But I never changed my name. I viewed it as my identity and the way all my college friends could find me forever.

4. So now that I think about it, maybe it is about me. I had previously chalked up the 'new judge school' experience to the belief that small-town downstate people should not be venturing to the big city without being more alert to pickpockets or opportunists. But perhaps I am an identity thief magnet.

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Recent appointments and retirements

1. Pursuant to its Constitutional authority, the Supreme Court has appointed the following to be Circuit Judge:
   - Hon. Rene' Cruz, 16th Circuit, 1st Subcircuit, July 11, 2016
   - Hon. Bradley T. Paisley, 4th Circuit, July 11, 2016
   - Hon. K. Wilson, 18th Circuit, July 13, 2016

2. Pursuant to its Constitutional Authority, the Supreme Court has assigned the following to the Appellate Court:
   - Hon. Mary L. Mikva, 1st District, July 29, 2016

3. The Circuit Judges have appointed the following to be Associate Judge:
   - JoAnn Imani Drew, 21st Circuit, July 22, 2016
   - Holly J. Henze, 8th Circuit, July 27, 2016
   - Todd B. Tarter, 16th Circuit, August 1, 2016
   - Bryan S. Chapman, 18th Circuit, August 22, 2016

4. The following judges have retired:
   - Hon. Jane H. Mitton, Associate Judge, 18th Circuit, July 4, 2016
   - Hon. Chet W. Vahle, Associate Judge, 8th Circuit, July 4, 2016
   - Hon. Robert J. Clifford, Associate Judge, Cook County Circuit, July 5, 2016
   - Hon. Judith M. Brawka, 16th Circuit, July 8, 2016
   - Hon. Blanche Hill Fawell, 18th Circuit, July 8, 2016
   - Hon. Jeffrey Lawrence, Cook County Circuit, 13th Subcircuit, July 15, 2016
   - Hon. Maureen F. Delehanty, Cook County Circuit, 3rd Subcircuit, July 31, 2016
   - Hon. George Scully, Jr., Cook County Circuit, 15th Subcircuit, July 31, 2016
   - Hon. Thomas E. Mueller, 16th Circuit, August 31, 2016
   - Hon. Rita M. Novak, Associate Judge, Cook County Circuit, August 31, 2016

5. The following Judge is deceased:
   - Hon. Dwayne I. Morrison, Associate Judge, 9th Circuit, August 10, 2016

6. The following judge has resigned:
   - Hon. Anthony E. Simpkins, appointed judge, Cook County Circuit, 1st Subcircuit, July 1, 2016 ■