DCBA BRIEF

The Journal of the DuPage County Bar Association

FELONY DIVISION
PRESIDING JUDGE

Hon. Kathryn E. Creswell

Volume 23 Issue 3
December, 2010

COURT BONDS

SURETY BONDS

BILL LAUHOFF

SERVING THE LEGAL PROFESSION IN DUPAGE COUNTY SINCE 1963

• Executor • Administrator • Guardian • Bond in Lieu of Probate
• Plaintiffs Replevin • Sheriff"s Indemnity • Bond to Sell Real Estate
• Injunction-Appeal • Lost Securities Bond: For Release or Reissue of
Stocks, Bonds, Life Insurance Policies, Checks,
Bank Books, Mortgage Notes, and Other Valuable Papers.

"LOOK FOR ME

OUTSIDE 2009"

INSURANCE

COMMERICAL • INDUSTRIAL • PERSONAL

- **Property - Casualty**
- **Employee Benefits**
- **Life - Health**
- **Loss Prevention & Fire Protection Engineering Consultation**

ATTORNEYS: We have a special Professional Office Package

W.M. LAUHOFF & COMPANY

Est. 1945
0 N.701 Barry Avenue
Wheaton, IL 60187

Professional Liability Insurance

(630) 668-1811
(630) 668-7311
FAX (630) 668-1838

FIDELITY BONDS

MISCELLANEOUS BONDS

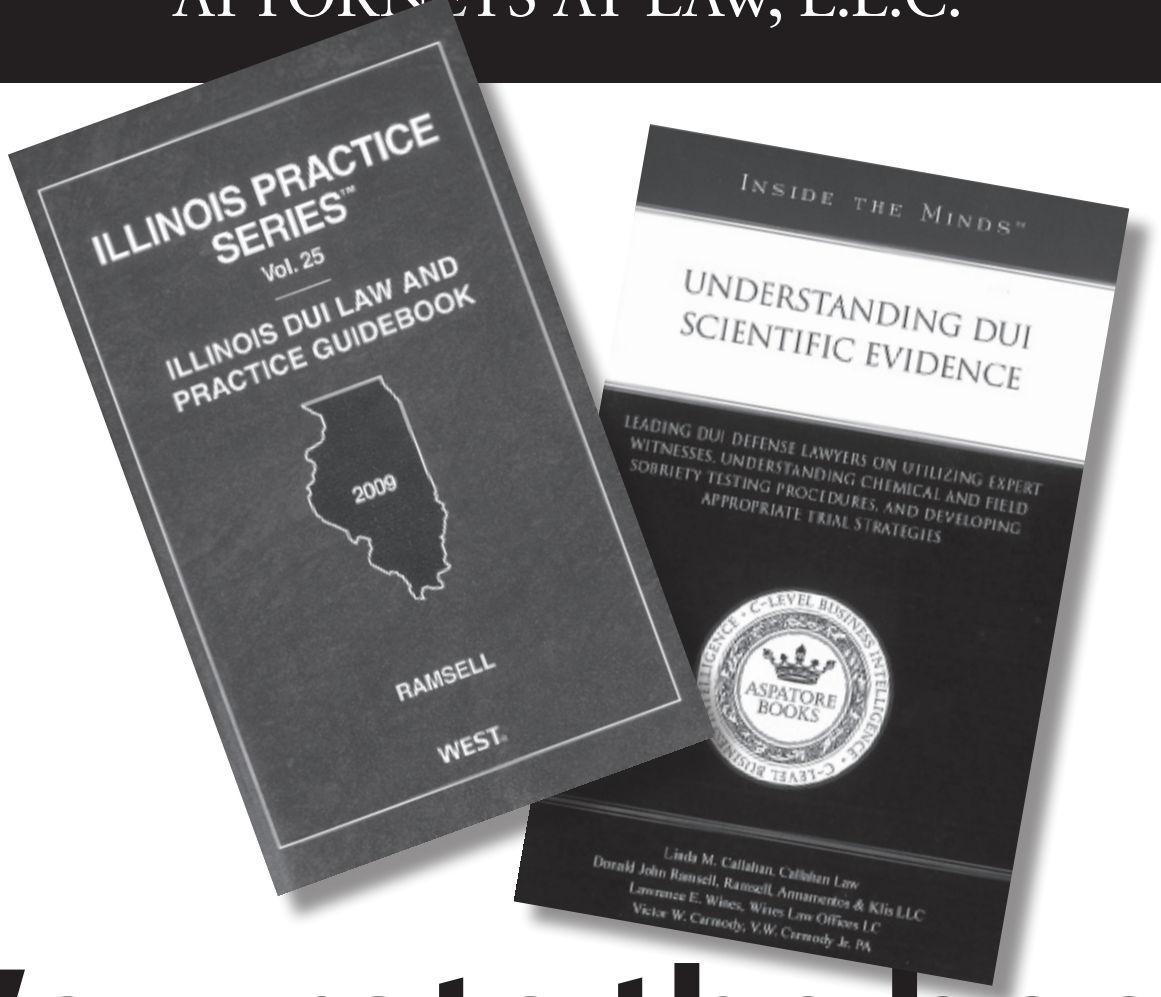
DCBA BRIEF
The Journal of the DuPage County Bar Association

VOLUME 23, ISSUE 3
(DECEMBER, 2010)

TABLE OF CONTENTS

The cover photo for this edition was created by **Robert E. Potter III** ©2010.
Our thanks as always, Rob!

RAMSELL & ASSOCIATES
ATTORNEYS AT LAW, L.L.C.



"We wrote the books on DUI in Illinois"

Donald J. Ramsell has been named "Illinois Super Lawyer" by Chicago Magazine's publishers since 2005. The Chicago Sun Times identified Mr. Ramsell as one of the top 5 DUI Defense Attorneys in the State of Illinois. Donald is a nationally recognized DUI defense attorney, author and lecturer on the topic of DUI defense. Recently, Don was also named one of "Illinois Leading Lawyers" in a statewide survey of his peers. Don has instructed attorneys on DUI defense in Illinois, Michigan, Texas and at Harvard. In 2007, Donald was nominated and recognized as a sustaining Member of the National College for DUI Defense.

630-665-8780 | *KNOWLEDGE • EXPERIENCE • SUCCESS ...SINCE 1986*

FROM THE EDITOR

Jury Duty: The Last Draft

BY TED A. DONNER

photo © REP3.com

The photo shoots for this magazine's covers are usually something of an adventure. This year, in particular, we've been trying to collect images which, all together, will provide our readers with a look at some of the more interesting angles of the DuPage Judicial Center. For our resident photographer, **Robert E. Potter III**, that's meant going through security with suitcases filled with lighting systems, cameras and lenses. Rob's certainly gotten used to the sheriff escorting him through the building and it's hard not to think that Courthouse Administrator, **John Lapinski**, and Deputy Court Administrator, **Robin L. Patin**, aren't enjoying these breaks from routine just a little. Still, this issue's cover in particular was something of a challenge.

Judge **Katherine Creswell,** who appears on the cover of this issue, is the Presiding Judge of the Felony Division. We wanted her portrait to appear against a backdrop that would capture the seriousness of that position and highlight one of the most important rooms in the courthouse, the waiting room for people called to serve jury duty. That meant scheduling the shoot when there would be few if any jurors in the building and then staying out of the room whenever any of those on trial were there for a break.

The DuPage County Judicial Center boasts a spacious, window-lined waiting room for jurors, capable of comfortably seating well over 200 people at a time. Early each day, jurors walk through the double doors to this room at the end of the first floor, past the "Jury Commission" sign that appears overhead, and take a seat in what is necessarily the largest open space in the building. The jurors are thanked for their service and shown a short video on the importance of jury duty.[1] As they settle in, they hear what all of us should hear, that "[j]ury service is one of the highest callings of American citizenship."

Chief Judge **Stephen Culliton** made life a little easier for jurors a few months ago when he entered an order allowing them to keep their cell phones and lap tops in this waiting room until they're called upstairs for a specific case. Despite the availability of refreshments and the relative comfort of the space we were in, though, as Rob arranged the lighting, it was hard not to think that jury duty must still be an often boring, tedious exercise. The jurors take time off from work, make arrangements for the kids, and then get to court, only to wait around for hours for the possibility that they may be called in for *voir dire*. Some are selected to hear a case. Others are simply sent home, left to ask themselves, "why did I need to even be here?"

Jurors are called to service involuntarily, it bears remembering. Indeed, in the history of the United States, this has been the only way, other than through the military draft (and some may be quick to point out, the payment of taxes), that American citizens have been required to serve their country. We honor our veterans and recognize, without hesitation, the important role they play in protecting our borders and maintaining the peace. We are not always so quick to recognize the role our jurors play in preserving the American judicial system. Their service does not involve years spent overseas, or the imminent threat of death or dismemberment, but it is vital to the integrity of our judicial system. The mere fact that jurors are in this room, waiting to be called, can be enough to resolve even the most difficult case.

This month's cover thus involved the usual arrangements, scheduling, and awkwardness in asking a judge to turn her head a certain way and say "cheese." But it also involved working in a room we needed to treat with much the same reverence one would a courtroom. To the jurors who came back after we were done, if we left a few couch pillows out of place, we apologize. You deserve our gratitude. We certainly meant no disrespect. □

1 The video can be viewed at http://www.dupageco.org/jury/index.cfm?doc_id=696.

Ted A. Donner is an AV-rated attorney with Donner & Company Law Offices LLC and an adjunct professor with Loyola University Chicago School of Law. He is the author of two national treatises for Thomson-West including Jury Selection: Strategy & Science and the Attorney's Practice Guide to Negotiation. He was the Editor-in-Chief of the DCBA Brief for 2007-08 and served as Associate Editor in 2006-07 and 2009-10.

LETTERS TO THE EDITOR

Our October, 2010 edition marked a more dramatic change in format than this magazine has seen in some years. We updated the cover logo, type style and design, and added a News & Events section to provide more in-depth coverage of what's going in the association. The responses we got to these changes were generally positive. One reader lauded the effort but pointed out that, "It's easy enough to do something like this once. The question is whether you can keep doing it...." While we endeavor to meet that challenge, here's a sampling of other letters we received:

Dear Editor:

I have been a practicing attorney for fifty-two (52) years come next month and a member of the DuPage County Bar Association since 1971. I am now practicing in Wisconsin as well and, of course, a member of the Wisconsin State Bar Association. I also still a member of the Illinois State Bar Association and a non-resident member of the Chicago Bar Association.

Obviously, for many years, I have received the various publications from all of those organizations and I want to say that the October 2010 issue of the DCBA Brief is absolutely one of the finest of its kind I have ever had the pleasure of reading. Congratulations! Not only are the photography and articles extremely good but the format - in my opinion - could not at all be improved upon.

And while we are throwing out kudos, I would like to comment on the article written by **Jim Reichardt**. I have read a number of articles dealing with Jim's subject and, quite frankly, his is the best I have ever read. I have had the pleasure of knowing Jim for a number of years and know that he is not only a fine lawyer but now I realize he is an excellent writer as well.

Please keep up the good work!

Robert C. Hultquist
Attorney at Law

Dear Editors:

It's really, really, really awesome. I love it! You've brought our publication into the 21st Century and it looks beautiful. The articles look good too. I can't wait to see the "Grief" this year!

Susan O'Neill Alvarado
Susan O'Neill Alvarado & Associates

Dear Editors:

The "new" DCBA Brief looks great. My compliments to everyone who worked on it.

Eddie Wollenberg

Hi Steve:

I loved your first "President's Message" in the DCBA Brief, a great way to kick off your presidency. I also enjoyed **Ted Donner**'s "Profile." Thanks for your commitment to our cause. You will do a great job!

Roger A. Ritzman
Peregrine, Stime, Newman,
Ritzman & Bruckner, Ltd.

Editor's Response: We're grateful for all the letters we received in response to the October, 2010 edition, but we're particularly glad to have gotten yours, Roger. We worried that the eight pages of material we included about the DCBA's new President, Steve Ruffalo, might be pushing the envelope (in addition to his President's Message and the profile, we ran well over a half dozen photographs of the man, not counting the cover). Your letter tells us we need not have worried. Look for more about Steve in the coming months, particularly in our April edition. DCBA Grief Editor, Melissa Piwowar, tells us she is keeping your letter in mind!

Dear Editors:

Kudos to Steve and the hard working editorial team of the DCBA Brief. The new layout is great!

Chantelle Porter
Angel Traub & Associates

Have something say about the DCBA, this magazine, or anything you've read in these pages? Send your letters to the DCBA Brief by email to letters@dcbabrief.org or write to DCBA Brief, 126 South County Farm Road, Wheaton, Illinois 60187. The DCBA Brief reserves the right to edit any letters we publish because of space considerations. We look forward to hearing from you.

WEBSITES

HELPING ATTORNEYS GET FOUND ON THE INTERNET

online video concepts LLC

"Official Corporate Sponsor of the DCBA"
Owned and Operated by Greg Wildman
See our recently released videos and websites at

www.onlinevideoconcepts.com

VIDEOS

OPTIMIZATION

YAHOO! Google YouTube LAW TUBE facebook.

DIRECTORY

HG.org WORLDWIDE LEGAL DIRECTORIES

NOLO'S LAWYER DIRECTORY

Avvo

LAWYER.com

Online Video Concepts also Offers:
Website Consulting
Website Development
Search Engine Optimization
Sponsor of the Young Lawyers Happy Hour

GREG WILDMAN

CALL US AT 312-953-3826 FOR A FREE CONSULTATION

MILLON & PESKIN, LTD.

At the law firm of Millon & Peskin, Ltd., we do only one thing. We represent injured workers in claims for benefits under The Illinois Workers' Compensation Act.

YOUR DUPAGE COUNTY WORKERS' COMPENSATION RESOURCE

Whether it is a minor injury or a life altering trauma, our goal is to ensure our clients receive every benefit to which they are entitled.

If you have a client who has been injured at work and needs representation, please call us. We cover all counties in the Chicagoland area including: DuPage, Cook, Kane, Will and Lake.

Kevin H. Millon **Mitchell M. Peskin**

Workers Compensation is what we do.

Call (630) 260-1130

2100 Manchester Road, Bldg. B, Suite 1060, Wheaton, Illinois 60187

PRESIDENT'S MESSAGE

In the Matter of Good v. Evil: Good's Motion to Intervene

BY STEVEN M. RUFFALO

For many years, I had two daily newspapers delivered to my home every day so that I could keep abreast of the news, current events, local happenings and the like. Over the past ten years or so, however, I have cut back on these subscriptions. It seems to me that the daily print newspapers have been increasingly overtaken with stories from far and wide that depict in graphic detail the worst examples of the human condition. In one story after another, innocent children are victimized, neglected or brutalized, the elderly are preyed upon by conniving scammers, stories of corruption and back room deal-making and of criminal acts which exceed the imaginable are trotted out, *ad nauseum*.

At some point, and I am not sure when we got there, the news became so saturated with these gut wrenching tales that, now, the stories seem to compete with one another on a sort of revulsion spectrum. Each day the news seems to reach new lows, so much so that, over time, we have been rendered incapable of being shocked or surprised by anything we read. After years of exposure to this viral media, I wonder if we risk becoming so calloused to bad news, so desensitized to tragedy, so beaten down, that we retreat into little cocoons, where we remain suspended as untrusting souls, blanketed only by our own fears and comforted only by our own precautions, lest we become the next victim, the next big story.

Fairly or unfairly, our profession is not immune from these sorts of bad-press stories. As attorneys and judges, we are on display, every day and in every way. Today, unlike in the day of the "instamatic" camera, we exist in a world where our every dalliance, misstep and embarrassing moment is being captured, published and digitally broadcast to the world at warp speed. There is not much any of us can do about this as it is a fact of modern day life. Undoubtedly, within our own local legal community, some of us will make mistakes and in some instances those mistakes may become our profession's own cross to bear. Perhaps only when our profession's good deeds, our acts of charity and kindness so far outnumber the oft over publicized blemishes, will we reach a point where the tarnish created by bad-press stories may be incapable of defining our profession as a whole.

Talk of good deeds, acts of charity and kindness may seem like the making of platitudes; easy to put onto one's bucket list, but much harder to perform for the average, hard working attorney. After all, what sort of organized opportunities do we have, individually? How do we find, much less sign on to perform these amorphous good deeds with some assurance that in doing so, we will net any meaningful benefit, either personally or to our profession? The answer is well at hand.

Thankfully, there exists today in our own DCBA several very well organized opportunities through which we can and do make a meaningful difference year after year. First there is the opportunity – automatically provided through our DCBA membership -- to serve *pro bono* through the Legal Aid Foundation. Legal Aid has for years provided the means by which any of us can volunteer to serve as counsel to low-income families in need.

Next, the DCBA's Modest Means Program similarly allows us to counsel lower-middle income families at reduced rates. Additionally, there is the night court program through which family law practitioners can volunteer to serve on an evening court call comprised of *pro se* litigants and presided over by one of our Circuit Court Judges. Last but not least, there is the Lawyers Lending a Hand arm of our Bar Foundation ("DCBF") which

PRESIDENT'S MESSAGE
CONTINUED ON PAGE 8 »

Steven M. Ruffalo is the President of the DuPage County Bar Association. He is also a member of Fuchs & Roselli, Ltd. where he serves the litigation and pre-litigation needs of small to mid-sized family and closely held business organizations. Mr. Ruffalo graduated from the University of Illinois at Chicago in 1984. He began his professional career in the Division General Counsel's office of the Unisys Corporation in 1988 while earning his law degree from the John Marshall School of Law and his Masters in Business Administration from Rosary College. Mr. Ruffalo also currently serves as Assistant Village Attorney for the Village of Hinsdale and as a Fellow of the American Bar Association.

The DCBA BRIEF is a publication of the
DuPage County Bar Association
126 South County Farm Road
Wheaton Illinois 60187
(630) 653-7779

» **PRESIDENT'S MESSAGE** CONTINUED FROM PAGE 7

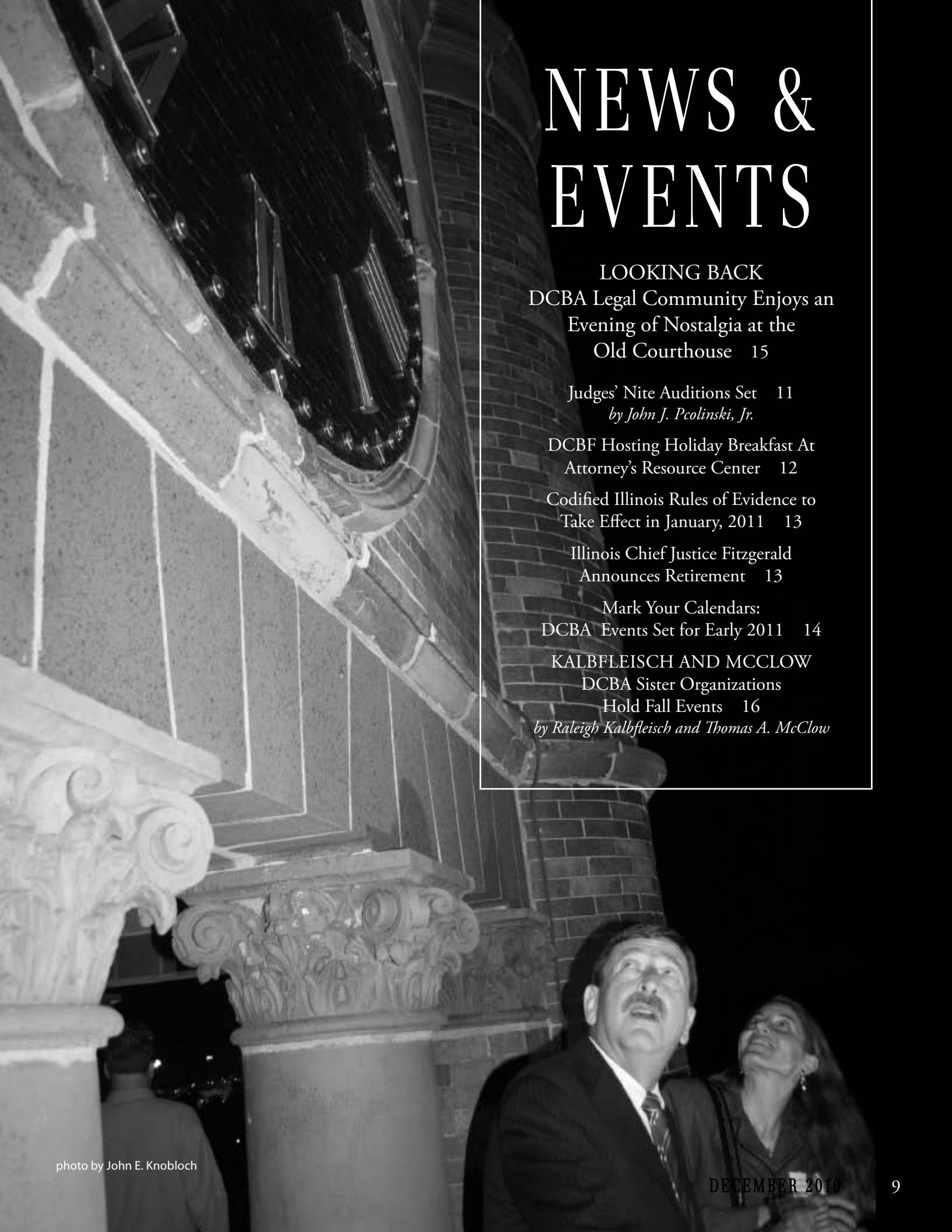
organizes and conducts a number of projects annually through which our members and their families can volunteer to help those within our own county who are in need.

Recently, we celebrated the Tenth Anniversary of Lawyers Lending a Hand and the efforts of Judge **Paul Marchese** and **Eddie Wollenberg.** These indviduals have, for the past ten years, remained at the forefront of innovating, organizing and perfecting a series of projects through which we as members of the DCBA (both attorneys and non-attorneys alike) are given a well organized and convenient platform through which to provide clothing, toys, meals and a little companionship within DuPage County to our fellow residents, families and children who are in dire need of assistance. These two individuals deserve our recognition, appreciation and support as they have given to us the ability to volunteer our time, elbow grease, food, money, clothing and toys.[1]

Whether we speak of volunteering goods to the needy or providing time to litigants who cannot afford to pay, those who contribute are making an effort to preserve if not enhance our profession's reputation within the community. While we all are free to choose how we spend our time and talent, the DCBA platform offers its members a wide range of options through which we can all do a little something. Even the slightest contribution, when made by many of us in a well organized effort, creates a wealth of goodwill. In its own way, the DCBA's charitable work through Legal Aid and the DCBF, its two charitable, non-for profit organizations, represents a fine example of good, a positive reflection of which, we as its members, should be unflinchingly proud.

In a world where very few press stories cover our many good deeds, our acts of kindness and helpfulness, instances where valor, compassion and good old common sense win out over absurdity and evil, rest assured that this year, the DCBA has made it one of its highest priorities to actively publicize the many good deeds that its members are achieving, day in and day out. The perception that these sorts of feel-good stories don't sell newspapers, well maybe that can be challenged. Maybe the forces of good and evil are more evenly matched than our newspapers seem to give them credit for. □

1 Whether you choose to give one, any combination, or all six of these gifts, your contribution is equally welcome and will be put to good use within the community by Lawyers Lending a Hand. Please contact Eddie Wollenberg at (630) 668-2415 for more information.



NEWS & EVENTS

photo by John E. Knobloch

Judge's Nite Auditions Set

BY JOHN J. PCOLINSKI, JR.

Saturday January 8, 2011 at noon at the Bar Center in the Boardroom is the place to be if you are interested in auditioning for this year's cast in Judge's Nite. Easily one of the most popular social functions of the year, Judge's Nite is a lighthearted spoof of the DuPage County legal scene with net proceeds benefitting Legal Aid. This year's show will be held on February 25, 2011 at 5:30 PM at the Abbington in Glen Ellyn, Illinois. Volunteers of all types and talent levels are welcome to try out. This year's producer, **Angel Traub**, quipped: "Are you funny? Or have you always wanted to be a performer? Can you sing? Maybe you can sew or build scenery or sets? Come out and join a great group of people, the Judge's Nite cast, band and crew. We always need new people to help with what has long been the biggest DCBA event of the year. So come on by and find out what it's all about."

There is a strong camaraderie among those who have performed with Judge's Nite in past years, but the group is always enthusiastically welcome to new members. **Sean McCumber** emphasized the inclusiveness of the audition process: "Auditions are a fun time to figure out where you want to be in the show. Kevin tests the voices to find the right persons for the parts and then the party gets started."

Art Rummler, who has also quickly become a Judge's Nite mainstay, added: "Talent really isn't a prerequisite, but an ability to have fun while enduring long, arduous hours of rehearsal is kind of important. At the first meeting you basically just show up and then if you can squeak out a few notes of a song, you're in. If you don't want to perform, there are lots of opportunities behind the scenes. Costumes, sets, logistics - it's all quite amazing really - kind of off, off, waaay off Broadway, if you know what I mean. An ability to laugh at oneself...mandatory."

Director, **Kevin Millon** summed it up: "As far as the 'auditions' go, it is really a painless process. The bottom line is we encourage anyone who has a desire to be a part of the show to come on out. Whether they would like to have a singing part, a non-singing part, be a stage prop, or even just work backstage, we want them there. The greatest aspect of being a part of Judges Nite is getting to spend a couple months with the other people in the show. So no matter how big or small of a part you want to have in the show, it is well worth it. No matter how much or how little talent a person has, if they want to come out, they will be welcome." □

Connie Gessner presents Judge Linda Davenport with the Deep Gavel Award following the 2010 Judge's Nite production, "Them in Black."

Sean McCumber, appearing as Judge Stephen Culliton, leads a chorus of other actors in song.

THE DCBF WOULD LIKE TO EXTEND ITS THANKS TO THE DONORS FOR THE 2010 GOLF OUTING AUCTION

The Second Annual DuPage County Bar Foundation ("DCBF") Golf Outing was held at Itasca Country Club on Thursday September 16th, 2010. DCBF President **Kent Gaertner** spearheaded a strong drive for donations, as demonstrated by the host of contributors to this year's silent auction. The DCBF would thus like to extend its thanks to the following:

Angelini & Angelini, Philip Angelini

ATG, Attorney Title Guarantee Fund, Phil Krawiec

Bank Restaurant, Wheaton

Biltmore Resort, Arizona

Bradford Renaissance Portrait

Bob Campbell, Photography

Clingen, Callow, McLean, LLC, Tim McLean

DuPage County Bar Association

Fuchs & Roselli, Ltd, Steve Ruffalo

The Grotto Restaurant, Oak Brook

Itasca County Club

Ivy Restaurant, Wheaton

Justinian Society of Lawyers

Knobbe, Laho, Gradishar & Mack, LLC, Sharon Knobbe,

Law Offices of Colleen McLaughlin, Colleen McLaughlin

Mirabella, Kincaid, Frederick & Mirabella, LLC

Koenig and Strey, Glen Ellyn, Pattie Murray,

PRP, Wine International, Cindy Klayman

Law Offices of Arthur W. Rummler, Arthur Rummler,

Scott Mitzner

Sikich LLP, Kelli MacKay

Springer Brown Covey Gaertner & Davis, Kent Gaertner,

Tasting deVine, Wheaton

West, a Thomson Reuters Business

Yorke Printe Shoppe

DCBF Hosting Holiday Breakfast At Attorney's Resource Center

The Dupage County Bar Foundation will host a Holiday Breakfast on December 21, 2010 starting at 8:00 a.m. The brainchild of DCBA and DCBF member, Walt Jackowiec, the Holiday Breakfast has been an annual event since 2008. The purpose of the breakfast is to celebrate the season over a collegial breakfast and to support the DuPage County Bar Foundation and its programs. There is no charge to attend for DCBA members. Sponsors for the breakfast are sought in advance. Anyone attending is encouraged to make a voluntary contribution to the DCBF as well. Since its inception, the Holiday Party has raised over $16,000.00 for the law school scholarships to local students and grants to area charitable organizations.

This year, the Holiday Breakfast will also serve as the kick-off event for a new endowment. Specifically, the Board of the DCBF recently determined to create an endowment to fund the activities and charitable objectives of the Foundation. "Initial plans are to solicit pledges of $2,000.00 from members who would be designated as 'Ambassadors,'" said DCBF President, **Kent Gaertner**. "Pledges may be paid in equal $200.00 installments over 10 years. The Board hopes to have 50 Ambassador Pledges by the end of its fiscal year on June 30, 2011." Further details about the program will be provided at the Holiday Breakfast.

Established in 1997, the DuPage County Bar Foundation is the charitable [501(c) (3)] arm of the DuPage County Bar Association. The purpose of this educational and charitable corporation is: "To foster and maintain the honor and integrity of the profession of law; To improve and facilitate the administration of justice; To promote the study of the law; To acquire, preserve and exhibit rare books and documents, subjects of art and items of historical interest having legal significance; and To assist deserving members of the DuPage County Bar and their dependents who are ill, incapacitated or superannuated." □

DCBF President, Kent Gaertner

Codified Illinois Rules of Evidence to Take Effect in January, 2011

In September, 2010, the Illinois Supreme Court approved the Illinois Rules of Evidence in codified form.[1] The recently retired **Chief Justice Thomas R. Fitzgerald** made this project his goal when he first became Chief in 2008, urging a special committee to take on the task. With the vocal support of the Illinois State Bar association, who said "Codification of evidentiary law from the multiple sources where it now resides will be a significant benefit to the practicing bar, and also a convenience for the judiciary. Legal research should be simpler, and codification may also result in a more unified application of evidentiary rules. We applaud the Court and Chief Justice Fitzgerald for undertaking this important task." **John E. Thies**, 2nd Vice President, ISBA.

After nearly two years of drafts and public hearings with the committee, chaired by **Appellate Justice Donald C. Hudson**, the rules of evidence were put into final form and approved by the Illinois Supreme Court. Previously found in case law, statutes and Supreme Court rules, the new rules will be effective January 1, 2011.

"The new rules of evidence will provide the bar of Illinois easy access to the Illinois law of evidence and be of enormous value to practicing lawyers in the state and the litigants they represent," said Chief Justice Fitzgerald. "I want to express thanks to all those members of the Special Committee who gave their tireless efforts to complete a large task with diligence and efficiency."

The goal of this project was codification of the current state of the law; avoiding any effect on the validity of existing statutes, modernization by incorporating the "noncontroversial developments" in the Federal Rules of Evidence and 44 jurisdictions surveyed by the Committee, and making limited changes. Some of these changes include rules on opinion testimony and hearsay statements. (Rules 405, 608 and 803(3)).

"From beginning to end, this was not only the Chief Justice's idea, but he made it a dynamic process as well," said **Warren Wolfson**, vice chair of the Committee and dean of the DePaul University College of Law. "He met with us. He inspired us to move quickly and diligently. He made clear to us what he had in mind as far as codifying Illinois law without any radical changes." □

1 As of the date of printing the new rules are not available on Westlaw but can be found on the Illinois Supreme Courts website at www.state.il.us/court/media/PressRel/2010/092710.pdf.

Illinois Chief Justice Fitzgerald Announces Retirement

Chief Justice **Thomas R. Fitzgerald,** who most recently spear-headed the codification of Illinois' rules of evidence but is probably best known as the judge who presided over the impeachment of former Governor **Rod Blagojevich**, recently announced that he is stepping down from the bench. Justice Fitzgerald made the announcement in the wake of discovering he had a confirmed diagnosis of Parkinson's disease.

"I didn't want to do anything to hurt the Court or the people it serves," he said. "Right now, I'm fully capable of discharging its duties. I don't know how much longer that will be true." Justice Fitzgerald recommended that his seat be filled by Appellate Justice **Mary Jane Theis** who then took his place on the bench on October 26, 2010.

Justice Fitzgerald made a practice of reminding new lawyers as they were sworn in of something **Abraham Lincoln** told a group of young lawyers sometime before the Civil War: "There is a vague, popular belief that lawyers are necessarily dishonest," Fitzgerald quoted Lincoln as saying. "It appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common – almost universal. Let no person choosing the law for a calling for a moment yield to this popular belief. Resolve to be honest at all events; and if, in your own judgment, you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation...." □

Judicial Center Renovations Underway

Work is ongoing on the escalators at the DuPage County Judicial Center. The down escalators will be replaced by the end of December, 2010. Once those escalators are installed, the other set of escalators is planned for replacement between January and the end of April, 2011. The new escalators are energy efficient Economod escalators manufactured by Kone. They were built in Coal Valley, Illinois and are currently at the factory, ready to be shipped on site as needed. The project is being funded by an ARRA Energy Efficient Block Grant.

Mark Your Calendars: DCBA Events Set for Early 2011

The new year is upon us. So when you pick up your new 2011 Lawyers Diary from the Bar Center (insert blatant advertising plug here), make sure to mark in the following DCBA events, which we'll be covering in these pages in more detail in the months ahead:

January 8, 2011: Judges Nite auditions, Noon at the Bar Center

February 25, 2011: Judges Nite, Abbington, Glen Ellyn

March 3-6, 2011: President's Arizona Spring Training CLE trip

May 4, 2011: Law Day Lunch at Cantigny

May 13, 2011 President's Ball at Medinah Country Club

June 9, 2011: Colleen McLaughlin Installation as President at the Hyatt Lodge Oakbrook

LOOKING BACK
DCBA Legal Community Enjoys an Evening of Nostalgia at the Old Courthouse

The New Lawyers Committee was offered a unique venue for it's October happy hour event. DCBA member **Pattie Murray,** who also works as a realtor, offered up what used to be the Historic DuPage County Courthouse at 201 N. Reber Street in Wheaton, Illinois. The property has been divided into condominium units (for which Murray is the listing agent) but much has been retained. New lawyers, old lawyers, judges and courthouse staff were thus given a chance to meander through the old halls and even climb the spiral staircase for a rare opportunity to view the city on a balmy fall evening from the historic clock tower. The evening was filled with stories.

DuPage County States Attorney, **Joe Birkett**, told us shortly after he arrived that, "I have lots of great memories.

When I was a young assistant and first started in felony here, the judges heard everything. Cases weren't assigned to different divisions depending on what was involved. So we got to watch the greatest lawyers on both civil and criminal matters. I got a chance to see **Phil Corboy** here trying a case. It was a great experience. We really got exposed to a lot. Of course, the system is much more convenient and efficient now with the judges being assigned to specific divisions, but those were good old days."

Birkett remembered well how overcrowded the space had become in those last few years before the DuPage Judicial Center opened its doors in 1991. "We were over in the little limestone building next door, 207 Reber Street," he said. "My office was a broom closet, actually, in a basement. It was a converted broom closet that I shared. We couldn't stand up at the same time because our desks were back to back, it was so small."

"It was a great experience," he said, recalling how he and his colleagues had to "jump down" to walk through a tunnel that connected his building with the courthouse. "Every time we walked into the courthouse, we felt like we were making history, because we knew even back then that our days here were numbered. Back in the 1980s, we knew we were going to need a new courthouse. By then a portion of the old jailhouse had been converted to

LOOKING BACK
CONTINUED ON PAGE 56 »

photo © REP3.com

KALBFLEISCH AND MCCLOW

DCBA Sister Organizations Hold Fall Events

BY RALEIGH KALBFLEISCH AND THOMAS A. MCCLOW

The DCBA is certainly the largest organization of lawyers in DuPage County, but there a couple other groups in the area in which DCBA members are often active. The Justinian Society has an active presence in the area as does the DuPage Association of Women Lawyers. Both organizations hosted events this fall, attended by many of us from the DCBA.

The 20th annual Justinian Cancer Ball was held on September 24, 2010 at Drury Lane in Oak Brook. At the ceremonies for the evening, the **Anthony M. Peccarelli** Award was given posthumously to Judge **John Panegasser**. **Elizabeth Pope** (his former associate) introduced Judge Panegasser as the honoree. His widow, **Leslie Panegasser**, accepted the award and said a few words on his behalf. The plaque itself now rests in the glass case on the back wall of the Attorney Resource Center at the courthouse.

(center photo) Todd Scalzo and Justice Ann Jorgensen; (top photo)Dion Davi, Lynn Mirabella, Joseph P. Glimco III, Maria Tolva Mack, Jay Laria, Sharon Knobbe, Sean McCumber, Elizabeth Pope, Todd Scalzo, (right photo) Elmhurst Memorial Healthcare receives support from Justinian Society

Past recipients of the award include **Umberto Davi**, Judge **Rodney Equi**,and **Joseph Mirabella**. Through the annual event, the Justinian Society has raised and donated over $100,000 to various hospitals and cancer research organizations. This year, over $20,000 was raised, one of the Justinian Society's best nights ever! Former President of the Justinians, **Michael J. Calabrese,** was the auctioneer for the evening and helped encourage the attendees to bid ever higher for the fabulous prizes available. Mike was also the lucky winner of a round of golf from the raffle. Look for him at the 19th hole.

Just a few days later, on September 27, 2010, the DuPage Association of Women Lawyers held this year's kick-off networking event at **Mullin's** in Naperville and had a rockin' tailgate party. The event was a great success

Raleigh Kalbfleisch is an attorney in Carol Stream who concentrates in domestic relations law. She received her undergraduate degree from Purdue University and her J.D. from Quinnipiac University School of Law.

Thomas A. McClow is the principal of the Law Office of Thomas A. McClow in Winfield, Illinois and an adjunct professor with Judson University in Elgin. He received his B.S. from Michigan State Univesity and his J.D. from Loyola University Chicago School of Law.

and the Bears Packers game was a real thriller. The DuPage Association of Women Lawyers was founded in 1980. Among its many community-focused endeavors, the group founded Safe Harbor, the children's waiting room at the DuPage Courthouse, and created its not-for-profit operator, the Child Friendly Courts Foundation. Just a reminder, the Zoo Ball will be held at the Brookfield Zoo on November 19, 2010, so start shopping now for that fabulous dress and Manolo Blahniks.

New members. Please join us in welcoming the DCBA's newest members: **Tracey Hower** of Steven H. Mevorah & Assoc., **William B. Kalbac** of Freedman Anselmo & Lindberg, **John M. Drews** of Drews & Associates P.C., **Michael Forkan** of The Illinois Law Group, **Michael Huseman** of Dreyer, Foote, Streit Furgason, **Frank E. Jeffers**, **Sally Ann Martin**, **Axel Cerny** of Mullen, Winthers & Kollias, P.C., **Kenneth K. Kugelberg, Jr.**, **Candice J. DeBray**, **Meghan N. Nemiroff, Benjamin Hughes, Karen A. Fouts, Gary Kemnitz, John J. Hogan, Nicole L. Hebel, Greg Kojak, Jerome J. Goergen, Noah Hamann, Angela Hart, Kaci L. Holguin**, and **Samuel Wieczorek** of Fuchs & Roselli, Ltd.

Movin' on up. Former DCBA president **Fred Spitzzeri** has moved his office to 1111 S. Washington Street, Naperville 60540. Meanwhile, **Guerard, Kalina & Butkus** have moved their offices to 310 South County Farm Road, Suite H, Wheaton, IL. Their telephone number remains the same.

LLH Toy Drive Underway. Finally, one quick reminder. During the month of December, the DCBA will be collecting toys for kids at the Bar Center so, please, drop by a toy the next time you're in. LLH is also hosting a gathering of volunteers to wrap toys on Tuesday, December 21 at 5:00. We hope to see you there! □

LRS Posts September Statistics

The Lawyer Referral and Mediation Service provides referrals to participating attorneys and serves the community by putting people in contact with a local attorney. If referred through the Service, callers are entitled to up to 1/2 hour free consultation. Beyond that half hour, regular fees may be charged. Attorney members pay annual dues to the DCBA, based on the number of areas of law in which they are listed, must have malpractice insurance in full force, be licensed to practice in the State of Illinois, and are subject to the DCBA Referral Service rules. Attorneys are not required to be DCBA members. For more information or to join the LRS, contact the Bar Center at (630) 653-7779 or visit www.dcba.org. Please refer prospective clients to (630) 653-9109.

The Lawyer Referral & Mediation Service received a total of 766 referrals (505 by telephone & 256 by Internet) for the month of September:

Administrative	4	Government Benefits	12
Appeals	3	Health Care Law	0
Bankruptcy	32	Immigration	7
Business Law	16	Insurance	4
Civil Rights	10	Intellectual Property	4
Collection	44	Mediation	8
Consumer Protection	7	Mental Health	2
Contract Law	2	Military Law	1
Criminal	126	Personal Injury	36
Elder Law	6	Real Estate	127
Employment Law	61	School Law	6
Estate Law	33	Social Security	3
Family	191	Tax Law	1
Federal Court	3	Worker's Comp.	13

DCBA COMMITTEE MEETING SCHEDULE

One of the great benefits of membership in the DCBA is participating in any of the many Association Committees at no additional charge. Each of the following meetings features a presentation for which attendees may receive one hour of MCLE credit (unless otherwise indicated).

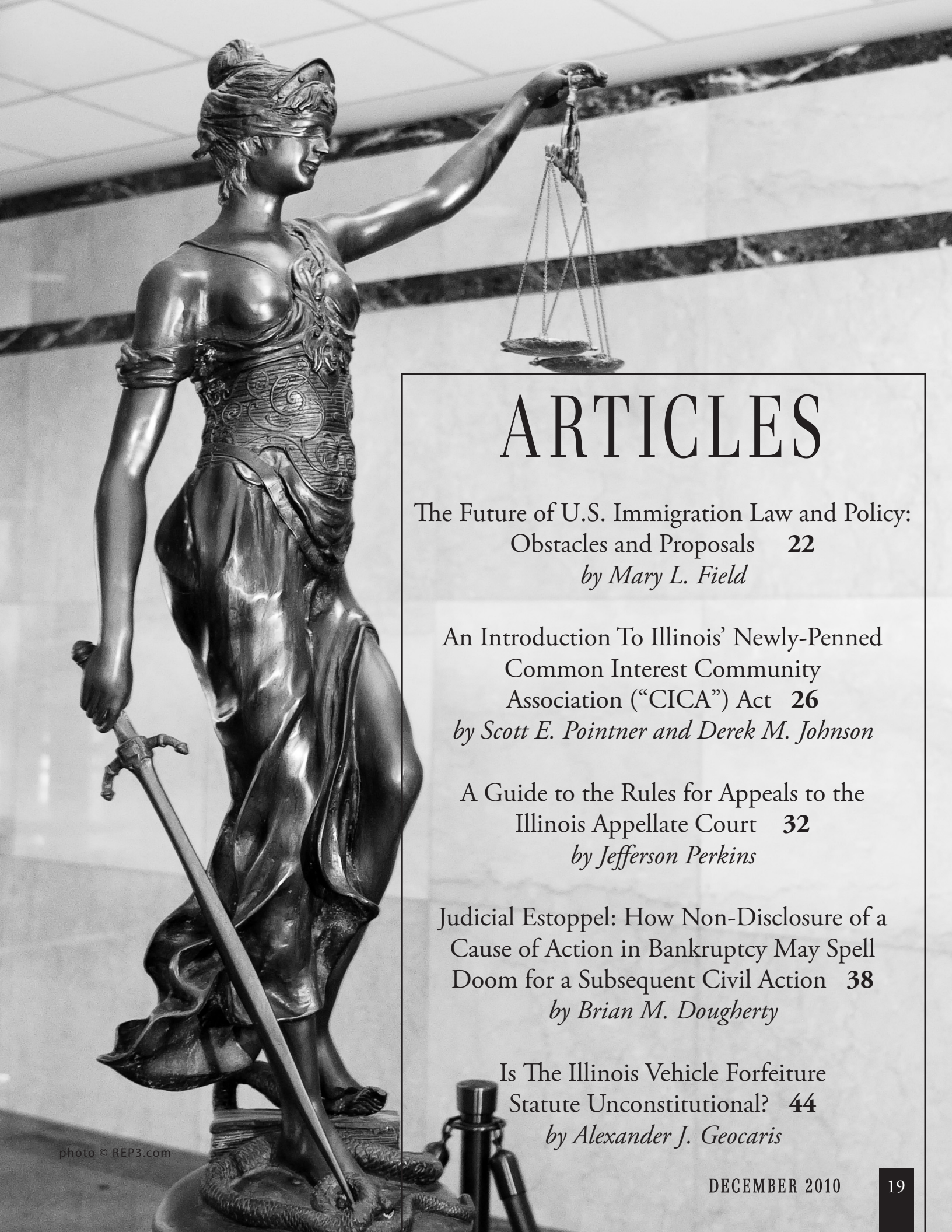
NOVEMBER, 2010

9	School Law	10:45 a.m. to 1:15 p.m. (seminar) at the ARC
9	Estate Planning & Probate	11:45 a.m. at the Bar Center
11	Real Estate Law & Practice	11:45 a.m. at the Naperville Country Club
16	Alternative Dispute Resolution	11:45 a.m. at the Bar Center
16	Family Law	11:45 a.m. at the ARC
17	Elder Law	11:45 a.m. at the Bar Center
18	Business Law & Civil Law (SEMINAR)	11:15 a.m. to 2:00 p.m. at the ARC

DECEMBER, 2010

1	Local Government	11:45 a.m. at the ARC
2	Law Practice Management	11:45 a.m. at the ARC
7	Environmental Law	Noon to 1:15 p.m. at the ARC
9	School Law	11:45 a.m. at the ARC
9	Real Estate Law & Practice	11:45 a.m. at the Naperville Country Club
13	Health Care Law (tentative)	11:45 a.m. at the ARC
14	Estate Planning & Probate	11:45 a.m. at the Bar Center
14	Family Law	11:45 a.m. at the ARC
15	Elder Law	11:45 a.m. at the Bar Center
16	Civil Law & Practice	11:45 a.m. at the ARC
17	Intellectual Property	11:45 a.m. at the ARC
22	Diversity Law & Practice	11:45 a.m. at the ARC

"ARC" refers to the Attorney Resource Center on the third floor of the DuPage Judicial Center, 505 County Farm Road, Wheaton, Illinois. The "Bar Center" is located at 126 County Farm Road, Wheaton, Illinois. The Naperville Country Club is located at 25W570 Chicago Avenue in Naperville, Illinois. Please call (630) 653-7779 for further information about any of these meetings or for current scheduling information about the meetings of any DCBA committee. Meetings marked with (*) are working meetings for which no MCLE credit is available.



ARTICLES

WestlawNext™

One reason WestlawNext™ helps you get more done is that it's powered by our new search engine – WestSearch™, which leverages the Key Number System and other West assets to streamline the search process. In fact, it helps **reduce your research time by up to 64 percent,** while still assuring that you haven't missed anything important. Hear what Brent and other customers are saying – and see details of the efficiency study yourself – at **WestlawNext.com**.

THOMSON REUTERS™

FROM THIS MONTH'S ARTICLES EDITOR

A Gift Basket of Articles to Round Out the Year

BY TERRENCE BENSHOOF

photo © REP3.com

Our third issue of the DCBA Brief comes out in the holiday season. As the Presiding Elf (a/k/a Articles Editor) for the holiday edition, it is my privilege to reach into the gift bag and treat our membership to several timely and informative articles to round out 2010 and move us into the 2011 new year.

As we move into 2011, the hot topic of our immigration laws and policies continues to grace the highlights of print and electronic media almost daily. To give us a look into the possible direction of immigration law, **Mary Field** has provided us with an excellent article on the subject. From immigration, we shift to the home front, where **Scott Pointner** and **Derek Johnson** guide us through the newly-enacted Common Interest Community Association Act. This act compiles regulations concerning property associations that do not fall under the ambit of the more familiar condominium law.

Next, for those of us with clients who have spent too much on those holiday gifts and parties, **Brian Dougherty** gives us some insight into a relatively little known aspect of bankruptcy law: judicial estoppel related to non-disclosure of causes of action. This article discusses the perils when filling out the asset schedule, and provides sound advice for practitioners in personal injury, employment and other tort areas. **Alexander Geocaris**, a law student at Northeastern University, also gives us his analysis on the Illinois Vehicle Forfeiture Statute.

Finally, as we venture on into the unknown, **Kristopher Classen** walks us through the unfamiliar territory of the Illinois Appellate Court System. This practical guide to the rules, including those of the individual districts, should prove invaluable to those of us attempting to follow the narrow and dangerous trails of the appellate world while avoiding calls to our malpractice carriers. Our thanks as well to **Melissa Piwowar**, **Ron Menna**, and **Anne Thereau** for their work in putting together this month's Sidebars

A Happy Holiday Season to all, and a Prosperous New Year in 2011! □

Terrence J. Benshoof is a solo practitioner officing in Glen Ellyn. His general practice includes concentration in taxation, estate planning, and commercial litigation. Mr. Benshoof received his undergraduate degree from UIC, and his law degree and LLM in Taxation from DePaul University.

ARTICLES FROM LAWYERS & PARALEGALS

The articles published in this magazine are generally contributed by lawyers and paralegals who are members of the DCBA. If you are interested in submitting an article to be considered for publication in the DCBA Brief, please contact the magazine's Associate Editor, Eric Waltmire, at ericwaltmire@dcbabrief.org. Our publication guidelines for author submissions appear at dcbabrief.org/submissions.html. Practicing attorneys whose articles are selected for publication in the DCBA Brief are qualified to receive CLE credit under the applicable Illinois rules.

STUDENT ARTICLES

The DCBA Brief has a long standing commitment to providing a forum for law students in the Chicago metropolitan area. If you are a law student who attends one of these schools or otherwise has an interest in the practice of law in DuPage County, you can join the DCBA for no charge and are then eligible to contribute articles to be considered for publication. If you have interest in submitting a student article, please contact our Student Articles Editor, Mark Carroll at markcarroll@dcbabrief.org.

SIDEBARS

The life blood of the DCBA is its committees, many of which are made up of practitioners with an interest in particular areas of legal study. In addition to the many CLE seminars they host, these committees put together case law updates that then appear in this section of the magazine as "Sidebars." If you know of any recent decisions or changes in the law our readers should know about, please contact Sidebars Editor, Melissa Piwowar, at melissapiwowar@dcbabrief.org

The Future of U.S. Immigration Law and Policy: Obstacles and Proposals

BY MARY L. FIELD

Immigration is complicated. Every day thousands of foreign citizens travel in and out of the United States for a variety of reasons. Some come to visit, study, and pursue employment opportunities while others come to reunite with family members. The population of foreign citizens entering the United States is as diverse as the U.S. itself. Immigrants vary in their net worth, education, race, religion, nationality, and economic class.

Setting the criteria for which foreign citizens should be able to immigrate to the United States is difficult and divisive. Like most developed countries, the focus of our current employment-based immigration system is to attract the best and brightest from overseas.[1] Unfortunately, this leaves very little legal immigration options for unskilled workers and others who do not fall into this category. While the United States has some visas available to low-skill, seasonal workers,[2] generally our immigration law and policy provide no permanent status to such workers. Yet undocumented individuals have settled here and perform a wide-range of labor in our workforce. Their lives have become intertwined with the lives of American citizens through employment, family, and other relationships.

The number of undocumented individuals currently living in the United States is estimated my some sources to be between 10 and 11 million,[3] and most Americans agree that deporting these individuals is not feasible. However, addressing the issue of which undocumented individuals should stay and which should go as well as who should be admitted legally in the future is the subject of much controversy.

Americans must also address the fact that some individuals seeking permanent status in the United States have violated the law. Some have violated a criminal code while others have violated the Immigration Act.[4] Immigration Act violations can be serious or minor. The Immigration Act is complicated, inflexible, and not clearly understood by all to whom it applies.

The voting American public simply does not agree on these matters. Given the complexity of the issues involved, it should come as no surprise that Congress has failed to comprehensively address the matter with a single immigration reform package.

The DREAM Act. The most recent proposed change to the Immigration Act is the Development, Relief, and Education for Alien Minors Act,[5] or the "DREAM Act." Originally introduced in 2001, this proposal offers permanent resident status to a very small, select group of undocumented individuals who entered the United States prior to age 16. This proposal has been considered several times since 2001, and most recently, it was reintroduced in the U.S. Senate by Senator Harry Reid (D-NV) as part of a defense spending bill.[6]

In order to qualify for residence under this proposal, an individual would need to be under age 35 on the date of enactment and demonstrate entrance into the United States prior to age 16, physical presence in the United States for five

1 The first three preferences of employment-based immigration are (1) Persons of extraordinary ability, outstanding professors and researchers, and multinational managers; (2) Members of the professions holding advanced degrees and aliens of exceptional ability; and (3) Skilled workers, professionals, and other workers. INA § 203(b)(1)-(3).

2 H-2A, H-2B visas. INA § 101(a)(15)(H)(ii)(a)-(b)

3 "Solutions that Work A Policy Manual for Immigration Reform," American Immigration Lawyers Association, AILA InfoNet Doc. No. 10031274 (posted 3/16/10), www.aila.org

4 The Immigration and Nationality Act, commonly referred to as the "INA" or "Immigration Act" begins at 8 U.S.C. 1101.

5 S. 1291, 107th Congress (2001-2002)

6 On September 21, 2010, the bill failed to receive enough votes for passage and was withdrawn by Senator Reid to be reintroduced at a later date.

years prior to the date of enactment, attainment of a high-school diploma or equivalent, and good moral character. The individual would first earn conditional resident status for a period of two-years which would be converted to permanent resident status after the individual either earns a two-year degree from a United States institution of higher education, completes two years toward a bachelor's degree from a United States institution of higher education or serves in the U.S. Armed Forces for a period of at least two years and after which an honorable discharge is granted.

Under the current Immigration Act, foreign-born children generally derive immigration status from their parents. If the parents are in undocumented status or achieve their legal status after their children attain age 21,[7] often the children or young adults are left undocumented through no fault of their own. As undocumented aliens, they face deportation, often to a country unknown to them, as their upbringing was in the United States. The DREAM Act offers relief for a very select group of individuals, but the proposal is significant as it shows an acknowledgment that at times, violations of the Immigration Act are not the fault of the foreign citizen.

Mary L. Field is a solo practitioner in Oak Brook where she concentrates her practice in the area of immigration law. She has a J.D. from Loyola University School of Law and a Bachelor's Degree in Public Accounting from Loyola University School of Business Administration. Currently, she serves as Vice Chair of DCBA's Immigration Law Committee.

Comprehensive Immigration Reform. Comprehensive Immigration Reform (often referred to as "CIR") refers to plans put forth by legislators to impose significant changes to the current Immigration and Nationality Act which would benefit many, unlike the select focus of the DREAM Act. To date, no such proposal has passed. Both the U.S. Senate and House of Representatives have recently had members draft such legislation. One such proposal sponsored by Senators Harry Reid (D-NV), Richard Durbin (D-IL), Charles Schumer (D-NY), Patrick Leahy (D-VT), Dianne Feinstein (D-CA) and Robert Menendez (D-NJ), called the Real Enforcement with Practical Answers for Immigration Reform,[8] or "REPAIR," was introduced in April of 2010. A previous and similar proposal was introduced by Rep. Luis V. Gutierrez (D-IL), called Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009,[9] or "CIR ASAP." These two proposals are similar in that they both establish methods for the undocumented population to legalize their status while increasing border security.

The REPAIR proposal creates a new temporary visa called an H-2C visa for non-seasonal, non-agricultural workers who perform low-skill labor. This visa would be available to the worker for an initial three-year period, which could then be renewed for an additional three years. The worker would have an opportunity to earn permanent resident status through this program. An annual cap on the number of H-2C visas issued would be imposed, and that cap would be adjustable based on labor market conditions.

Another employment-based aspect of the REPAIR proposal offers permanent resident status to any foreign student who earns an advanced degree (master's degree or higher) from a United States college or university in the field of science, technology, engineering, or mathematics and who gains an offer of employment from a United States company in their field of study.

REPAIR also implements a plan to offer legal status to all undocumented individuals through a program where such individuals would need to announce their presence in the United States, undergo an application process which includes criminal background screening, fingerprinting, payment of fees, and identity confirmation. These applicants would then receive a newly created, temporary status, called "lawful prospective immigrant". After remaining in Lawful Prospective Immigrant status for a period of time, the individual would be able to apply for permanent resident status if they qualify based on the following factors, knowledge of the English language, continuous residence in the United States, satisfactory background checks, proper payment of all taxes, and registration for the Selective Service.

The CIR ASAP proposal offered by Rep. Gutierrez also creates a visa program for qualified undocumented workers. It establishes a new status called "conditional non-immigrant," which can be converted to permanent resident status after a period of time. Conditional non-immigrant status would be attainable through a registration process which includes background checks and requires the applicant to attest to contributions to the United States through employment, education, military service, and community service.

Both REPAIR and CIR ASAP require the applicant to demonstrate physical presence in the United States upon date of enactment of the legislation as a measure to prevent

7 The INA defines child as an unmarried person under age 21. INA § 101(b)(1). However the Child Status Protection Act (INA § 201(f)) provides certain protection for individuals who reach age 21 prior to completion of the immigration process.

8 AILA InfoNet Doc. No. 10042912, available at www.aila.org (posted Apr. 29, 2010).

9 H.R. 4321, 111th Congress (2009-2010)

others from illegally entering the United States to participate in the program. Both proposals disqualify individuals with serious criminal backgrounds.

Under both proposals, border patrol and workplace enforcement of immigration laws are to be strengthened as an exchange for the creation of new immigration status for the previously undocumented. The REPAIR proposal adds border patrol officers and creates a bipartisan commission to investigate the state of security on the borders. It also bars state and local governments from enacting their own immigration laws once border control is established. REPAIR directs the Social Security Administration to issue a different version of the Social Security Card that is fraud and tamper resistant, contains the cardholder's photograph, and a unique biometric identifier. Further, REPAIR creates an improved system for employers to ensure employment eligibility of their workers.

> The Immigration Act is complicated, inflexible, and not clearly understood by all to whom it applies.

CIR ASAP creates a task force to study southern border security, increases training and equipment provided to border patrol agents and establishes improved systems for verification of worker employment eligibility. Like REPAIR, CIR ASAP clarifies that immigration enforcement lies solely with the federal government. Both REPAIR and CIR ASAP incorporate the provisions of the DREAM Act.

In summary, both of these proposals create a path to permanent resident status for a large portion of currently undocumented immigrants while strengthening the mechanisms to enforce provisions of the Immigration Act. The route to permanent residence under both proposals includes a conditional residency which can be later converted to permanent residency, and both specify that immigration enforcement is the job of the federal government alone. However, neither of these proposals is the current law, and the United States must still address societal issues caused by having a large, undocumented population. State and local governments have attempted to intervene and address the matter themselves, but whether this is proper under our current laws and Constitution remains uncertain.

State and Local Statutes Addressing Immigration Issues. According to a report from the National Conference of State Legislatures, in the first quarter of 2010, state legislatures in 45 states introduced 1,180 bills and resolutions relating to immigration issues.[10] Immigration related issues addressed by these bills include education, employment, identification/driver's licenses, and law enforcement.

In April of 2010, the State of Arizona attracted national attention by enacting a bill entitled "Support Our Law Enforcement and Safe Neighborhoods Act," commonly referred to as S.B. 1070. S.B. 1070 requires law enforcement officers to check the immigration status and documents of any person stopped if there is reasonable suspicion that the person is unlawfully present in the United States. It also creates a criminal law requiring legal aliens to carry their immigration documents and outlaws any unauthorized alien from soliciting, applying for or performing work.[11]

The Arizona legislation was greeted with much controversy, and in July of 2010, the United States Department of Justice filed a lawsuit in federal court challenging the authority of a state to enforce immigration laws. An injunction was granted prohibiting implementation of the most controversial provisions of the law.[12] In granting the injunction, the court held that "the federal government's ability to enforce its policies and achieve its objectives will be undermined by the state's enforcement of statutes that interfere with federal law."[13] Arizona has filed an appeal of this decision with the Ninth Circuit Court of Appeals, and as of the writing of this article, the matter is still pending.

In Pennsylvania, the city of Hazleton passed a law prohibiting landlords and employers from renting to or hiring undocumented aliens. In 2007, a federal district court found it unconstitutional.[14] That decision was appealed, and on September 9, 2010, the Third Circuit Court of Appeals upheld the district court's ruling, finding that the Hazleton law undermined federal objectives and usurped the authority of the federal government.[15]

While state and local governments may find themselves frustrated with the federal government's lack of action on immigration issues, their efforts at resolving the issues themselves so far have met significant challenges.

Administrative Alternatives. Absent comprehensive immigration reform, the U.S. Department of Homeland Security ("DHS") is faced with the task of addressing the fact that they do not have the resources or capability

10 "2010 Immigration-Related Bills and Resolutions in the States (January-March 2010)," National Conference of State Legislatures, www.ncsl.org.

11 A.R.S. § 11-1051(B); A.R.S. § 13-1509; A.R.S. § 13-2928(C).

12 United States v. State of Arizona, 703 F.Supp.2d 980, 30 IER Cases 1633 (D. Ariz. 2010).

13 United States v. State of Arizona, 703 F.Supp.2d 980, 30 IER Cases 1633 (D. Ariz. 2010).

14 Lozano v. City of Hazleton, 496 F.Supp.2d 477 (M.D. Pa. 2007).

15 Lozano v. City of Hazleton. 2010 WL 3504538, 31 IER Cases 129 (3d Cir. 2010).

of applying the Immigration Act uniformly to every, single undocumented alien. However, they do have administrative authority to implement other options. Not every undocumented individual who comes into their contact needs to be deported.

Under Section 212(d)(5)(A) of the Immigration Act, USCIS has the authority to grant "parole" to an alien who has not been formally admitted to the United States The term "parole" refers to the ability of an immigration officer to admit a foreign citizen to the United States when that person is not in possession of a valid visa. A process called "parole-in-place" has been established where the alien is deemed admitted to the United States, even though he never physically entered the country through a legal route. This is significant as it provides aliens who entered the country without inspection, *e.g.* through an unauthorized route, an opportunity to apply for permanent residence inside the United States Under the current law, an alien applying for permanent residence must show he entered the country after being inspected by an immigration officer.[16] Otherwise, that individual must process his application for permanent residence at the U.S. consulate in his native country, often with no guarantee the application will be approved. At present, parole-in-place is used only in limited circumstances, but its use could be expanded.

DHS can also utilize its authority to grant "deferred action," which is the exercise of prosecutorial discretion not to deport a certain individual.[17] While deferred action in itself does not confer immigration status on the alien, the circumstances of that individual may change in the future.

Parole-in-place and deferred action are just two of many examples of circumstances where DHS can use discretion when enforcing immigration laws. While not illegal or prohibited by the Immigration Act, the wisdom of having administrative agencies engaging in this type of decision-making must be questioned.

Conclusion. The current law and policy of the United States on immigration does not adequately address the complicated issues raised by immigration. We have an undocumented population too large to remove from the country but the country cannot agree on which individuals should be granted the ability to remain here legally. Because of this disagreement, states are attempting to tackle the issue on their own and administrative agencies are considering alternatives not clearly sanctioned by the American public. Whether Congress will effectively be able to do as courts direct and take control of immigration as mandated by our Constitution and federal law remains to be seen. □

16 INA § 245

17 Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing, and Removal (Standard Operating Procedures), Part X; Meissner, Comm., Memo, HQOPP 50/4 (Nov. 17, 2000), published on AILA InfoNet at Doc. No. 00112702, www.aila.org.

SIDEBAR: CIMINAL LAW

Credibility of Witnesses. *People v. McCulloch*, ___ N.E.2d ___, 2010 WL 3706633 (2nd Dist. 2010). Defendant appealed from his conviction for three counts of perjury and one count of disregarding the Election Code and after a bench trial over signatures he obtained on petitions on behalf of a candidate for township assessor. The defendant testified that he signed the petition sheets acknowledging that each and every signature was signed in his presence to the best of his belief. The testimony at trial was that the signatures were collected during a heavy snow storm and there were crews collecting signatures on opposite sides of the street. The Appellate Court disagreed with the defendant's contention that he subjectively believed the attestations he made on the petitions were true and as such, a perjury conviction was inappropriate. The Court pointed to evidence that the defendant suspiciously sought payment quickly and changed his story about how the signatures were collected after being confronted by a witness who expressed concern about notarizing the petitions. As such, the Court held that the trial court had made reasonable determinations about the credibility of the witnesses and reasonably relied on the circumstantial evidence to conclude that the defendant did not believe his attestations were true. Affirmed.

Mens Rea. *People v. Jones*, ___ N.E.2d ___, 2010 WL 3834433 (1st Dist. 2010). The Court reduced the defendant's conviction for first degree murder to involuntary manslaughter and remanded the case for sentencing finding the testimony at trial indicated that the defendant was holding down the victim as opposed to standing on the victim. There was nothing in the record, that suggested the defendant was aware of the various degrees of pressure that when applied to a person's body would cause them to asphyxiate. While the Court held that clearly the defendant intended to beat up the victim, he did not intend to kill him. Rather, it was a brief altercation and when the defendant left the victim lying on the ground, he was still breathing. This fact is inconsistent with the mental state for first degree murder. Concluding the evidence was insufficient to establish that when the defendant placed his foot on the victim's neck it was done with the intent to kill him.

An Introduction To Illinois' Newly-Penned Common Interest Community Association ("CICA") Act

BY SCOTT E. POINTNER AND DEREK M. JOHNSON

Until July 29, 2010, the effective date of Illinois' newly-penned Common Interest Community Association Act, 765 ILCS 160/1 et seq., (the "Act"), condominium associations were subject to extensive regulation under the Condominium Property Act, 765 ILCS 605/1 et seq., whereas non-condominium homeowner's associations ("HOA's") were left to piecemeal regulation from portions of statutes such as the General Not For Profit Corporation Act and case law.

With the passage of the Act comes a comprehensive set of regulations that now apply to HOA's by identifying them as "Common Interest Community Associations" ("CICA's"). All those affected by CICA's, from residents, board members and officers, to attorneys representing either CICA's or property owners subject to CICA's, should learn all they can about the new statute. While an analysis of the full impact of the Act will surely fill more than one chapter of books and be the subject of numerous features, the purpose of this article is to: 1) explain the background of the Act; 2) highlight key provisions of the Act; 3) briefly identify ways the Act will affect CICA's; and 4) raise important unanswered questions with regard to the applicability of the Act.

Background. The genesis of the Act can be traced to as early as 1963, the year Illinois enacted its first condominium act, which was adopted from a model statute developed by the Federal Housing Authority.[1] From 1977 through 1981, the National Conference of Commissioners on Uniform State Laws (the "ULC") promulgated the Uniform Condominium Act (1977), the Uniform Planned Community Act (1980), and the Model Real Estate Cooperative Act (1981) which offered states guidance in drafting statutes related to HOA's. In 1982, the ULC promulgated the Uniform Common Interest Ownership Act (the "UCIOA"), which was designed to supercede the three prior acts to provide a single, comprehensive act to govern common interest communities, regardless of whether they

1 765 ILCS 605, Historical and Practice Notes-Introduction, by Ellis B. Levin.

were for condominiums, HOA's, or cooperatives.[2]

Two years later, the General Assembly amended Section 102 of the Forcible Entry and Detainer Act ("FEDA") by adding subsections 102(b) and 102(c), which defined (and then regulating for purposes of the FEDA) the term "common interest community" as "real estate other than a condominium or cooperative with respect to which any person by virtue of his or her ownership of a partial interest or unit therein is obligated to pay for maintenance, improvement, insurance premiums, or real estate taxes of other real estate described in a declaration which is administered by an association." Although individual sections of other statutes made references to and imposed some regulations upon common interest communities,[3] the General Assembly neither adopted the UCIOA, nor promulgated a sister act to the Condominium Property Act, until this summer.

Although not expressly spelled out in the Act, there are at least five primary characteristics that most CICA's share: 1) they govern residential developments that are subject to a declaration recorded against all properties in the development; 2) unit owners share common interests, both in shared rights and shared property owned by the CICA for their benefit; 3) unit owners pay assessments for maintenance and other common interest expenses; 4) the CICA is typically an Illinois not for profit corporation; and 5) the CICA's are subject to a set of bylaws that govern their internal affairs. Although the Act expressly trumps certain provisions contained in declarations that conflict with it[4], the Act will generally govern CICA's alongside the CICA's declaration and bylaws.

Scott Pointner is a member of Rathje & Woodward, LLC in Wheaton, where he represents businesses, landowners, homeowners associations, and professionals in real estate, litigation, and corporate matters. He has been a featured speaker at various continuing legal education seminars, and is a regular lecturer at Midwestern University. He earned his J.D. degree from Southwestern University School of Law, and his B.S. degree in finance from Indiana University.

Derek M. Johnson is an associate attorney at the law firm of Rathje & Woodward, LLC. Derek received his Bachelors of Science (with Distinction) from the University of Wisconsin-Madison, and his Juris Doctorate (with Honors) from the Chicago-Kent College of Law. Derek practices in the areas of commercial litigation (with an emphasis in construction and real estate litigation) and trusts and estates.

Key Provisions of the Act. The Act is organized in fourteen key sections: 5) Definitions; 10) Applicability; 15) Interpretation; 20) Amendments; 25) Board of Directors; 30) Board Duties and Records; 35) Unit Owner Powers; 40) Meetings; 45) Finances; 50) Administration Prior to Turnover; 55) Fidelity Insurance; 60) Errors and Omissions; 65) Management Companies; 70) Use of an American Flag; and 75) Exemptions. Although the Act impacts CICA's in hundreds of ways, the key provisions of the Act are as follows:

Applicability. The Act generally applies to all CICAs[5], which are defined as "real estate other than a condominium or cooperative" in which a person, by virtue of his or her ownership of a partial interest or unit therein, is obligated to pay the maintenance, improvement, insurance premiums or real estate taxes of common areas described in a declaration which is administered by an association.[6] This definition is nearly identical to the definition promulgated in 1982 under the FEDA. Notably, the Act exempts CICAs incorporated under the General Not For Profit Corporation Act if they have 10 units or less, or if their annual budget is $100,000.00 or less, unless a majority of their directors affirmatively elect to be governed by the Act.[7]

Declaration and Bylaws. A declaration and bylaws must be created and recorded, and the bylaws may be included in the declaration or in a separate instrument attached to the declaration when recorded.[8] Any amendments to the declaration or bylaws must also be recorded.[9]

2 See Introduction to the Uniform Common Interest Ownership Act, National Conference of Commissioners on Uniform State Laws.

3 See e.g., 735 ILCS 5/15-1507(c)(1)(H)(2) (mortgage foreclosure); 765 ILCS 122/3(e)(3) (environmental covenants).

4 See e.g., 765 ILCS 160/1-15(c) (generally forbidding boards from prohibiting the display of the American flag or a military flag "notwithstanding any provision in the" community instruments).

5 765 ILCS 160/1-10.

6 765 ILCS 160/1-5.

7 765 ILCS 160/1-75(a).

8 765 ILCS 160/1-20(a).

9 765 ILCS 160/1-20(a).

Initial Election of Board Members. Prior to formation of the CICA, the original developer has all responsibilities the CICA has under the Act.[10] However, the initial election of the board must be held no later than 60 days after the developer's conveyance of 75% of the units, or 3 years after recording of the declaration, whichever occurs first.[11]

Board Composition; Terms; Meetings. There must be at least 3 board members: a president, a secretary, and a treasurer.[12] The board members' terms of office can be no longer than 3 years (though there are no term limits and a board member can run for re-election indefinitely).[13] However, their terms must be staggered such that at least one-third of their terms of office expire each year.[14] The board must meet at least 4 times a year[15], unless the CICA is exempt from the Act.[16]

Board Meetings. All board meetings must be open to the unit owners, except for any portion held: (i) to discuss probable or actual litigation filed by or against the association; (ii) to consider information regarding the appointment, employment, or dismissal of an employee; or (iii) to discuss violations of the CICA's rules or regulations, or a unit owner's unpaid share of common expenses.[17] Any vote concerning "closed meeting" matters must be open to all unit owners.[18]

Board Members' Conflicts of Interest. A board member, or a corporation or partnership in which a board member or a member of his/her immediate family holds a 25% interest, cannot enter into a contract with the CICA unless the CICA gives 20 days notice of its intent to enter into such contract to the unit owners.[19] Within 20 days after such notice, the unit owners are afforded an opportunity to file a petition for an election to approve or disapprove of such contract if 20% of the unit owners sign the petition.[20]

Insurance Requirements. Unless exempt under Section 75(b), a CICA with 30 or more units must obtain fidelity insurance covering those persons who control or disburse funds of the association for the maximum amount of coverage available to protect such funds.[21]

Membership Meetings; Voting; Voting Rights. Unless exempt under the provisions of Section 75(b), the unit owners must hold an annual meeting, a purpose of which must be to elect board members.[22] Voting may be done in person, by mail, or by written proxy, and the association may adopt rules such that voting is done by secret ballot to verify unit ownership.[23] Contract purchasers under an installment contract with a seller other than the original developer will have the right to vote during such times as the purchaser resides in the unit, unless the seller expressly retains the right to vote in writing.[24]

> The authors are of the belief that as of the effective date of the Act, there was likely not a single existing CICA in Illinois with declarations and bylaws that fully complied with the Act.

Notice Requirements. With regard to *membership* meetings, unless exempt under Section 75(b), all members must be given written notice of the time, place, and purpose of all membership meetings by mail or personal delivery within 10 to 30 days prior to each meeting.[25] Twenty percent of the unit owners constitute a quorum.[26] With regard to *board* meetings, for any meetings concerning the adoption of the proposed annual budget, regular assessments, or a separate or special assessment, the board must give notice to the unit owners within 10 to 30 days prior to the meeting by mail or personal delivery.[27] For all other board meetings, the board need only give 48 hours notice by mail, personal delivery, or posting copies of the notice in the entranceways, elevators, or other conspicuous places in the CICA.[28]

Required Disclosures. Every year the board must provide to all unit owners an itemized accounting of all

10 765 ILCS 160/1-50(a).
11 765 ILCS 160/1-50(b).
12 765 ILCS 160/1-25(f).
13 765 ILCS 160/1-25(b).
14 765 ILCS 160/1-25(d).
15 765 ILCS 160/1-30(a).
16 765 ILCS 160/1-75(b).
17 765 ILCS 160/1-40(b)(5).
18 765 ILCS 160/1-40(b)(5).
19 765 ILCS 160/1-30(b).
20 765 ILCS 160/1-30(b).
21 765 ILCS 160/1-55.
22 765 ILCS 160/1-40(b)(2).
23 765 ILCS 160/1-25(h), (i).
24 765 ILCS 160/1-25(j).
25 765 ILCS 160/1-40(a).
26 765 ILCS 160/1-40(b)(1).
27 765 ILCS 160/1-40(b)(4).
28 765 ILCS 160/1-40(b)(4).

expenses paid for the preceding year.[29] Prior to adoption of a proposed annual budget, the board must provide a copy of the proposed annual budget to all unit owners at least 30 days prior to adoption.[30]

Records Retention Requirements. The board must maintain a number of records and make them available for inspection, including: the declaration, bylaws, rules and regulations, and other community instruments; detailed records (in chronological order) of the receipts and expenditures for the common areas; copies of all contracts, leases, or other agreements entered into by the board; minutes of all board meetings for the preceding seven years; ballots, proxies, and written statements of purpose for any election held within the preceding year; all records as are available for inspection under the General Not For Profit Corporation Act; and written designations as to who is authorized to vote on behalf of a unit owner.[31]

Availability of Records to Prospective Purchasers. If a unit owner other than the original developer sells a unit, upon demand, the board must make available for inspection to the prospective purchaser, without limitation, the declaration, rules and regulations, any statements of unpaid assessments for the unit, a statement of the financial condition of the association, and a statement of the status of any pending suits or judgment in which the association is a party.[32]

Age; Leasing Restrictions. With regard to age restrictions, the declaration may impose a minimum age restriction limiting ownership, rental, or occupancy to persons 55 years or older and such restriction will not constitute age discrimination under Article 3 of the Illinois Human Rights Act.[33] However, if a person (or the immediate family of such person) who owns, rents, or occupies a unit is less than 55 years old at the time such restriction is created, such person will not be deemed to be in violation of the restriction so long as he or she continues to own or reside in the unit.[34] Once that person ceases to own or reside in such unit, the minimum age restriction will apply to the unit.[35] With regard to leasing, the association may validly prohibit the leasing of units.[36] However, if a not for profit corporation owns and is leasing a unit at the time the association amends the declaration or bylaws to prohibit leasing, such prohibition will not apply to such unit until the not for profit corporation voluntarily sells the unit.[37] The Act, the declaration and bylaws, and all rules and regulations shall also be deemed to be incorporated into any lease for a unit.[38] The unit owners must also deliver a written copy of the lease, or if oral, a memorandum of the lease, to the association no later than the date of occupancy or 10 days after the lease is signed, whichever occurs first.[39]

Display of an American or military flag. The Act generally prohibits CICA's from prohibiting the display of, or installation of a flagpole for the display of, the American and/or a military flag.[40] However, an "American flag" or "military flag" can only be made of paper, cloth, or fabric, and not any other type of materials, and must be displayed from a staff or flagpole or in a window.[41] Moreover, the association may adopt reasonable rules and regulations regarding the placement and manner of displaying such flags.[42]

Potential Liability For Costs and Attorney Fees. In various places, the Act provides that either a unit owner or third person is entitled to recover its costs and reasonable attorneys' fees in any action to compel the association to do certain acts or provide certain information.[43]

How Is the Act Most Likely to Affect CICA'S? Of the myriad of ways the Act will significantly impact CICA's, the most glaring issues relate to *existing* CICA's. The authors are of the belief that as of the effective date of the Act, there was likely not a single existing CICA in Illinois with declarations and bylaws that fully complied with the Act. Unlike condominiums with declarations and bylaws that were drafted in conformity with existing requirements of the Condominium Property Act-the very act that created condominiums-existing CICA's were created before the Act existed, and their declarations and bylaws were drafted without reference to the Act's requirements. With the Act applying to existing CICA's on the effective date of July 29, 2010 with neither a "grandfathering clause" nor a grace period to allow existing CICA's to amend declarations and bylaws to conform to the Act, CICA's would be wise to review their existing declarations and bylaws and make necessary changes in an expeditious manner, especially given the provision for attorney fees for violations of the Act.

Aside from the need to amend declarations and bylaws, the Act will require a significant commitment, new to many CICA's, to institutional organization. While these requirements are for the protection of unit owners, they do not come without cost in terms of money, time, and other

29 765 ILCS 160/1-45(b).
30 765 ILCS 160/1-45(a).
31 765 ILCS 160/1-30(i).
32 765 ILCS 160/1-35(d).
33 765 ILCS 160/1-15(c).
34 765 ILCS 160/1-15(c).
35 765 ILCS 160/1-15(c).
36 765 ILCS 160/1-20(c).
37 765 ILCS 160/1-20(c).
38 765 ILCS 160/1-35(a).
39 765 ILCS 160/1-35(a).
40 See 765 ILCS 160/1-70(a).
41 765 ILCS 160/1-70(b).
42 765 ILCS 160/1-70(a).
43 See, e.g., 765 ILCS 160/1-25(g); 765 ILCS 160/1-30(i)(4).

resources. These costs will almost certainly be passed on to the unit owners in the form of assessments.

Unanswered Questions. While the Act codifies and organizes many aspects of the laws that apply to CICAs, it does leave a number of questions unanswered on a variety of topics so numerous that one can expect future commentaries and articles to expound on these questions and answers. Here, the authors will limit this discussion to three issues concerning applicability of the Act.

Does the Act Apply to Some Condominium Associations? Although the Act's definition of a Common Interest Community expressly states that it is real estate "other than a condominium", the term Common Interest Community includes "master associations".[44] A "master association" is defined as a CICA "that exercises its powers on behalf of one or more *condominium* or other common interest community associations[.]"[45] This inconsistency begs the question of whether the Act applies to condominium associations subject to master associations and, if so, to what extent, if any, does it supplant the Condominium Property Act. Given that the definition of a CICA expressly excludes condominiums, the likely answer is "no" and this inconsistency is likely nothing more than a drafting oversight. Nonetheless, this is the language passed by the legislature and courts must attempt to give meaning to all language of a statute such that no language is rendered meaningless.[46] How courts will resolve this issue is subject to debate.

Will Decreases In Annual Budgeted Assessments Make The Act Inapplicable? Non-profit CICAs with annual budgeted assessments of $100,000.00 or less are exempt from the Act.[47] What is the effect if a non-profit CICA has annual budgeted assessments of more than $100,000.00 in one year, but $100,000.00 or less in a subsequent year? Does the Act apply in those years in which there is a drop below $100,000.00? How courts resolve this issue is also open for debate, but for the sake of clarity and consistency, it is the authors' opinion that the Act should have been drafted to apply *in toto*, or not at all. Triggering the application of the Act in this manner may lead to frustration and confusion over the extent of a non-profit CICA's legal obligations, for over time, as assessments rise due to inflation, more CICA's will begin crossing the $100,000.00 threshhold. Moreover, non-profit CICAs with annual budgets around $100,000.00 may deem compliance with the additional requirements imposed by the Act as too costly and purposefully seek to reduce their *budgets* under $100,000.00 to avoid application of the Act, even if they end up *collecting* more.

How Should Courts Address Provisions In CICA Declarations That Conflict With The Act? As previously noted, the Act only *expressly* invalidates conflicting CICA declaration provisions with regard to flags. This is in stark contrast to how conflicting declaration provisions are addressed under the Condominium Property Act, for 765 ILCS 605/2.1 expressly provides that "any provisions of a condominium instrument that contain provisions inconsistent with the provisions of this Act are void as against public policy and ineffective"[48]. There is no similar provision in the Act.[49] Other than those provisions that deal with flags, how are provisions in CICA declarations that conflict with the Act to be handled given the fact that both acts include a section entitled "Applicability" that begins with a virtually identical first sentence but only the Condominium Property Act includes a second sentence that makes a blanket invalidation of any conflicting provisions? The point is further underscored by the fact that the General Assembly expressly invalidated inconsistent provisions with regard to flags.

If the General Assembly intended the Act to trump inconsistent provisions in CICA's, it could have included a blanket provision like it did in the Condominium Property Act. Perhaps it concluded that general principles of statutory construction or case law alleviated the need for a blanket prohibition, although if it did, why would it have included a specific provision with regard to flags knowing that courts are to construe statutes so as to not render any provision superfluous[50]? It is the authors' belief that these issues are the result of drafting errors by the General Assembly, and that provisions in CICA declarations that conflict with the Act will be invalidated notwithstanding the points raised above.

Conclusion. While the Act effectively addresses, codifies, and clarifies the governance of CICAs, it does leave a number of issues open for debate. Through this introduction to the Act, those involved with CICAs should be better able to read, study, and analyze the Act in order to better understand its application and future impact. □

44 765 ILCS 160/1-10.
45 765 ILCS 160/1-10 (emphasis added).
46 Solon v. Midwest Med. Records Ass'n, Inc., 236 Ill. 2d 433, 440-41, 925 N.E.2d 11113 (2010).
47 765 ILCS 16001-75(a).
48 765 ILCS 605/2.1.
49 Compare 765 ILCS 605/2.1 with 765 ILCS 160/1-10.
50 Solon, 236 Ill.2d at 440-41.

SOMETIMES THE BEST JUDGMENT IS THE RESULT OF A TEAM EFFORT.

The team from the DuPage office of Ice Miller is here to assist you and your clients. We have extensive experience in regulatory and legislative issues, complex business transactions, mergers and acquisitions, land development and development related litigation, personal services, trusts and estates, succession planning, public finance transactions, litigation, class actions, higher education and construction law. With additional offices located in Chicago, Indianapolis and Washington, D.C., our attorneys number over 250 strong.

THE ATTORNEYS OF THE DUPAGE OFFICE OF ICE MILLER:

Mark Baggio
David Chroust
James Durkin
Thomas Hayes
Keoini Haynes
David Hight
Richard Johnson
Dean Leffelman
Mark McAndrew
Elizabeth McKillip
Laurie Miller
Bart Murphy
Michael Roth
Robert Schillerstrom
Eric Singer
James Snyder
Jenée Straub

2300 Cabot Drive, Suite 455
Lisle, IL 60532

Phone: 630-955-0555

www.icemiller.com

1910 - 2010
ICEMILLER LLP
Celebrating 100 Years of Client Service

A Guide to the Rules for Appeals to the Illinois Appellate Court

BY KRISTOPHER N. CLASSEN

For the unfamiliar, the rules governing appeals can be difficult to navigate. Here is a map. For the practitioner who is not versed in the intricacies of appellate procedure, negotiating the maze of rules laid out by the Supreme Court--and each of the five Appellate Court districts--can be a daunting, time-consuming task. To avoid becoming mired, or victimized, by the rules, use this step-by-step guide.

The basic rules governing appeals are very similar, regardless of the type of the appeal or the district in which it is filed. However, there are some subtle, and occasionally significant, variations. The below guide assumes a typical civil appeal. At each step, it notes any specialized rules, such as those relating to accelerated or interlocutory appeals.

Filing Notice of Appeal (Rules 301 – 310). The first step in almost all appeals is the filing of a notice of appeal,[1] the document that confers jurisdiction to the Appellate Court.[2] Normally, the notice of appeal must be filed within 30 days of the date of the order that is being appealed, or, if a timely post-judgment motion has been filed, within 30 days of its resolution.[3] The thirty-day limit is calculated as provided in the Statute on Statutes,[4] which mandates that, if the final day is a weekend or holiday, the deadline will fall on the first working day after.[5] Except in rare situations,[6] the notice of appeal must be filed with the Circuit Court, not the Appellate Court.[7] In civil cases, within seven days of the filing of the notice of appeal, the appellant must serve notice on any interested parties and file with the Appellate Court a notice of filing and a proof of service.[8] As with any materials filed in the Appellate Court, this service and proof of service must conform to Rules 11 and 12.[9] A notice of appeal will be deemed filed on the day it is received, or, if it is mailed and received after the due date, on the date it was mailed.[10]

The Rules provide exemplar forms for civil and criminal notices of appeal.[11] A notice of appeal must specify the order(s) to be appealed.[12] The Appellate Court will review orders not named in the notice of appeal only if a challenge to such orders can be inferred from the orders listed or if the unnamed orders were "a step in the procedural progression

1 Ill. Sup. Ct. R. 301 (civil cases); Ill. Sup. Ct. R. 606(a) (criminal cases); Ill. Sup. Ct. R. 660(a) (juvenile appeals follow criminal appeals rules).
2 *In re D.D.*, 212 Ill. 2d. 410, 417, 819 N.E.2d 300, 304 (2004).
3 Ill. Sup. Ct. R. 303(a) (civil); Ill. Sup. Ct. R. 606(b) (criminal).
4 Ill. Sup. Ct. R. 2 (adopting 5 ILCS 70/0.01).
5 5 ILCS 70/1.11.
6 See, for example, 35 ILCS 200/16-195 (certain property tax appeals filed directly with the Appellate Court); Ill. Sup. Ct. R. 335 (direct review of administrative orders in Appellate Court).
7 Ill. Sup. Ct. R. 303(a); Ill. Sup. Ct. R. 606(a); *First Bank v Phillips*, 379 Ill. App. 3d 186, 882 N.E.2d 1265 (2nd Dist. 2008).
8 Ill. Sup. Ct. R. 303(c). The Circuit Court clerk will serve any needed notice in criminal cases. Ill. Sup. Ct. R. 606(e).
9 Ill. Sup. Ct. R. 11 (methods of service); Ill. Sup. Ct. R. 12 (proof of service).
10 Ill. Sup. Ct. R. 373.
11 Ill. Sup. Ct. R. 303(b) (civil); Ill. Sup. Ct. R. 606(d) (criminal).
12 Ill. Sup. Ct. R. 303(b)(2).

leading" to the listed orders.[13]

In criminal cases, premature notices of appeal will be stricken.[14] In civil cases, the Rules offer a reprieve for early notices of appeal: so long as such a notice is filed after an order resolving a claim, it will be deemed to be filed as of the date any later-resolved claims (or post-judgment motions) are finalized.[15] There is, however, an important limitation on this reprieve. As noted, a notice of appeal confers appellate jurisdiction over only orders it describes. Thus, a premature notice of appeal cannot confer jurisdiction over later orders. To appeal those orders, another notice of appeal is required.

The failure to file a notice of appeal within the 30-day deadline normally precludes Appellate Court jurisdiction.[16] However, the Rules provide another chance for the would-be appellant who has missed the deadline: within the thirty days following the first thirty day deadline, a party with a reasonable excuse for the delay may move to file a late notice of appeal.[17] In criminal cases, the Rules extend this grace period to six months if the appellant can show that the appeal has merit and that the delay was not due to culpable negligence.[18]

Kristopher N. Classen is a law clerk to Justice Jack O'Malley in the Illinois Appellate Court, Second District. He graduated cum laude from the University of Illinois College of Law in 2004, and he received his B.S. in Business Management and Administration from Bradley University in 2001.

Permissive interlocutory appeals are initiated, still within the normal thirty day limit, by a petition to appeal as described in Rule 306(c).[19] The opposing party receives twenty-one days to file its answer.[20] Interlocutory appeals as of right follow the procedure for normal appeals.[21] Interlocutory appeals from certified questions must be sought within fourteen days by application as described in Rule 308(c); the opposing party receives fourteen days to answer the application.[22] Permissive interlocutory appeals of orders affecting child custody must be appealed by petition within fourteen days, and the notice of appeal must be served on the trial judge.[23] If the Appellate Court accepts the appeal of an interlocutory child custody order, the case will proceed as an accelerated appeal under Rule 311(a).[24]

Appeals from temporary restraining orders must be initiated by petition within two days, with the supporting record described in Rule 307(d).[25] The First District requires that parties file four (4) copies of any application or petition to appeal and specify on the cover page the Supreme Court Rule under which appeal is sought.[26]

A party may file a cross-appeal within thirty days of the final order being directly appealed or ten days of the notice of appeal, whichever is later.[27]

Appeals involving child custody (and, in the Second District, orders granting or denying petitions for removal[28]) are automatically accelerated under Rule 311.[29] Rule 311 provides a special caption that must be included on all filings in the case, including the notice of appeal.[30]

Filing and Responding to Motions (Rules 11, 12, and 361). With the exception of motions for extension of time (discussed below), motions in criminal and civil appeals are governed by the same rules.[31] Motions must be accompanied by proof of service as described in Rule 12. Parties must file two copies of each motion, except in the First District, which requires four copies,[32] and the motion must include a proposed order.[33] The First and Fourth Districts require that the motion title reflect the relief sought.[34] The Second District requires that motions contain an attorney's (or pro se party's) address and signature and follow the formatting guidelines of Rule 341(a).[35] In the Third District, motions (and responses) may not exceed eight pages.[36]

If the opposing party has no objection to a motion, the motion should so state.[37] Otherwise, the time an opposing party receives to respond to a motion depends on the

13 *Nieman v Economy Preferred Insurance Co.*, 357 Ill. App. 3d 786, 790-91, 829 N.E.2d 907, 911 (1st Dist., 2005).
14 Ill. Sup. Ct. R. 606(b).
15 Ill. Sup. Ct. R. 303(a).
16 *In re Estate of K.E.J.*, 382 Ill. App. 3d 401, 423, 887 N.E.2d 704, 723-24 (1st Dist. 2008); *People v Partee*, 125 Ill. 2d. 24, 29-30, 530 N.E.2d 460, 462 (1988).
17 Ill. Sup. Ct. R. 303(d); Ill. Sup. Ct. R. 606(c).
18 Ill. Sup. Ct. R. 606(c).
19 Ill. Sup. Ct. R. 306(a), 306(c).
20 Ill. Sup. Ct. R. 306(c)(2).
21 Ill. Sup. Ct. R. 307(a).
22 Ill. Sup. Ct. R. 308(c).
23 Ill. Sup. Ct. R. 306(b).
24 Ill. Sup. Ct. R. 306(b) (invoking Ill. Sup. Ct. R. 311(a)).
25 Ill. Sup. Ct. R. 307(d).
26 Ill. 1st Dist. Rule 8.
27 Ill. Sup. Ct. R. 303(a)(3).
28 Ill. 2nd Dist. Rule 106(a).
29 Ill. Sup. Ct. R. 311.
30 Ill. Sup. Ct. R. 311(a)(1).
31 Ill. Sup. Ct. R. 610.
32 Ill. 1st Dist. Rule 4(A).
33 Ill. Sup. Ct. R. 361(b).
34 Ill. 1st Dist. Rule 4(C); Ill. 4th Dist. Rule 8.
35 Ill. 2nd Dist. Rule 102.
36 Ill. 3rd Dist. Admin. Order 43.
37 Ill. Sup. Ct. R. 361(a).

method by which the motion was served: a party receives ten days for motions filed by mail or five days for motions served by facsimile or in person.[38] Absent "extraordinary circumstances," the Court may not rule on a contested motion until the time for response has passed.[39] Motions should be served (and filed) with this limitation in mind: if a party files a motion seeking relief within seven days but serves the motion by mail, it may not receive a timely ruling. As with notices of appeal, motions and responses will be deemed to be filed as of the date they are received, or, if received after the due date, on the date of mailing.[40] Replies to responses are not allowed without leave.[41]

In any appeal in which time is of the essence (if, for example, the appeal may soon become moot), a party may file a motion to accelerate pursuant to Rule 311(b).

Emergency motions are governed by local rule in all five districts. All but the Third District do not allow emergency motions to be filed unless the case has been docketed.[42] However, the First and Fifth Districts allow an appeal to be docketed upon receipt of an emergency motion if it is accompanied by a copy of the notice of appeal and relevant trial court documents.[43] All districts require emergency motions to include the words "Emergency Motion" in their titles. The First, Fourth, and Fifth Districts require emergency motions to be served personally, by overnight mail, or by facsimile; the Second District requires personal or facsimile service; and the Third District requires personal or overnight mail service. The Third District also requires that the moving party notify any other parties of the motion by telephone. The First, Second, and Fourth Districts require that emergency motions set forth any deadlines for a ruling as well as the nature of the emergency and the grounds for relief. Those districts also require that relevant documents be attached to the motion.

Motions for extension of time in criminal cases must be supported by an affidavit listing the date counsel was appointed, the date the record was filed, and the reason for the extension.[44] In the First District, motions for extension in civil and criminal cases must ask for a specific due date at least fourteen days after the original due date.[45] In the Second District, motions for extension in civil and criminal cases must describe the length of any extensions already granted, the total number of days that will have elapsed since the notice of appeal if the extension is allowed, and the date on which the appeal may become moot (or, in a criminal case, the status of the defendant's sentence).[46]

> The rules governing practice in the Illinois Appellate Court can be difficult to navigate, but this primer should provide sufficient guideposts to see you through, so you can avoid the procedural morass, and focus your energies where they belong: on your argument.

Motions in accelerated child custody appeals must include the special caption from Rule 311(a). In the Second and Fourth Districts, all motions in accelerated appeals should be served in person or by facsimile;[47] the Fifth District suggests as much for motions for extensions.[48] Requests for extensions in such cases are disfavored.[49] Requests for extensions based on delays in obtaining the record must be served on the trial judge and chief circuit judge and be accompanied by an affidavit from court reporting personnel.[50] The Second District also requires such motions for extension to detail the proceedings at the status hearing required by Rule 311(a)(3).

Filing a Docketing Statement (Rule 312). The form of a proper docketing statement is provided in Rule 312. It must be accompanied by any filing fees due and copies of requests for the record from Circuit Court personnel.[51] In a normal appeal, the docketing statement must be filed within fourteen days of the notice of appeal; in interlocutory appeals as of right, it must be filed within seven days; in permissive interlocutory appeals and appeals from temporary restraining orders, it must be filed with the

38 Ill. Sup. Ct. R. 361(b).
39 Ill. Sup. Ct. R. 361(d).
40 Ill. Sup. Ct. R. 373.
41 Ill. Sup. Ct. R. 361(b).
42 Ill. 1st Dist. Rule 6; Ill. 2nd Dist. Rule 108(a); Ill. 4th Dist. Rule 9; Ill. 5th Dist. Admin. Order (Jan 3, 2006).
43 Ill. 1st Dist. Rule 5; Ill. 5th Dist. Admin. Order (Jan 3, 2006).
44 Ill. Sup. Ct. R. 610.
45 Ill. 1st Dist. Rule 4(D).
46 Ill. 2nd Dist. Rule 103(a).
47 Ill. 2nd Dist. Rule 106(e); Ill. 4th Dist. Admin. Order 47.
48 Ill. 5th Dist. Admin. Order (April 1, 2010).
49 Ill. Sup. Ct. R. 311(a)(7).
50 Ill. Sup. Ct. R. 311(a)(4).
51 Ill. Sup. Ct. R. 312(a).

MOMKUS McCLUSKEY LLC

ATTORNEYS AT LAW

The Law Firm of Momkus McCluskey, LLC has served the DuPage County community for the past twenty years. The firm accepts referrals and co-counsel relationships in the following areas:

- Commercial and General Civil Litigation
- Business, Corporate and Transactional
- Financing, Loans and Commercial Real Estate
- Insurance Coverage
- Appeals
- Family Law
- Estate Planning
- Patents, Trademarks and Copyrights
- Employment

For more information, please contact one of the firm's members, Ed Momkus, Jim McCluskey, Jim Marsh, Angelo Spyratos, or Jefferson Perkins.

1001 Warrenville Road, Suite 500, Lisle, IL 60532 • Tel: 630.434.0400 • Fax: 630.434.0444 • www.momlaw.com

30 North LaSalle Street, Suite 2850 • Chicago, IL 60602-3481 • Tel: 312.345.1955 • Fax: 312.346.8300 • www.momlaw.com

petition or application to appeal.

Obtaining the Record (Rules 321 – 335). In criminal cases, the record on appeal is prepared as a matter of course.[52] In civil cases, within the time for filing a docketing statement, the appellant in a civil case must make a written request for preparation of the report of proceedings, which should include all information pertinent to the appeal.[53] The record, or a certificate in lieu of record pursuant to Rule 325, must be filed within 63 days of the notice of appeal.[54]

As the party that bears the burden to provide a record sufficient to support a claim of error, the appellant must ensure that the record contains all needed material.[55] In criminal and civil cases, physical evidence is not normally included in the record on appeal,[56] and all but the Fifth District by default do not accept such evidence as part of the record.[57] Thus, where such evidence is relevant, a party should move for its inclusion in the record. If no verbatim transcript is available, the appellant may substitute a certified bystander's report or an agreed statement of facts.[58] Omissions and inaccuracies in the record may be corrected by agreement, or, where there is dispute, by decree of the trial court.[59]

In permissive interlocutory appeals, appeals of temporary restraining orders, and appeals from certified questions, a supporting record (as described in Rule 328) must be filed with the petition or application to appeal.[60] The First District asks that parties submit four copies of supporting records, unless the supporting record is certified.[61] If the petition for a permissive interlocutory appeal is granted, or an application to present certified questions is allowed, the parties may file an additional record.[62]

The record in accelerated appeals must be filed within thirty-five days of the notice of appeal.[63]

Filing Briefs (Rules 341 and 342). After the record is filed, the appellant receives 35 days to file its white opening brief, the appellee thirty-five days to respond with its blue brief, and the appellant fourteen days to file a yellow reply brief;[64] these deadlines may be changed on motion.[65] If the parties opt to file briefs, the same schedule applies for appeals from certified questions[66] and from permissive interlocutory appeals not involving child custody.[67] The formatting guidelines for briefs in civil and criminal appeals are contained in Rule 341.[68] Along with typeface and other formal mandates, Rule 341 limits main briefs to fifty pages (and reply briefs to twenty pages), states that parties must file nine copies of each brief, and requires that briefs cite to the official reporters. Rule 341(h) describes the required sections of an appellant's brief; Rules 341(i) and (j) describe the less extensive requirements for response and reply briefs. If either party seeks oral argument, it should so indicate on the cover page of its briefs.[69] Rule 342 describes the materials that must be included in the appendix to the appellant's brief.[70]

The Third District does not allow statements of facts to exceed fifteen pages,[71] and it requires that the standard of review be discussed in a separate heading under each argument.[72] It also encourages parties to file five electronic copies of briefs on compact disc.[73]

In the First and Second Districts, after a brief is filed, parties may seek leave by motion to correct typographical errors, but parties may make substantive corrections only by filing a motion to withdraw the brief and substitute a new one.[74]

The appellee pursuing a cross-appeal should file a single response brief containing both response to the opening brief and argument supporting the cross-appeal.[75] The appellant receives thirty-five days to file a combined reply (on the appellant's appeal) and response (to the cross-appeal). The appellee then receives fourteen days to file a red cross-reply brief.

In interlocutory appeals as of right, the opening brief must be filed within seven days of the filing of the record; the response must be filed within seven days thereafter, and the reply seven days after that.[76]

In appeals of temporary restraining orders, the Appellate

52 Ill. Sup. Ct. R. 608.
53 Ill. Sup. Ct. R. 323(a).
54 Ill. Sup. Ct. R. 326.
55 *Foutch v O'Bryant*, 99 Ill. 2d 389, 459 N.E.2d 958 (1984).
56 Ill. Sup. Ct. R. 321.
57 Ill. 1st Dist. Rule 21(A); Ill. 2nd Dist. Rule 104(a); Ill. 3rd Dist. Admin. Order 1; Ill. 4th Dist. Rule 4.
58 Ill. Sup. Ct. R. 323(c) (bystander's report); Ill. Sup. Ct. R. 323(d) (agreed statement of facts); Ill. Sup. Ct. R. 612(c) (Rule 323 applies in criminal appeals).
59 Ill. Sup. Ct. R. 329.
60 Ill. Sup. Ct. R. 306(c)(1), 307(d)(1), and 308(c).
61 Ill. 1st Dist. Rule 20.
62 Ill. Sup. Ct. R. 306(c)(6) and 308(d).
63 Ill. Sup. Ct. R. 311(a)(4).
64 Ill. Sup. Ct. R. 343(a).
65 Ill. Sup. Ct. R. 343(c).
66 Ill. Sup. Ct. R. 308(d).
67 Ill. Sup. Ct. R. 306(c)(7).
68 Ill. Sup. Ct. R. 341; Ill. Sup. Ct. R. 612(i) (Rule 341 applies in criminal appeals).
69 Ill. Sup. Ct. R. 352(a).
70 Ill. Sup. Ct. R. 342(a); Ill. Sup. Ct. R. 612(j) (Rule 342 applies in criminal appeals).
71 Ill. 3rd Dist. Admin. Order 39.
72 Ill. 3d Dist. Admin. Order 48.
73 Ill. 3rd Dist. Admin. Order 52.
74 Ill. 1st Dist. Rule 23; Ill. 2nd Dist. Rule 101(c).
75 Ill. Sup. Ct. R. 343(b)(1).
76 Ill. Sup. Ct. R. 307(c).

Court will accept memoranda in lieu of briefs no longer than fifteen pages.[77] A respondent has two days after the filing of the petition for appeal to file a responsive memorandum, and no reply is allowed without leave.[78]

In accelerated child custody appeals, the Second District allows memoranda in lieu of briefs in accelerated child custody appeals.[79] In the First District, the appellant must file his or her opening brief within twenty-one days of the filing of the record on appeal; the appellee must respond within twenty-one days; and the appellant has fourteen days to reply.[80] The Second, Fourth, and Fifth Districts follow a 21-21-7 schedule;[81] the Third follows a 14-14-7 schedule.[82]

Oral Argument (Rules 351 and 352). If the Appellate Court grants oral argument, unless given leave of court, each side will receive no more than twenty minutes for its main argument, and the appellant will receive no more than ten minutes for rebuttal.[83] The Second District normally allows fifteen minutes for each main argument and five minutes for rebuttal;[84] the Fourth District allows twenty minutes and five minutes.[85] Recordings of oral arguments are posted on the Supreme Court's website soon after the arguments are held.

After the Court's Decision. The prevailing party may file a motion for costs pursuant to Rule 374. If the Appellate Court's decision was not published, the winning party also might consider a motion to publish pursuant to Rule 23.

Within twenty-one days of the Appellate Court's decision, a party may file a petition for rehearing pursuant to Rule 367.[86] Petitions for rehearing, which should have a green cover, may not exceed twenty-seven pages, and nine copies of such petitions must be filed. The losing party also may file a petition for leave to appeal to the Illinois Supreme Court,[87] or it may ask the Appellate Court to compel Supreme Court review via Rule 316 certification.

The rules governing practice in the Illinois Appellate Court can be difficult to navigate, but this primer should provide sufficient guideposts to see you through, so you can avoid the procedural morass, and focus your energies where they belong: on your argument. □

77 Ill. Sup. Ct. R. 307(d).
78 Ill. Sup. Ct. R. 307(d)(2).
79 Ill. 2nd. Dist. Rule 106(b).
80 Ill. 1st Dist. Rule 14(B).
81 Ill. 2nd Dist. Rule 106(c); Ill. 4th Dist. Rule 12; Ill. 5th Dist. Admin. Order (April 1, 2010).
82 Ill. 3rd Dist. Admin. Order 47.
83 Ill. Sup. Ct. R. 352(b); see Ill. Sup. Ct. R. 611(b) (Rule 352 applies in criminal appeals).
84 Ill. 2nd Dist. Rule 109(a).
85 Ill. 4th Dist. Rule 14.
86 Ill. Sup. Ct. R. 367; Ill. Sup. Ct. R. 612(o) (Rule 367 applies in criminal appeals).
87 Ill. Sup. Ct. R. 315; Ill. Sup. Ct. R. 317.

SIDEBAR: APPELLATE PRACTICE

Appellate Jurisdiction. *KT Winneburg v. The Calhoun County Board of Review*, ___ Ill.App.3d ___, 2010 WL 3838476 (4th Dist. 2010) (Appeal dismissed: "Subject-matter jurisdiction cannot be waived, stipulated to, or consented to by the parties, nor can it be conferred by estoppel. Jones v. Industrial Comm'n, 335 Ill. App.3d 340, 343, 269 Ill.Dec. 225, 780 N.E.2d 697, 700 (2002). Thus, even though respondents submitted to the circuit court's exercise of jurisdiction in this case, it remains their prerogative to challenge it on appeal.").

Arguments Not Raised in Briefs. *Mid-Century Insurance Company v. Founders Insurance Company*, ___ Ill. App.3d ___, 2010 WL 3768073 (1st Dist. 2010) (Decision Reversed: "Although the parties did not address this threshold issue of coverage in the trial court and both parties proceed before us under the assumption that the two policies provided overlapping insurance coverage, it is within our discretion to address this possibly dispositive issue.... While generally issues not raised at the circuit court level are considered waived, a reviewing court does not lack authority to address unbriefed issues and may do so... when a clear and obvious error exists in the trial court proceedings.... In choosing to address an unbriefed issue, we recognize that as a reviewing court, we must refrain from doing so if the effect would be to transform us from jurist to advocate.")

Cross-Appeals /Jurisdiction. *Illinois Council of Police v. Illinois Labor Relations Board*, ___ Ill.App.3d ___, 2010 WL 3834596 (1st Dist. 2010) (Dismissed for lack of jurisdiction: "We will not deny review of a petition not properly titled as a cross-petition where the cross-petitioner did not know it was the second party to file. A notice of appeal is to be liberally construed as a whole.... [T]he fact that the petition is not termed as a cross-petition does not deprive this court of jurisdiction. Further, pursuant to this court's order, the parties worked out a briefing schedule....").

Amendment to Rule 345. Briefs Amicus Curiae/Motion For Leave. Effective immediately. Rule 345 reads as follows: (a) Leave or Request of Court Necessary. A brief amicus curiae may be filed only by leave of the court or of a judge thereof, or at the request of the court. A motion for leave **must be accompanied by the proposed brief** and shall state the interest of the applicant and explain how an amicus brief will assist the court.

Judicial Estoppel: How Non-Disclosure of a Cause of Action in Bankruptcy May Spell Doom For A Subsequent Civil Action

BY BRIAN M. DOUGHERTY

Over the past few years, the U.S. has faced a dramatic rise in mortgage foreclosures. With this rise also came an increase in bankruptcy filings under the U.S. Bankruptcy Code ("Code").[1] For homeowners with a mortgage, in particular, Chapter 13 of the Code has had the salutary goal of allowing a debtor to pay off mortgage arrearages over time while making current payments on the mortgage.[2] Once a Chapter 13 bankruptcy petition is filed, all assets of the debtor become property of the bankruptcy estate.[3] One type of asset is a cause of action. However, failure to disclose a cause of action in a bankruptcy case can have severe consequences in the future.

Let's say homeowner is fired from his job. He thinks he was fired because of his race and files a charge of discrimination with the EEOC. Homeowner is delinquent on his mortgage and files for Chapter 13 protection. He fails to disclose his EEOC charge in his bankruptcy case. Homeowner later files a race discrimination lawsuit against his employer. At his deposition, employer's attorney shows homeowner his bankruptcy schedules and statement of financial affairs, which never disclosed his EEOC charge and were never amended to reflect his race discrimination lawsuit. Employer files a motion for summary judgment arguing that "judicial estoppel" bars this otherwise meritorious lawsuit because homeowner affirmed, under oath in his bankruptcy case, that he had no claim against his employer, and yet filed a race discrimination action. Guess what? Employer has a strong chance at winning this argument, because courts take seriously the issue of non-disclosure of assets in a bankruptcy case. This article will give a basic overview of Chapter 13 bankruptcies, how Illinois and federal courts define judicial estoppel, how judicial estoppel has been applied to bankruptcy proceedings, and how attorneys should address this issue in their practice.

Chapter 13 Overview. In a bankruptcy case, when the petition is filed, all assets of the debtor generally become property of the bankruptcy estate and under the control of the bankruptcy court.[4] Additionally, Section 541(a)(7) of the Code provides that after-acquired property (viz. property acquired after the bankruptcy commences) also becomes property of the estate.[5] In a Chapter 13 case, after acquired property is specifically included as property of the estate, but is only included before the case is closed, dismissed or converted to a case under Chapters 7, 11 or 12.[6]

1 In 2007, non-business bankruptcy filings totaled 822,590. By 2009, such filings had increased to 1,412,838. See www.uscourts.gov/Press_Releases.
2 11 U.S.C. § 1322.
3 11 U.S.C. §541.
4 11 U.S.C. § 541(a)
5 11 U.S.C. § 541(a)(7).
6 11 U.S.C. § 1306(a)(1).

When a bankruptcy case is filed, a debtor must also file his bankruptcy schedules (under oath) that disclose certain entities, assets and claims. The required schedules are provided for in Official Forms which are set forth in the Federal Rules of Bankruptcy Procedure.[7] Form 6 – Schedules - of the Official Forms contains important disclosure requirements. For instance, Schedule B, question 21 requires the disclosure of contingent and unliquidated claims. As we will see, this has been construed to mean lawsuits. Official Form 7 – Statement of Financial Affairs – also must be completed (under oath) by the debtor. Question 4 asks about suits and administrative proceedings to which the debtor is a party within one year preceding the filing of the bankruptcy case. Thus, an EEOC proceeding would fall within this category even if the lawsuit is not filed until *after* the commencement of the bankruptcy case. Question 8 asks about casualty losses and theft within one year preceding the bankruptcy case or since the commencement of the case. Thus, if one's vehicle was repossessed and sold after the case commenced, and the owner sues for conversion, this must be disclosed.

The debtor must also submit a Chapter 13 plan.[8] The plan places the debtor's future income within the supervision and control of the bankruptcy trustee in order to effectuate the plan's terms.[9] The trustee's duties include advising the debtor (including making sure the debtor's schedules and statement of financial affairs are accurate) and to ensure timely payments under the plan.[10] The purpose of the plan is to pay creditors over a prescribed period of time. The plan must also comport with certain statutory requirements. After the plan is filed there is a confirmation hearing after notice of the plan was provided to interested parties (viz. creditors).[11] The plan would be confirmed if certain requirements were met.[12] Thus, the bankruptcy court is has "an independent duty to scrutinize the proposed plan."[13] Unsecured creditors could object to the plan if their claims are not properly provided for.[14]

The debtor's debts under the plan would be discharged after payments are completed.[15] The bankruptcy court, under certain situations, can grant a discharge if payments are not completed.[16] The trustee or a creditor could move to dismiss the case if the debtor fails to file a plan, fails to make plan payments, or there is a material default under the plan.[17]

Judicial Estoppel at the State and Federal Levels. Judicial estoppel has its roots in Illinois as far back as 1930 when the appellate court acknowledged it in (coincidentally) a case that involved a prior bankruptcy proceeding.[18] Generally, judicial estoppel provides that a party who assumes a particular position in a legal proceeding is estopped from assuming a contrary position in a subsequent legal proceeding.[19] It is designed to promote the truth and to protect the integrity of the court system by preventing litigants from deliberately shifting positions to suit the exigencies of the moment.[20] In Illinois, judicial estoppel has five elements: 1) the two positions must be taken by the same party; 2) the positions must be taken in judicial proceedings; 3) the positions must be given under oath; 4) the party must have successfully maintained the first position and received some benefit; and 5) the two positions must be totally inconsistent.[21] Judicial estoppel's main focus is on the relationship between the litigant against who estoppel is being asserted and the judicial system.[22] Not to be confused with equitable estoppel, judicial estoppel does not require the party asserting estoppel to show that it was misled by the other party's words or conduct.[23] Judicial estoppel does not prevent pleading inconsistent theories in a lawsuit.

At the federal level, judicial estoppel is quite similar. The United States Supreme Court, in *New Hampshire v. Maine*,[24] has fashioned a more condensed test for judicial estoppel: 1) whether the party's later position is clearly inconsistent

Brian M. Dougherty is an associate at the law firm Goldstine, Skrodzki, Russian, Nemec and Hoff, Ltd. and is a member of the firm's Litigation Group. His practice in concentrated in commercial landlord-tenant matters, business torts, and in representing employees and employers in employment disputes arising under state and federal law.

7 These forms are also obtainable from the bankruptcy court's website. See, e.g., www.ilnb.uscourts.gov.
8 11 U.S.C. § 1321. Bankruptcy courts in the Northern District of Illinois use a "Model Chapter 13 Plan."
9 11 U.S.C. § 1322(a)(1).
10 11 U.S.C. § 1302(b)(4), (5).
11 11 U.S.C. § 1324.
12 11 U.S.C. § 1325.
13 In re Martin, 17 B.R. 924 (N.D. Ill. 1982).
14 11 U.S.C. § 1325(b)(1).
15 11 U.S.C. § 1328(a).
16 11 U.S.C. § 1328(b).
17 11 U.S.C. §§ 1307(c)(3), (4) and (6).
18 *Rifkin & Hart, Inc. v. S. Buchsbaum & Co.*, 257 Ill. 473 (1st Dist. 1930).
19 *Bidani v. Lewis*, 285 Ill. App. 3d 545, 675 N.E.2d 647 (1st Dist. 1996).
20 *Bidani v. Lewis*, 285 Ill. App. 3d 545, 675 N.E.2d 647 (1st Dist. 1996).
21 *Bidani v. Lewis*, 285 Ill. App. 3d 545, 675 N.E.2d 647 (1st Dist. 1996).
22 *Bidani v. Lewis*, 285 Ill. App. 3d 545, 675 N.E.2d 647 (1st Dist. 1996).
23 *Cf. County of Kendall v. Rosenwinkel*, 353 Ill. App. 3d 529, 818 N.E.2d 425 (2nd Dist. 2004) (elements of equitable estoppel).
24 *New Hampshire v. Maine*, 532 U.S. 742, 121 S.Ct. 1808 (2001).

with its earlier position; 2) whether the party has succeeded in persuading a court to accept the earlier position so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled; and 3) whether the party seeking to assert the inconsistent position would derive an unfair advantage or impose an unfair detriment if not estopped. The same rationale underlying Illinois cases also runs through the United States Supreme Court's reasoning: judicial estoppels prevents a party from prevailing on one phase of a case and later relying on a contradictory argument to prevail in another phase of a case.[25] The interest protected is that of the judiciary, and not the parties.[26] As seen at both levels, it does not matter that the party asserting estoppel has obvious liability to the other. Judicial estoppel diverts the issue from the merits of the case, allows the asserting party to act as an officer of the court (in the truest sense of the phrase), and alerts the court to the opposing party's attempt to dupe the court.

Since judicial estoppel exists at both levels, there may be a choice of law issue. If a lawsuit is filed in Illinois, but the prior judicial proceeding arose in Texas, which forum's law applies? Since the prior judicial proceeding is a bankruptcy case, the better reasoned argument is that federal judicial estoppel applies.[27] Additionally, federal judicial estoppel has fewer elements than Illinois judicial estoppel, so there are fewer issues to worry about.

Application to Bankruptcy Cases. Since a litigant might use a bankruptcy proceeding as a predicate for judicial estoppel, it would not be uncommon for judicial estoppel to arise at the state level. In an Illinois case, the appellate court affirmed the trial court's application of judicial estoppel where the plaintiff maintained that he was entitled to a share of partnership profits.[28] However, plaintiff failed to disclose that asset in his prior bankruptcy case. In his bankruptcy schedules, plaintiff failed to disclose any contingent and unliquidated claims, and failed to disclose any partnership interest in the prior years. The court found that plaintiff was able to avoid his creditors as a result of the non-disclosure.[29] Thus, plaintiff took inconsistent positions in separate legal proceedings, under oath and to his benefit.[30] While this case appeared to involve a Chapter 7 bankruptcy, its analysis would apply equally to judicial estoppel in Chapter 13 cases. The court did not discuss whether Illinois or federal judicial estoppel applied.

In *Cannon-Stokes v. Potter*,[31] the Seventh Circuit applied judicial estoppel to a debtor who failed to disclose her prior administrative proceeding in her pending Chapter 7 bankruptcy case. The court of appeals, relying on the Supreme Court's *New Hampshire* opinion, found that judicial estoppel applied to bar the debtor's civil suit which was filed after her bankruptcy proceeding was over. The court noted that six other courts of appeal have held that a debtor in bankruptcy who denied owning an asset cannot realize on that concealed asset after the bankruptcy was over. Plaintiff also argued that her bankruptcy attorney told her to omit her claim on her schedules. The court was not persuaded, stating that a client is bound by her attorney's (bad) advice even if the client relied on the advice in good faith.[32]

In an unpublished decision, the Seventh Circuit extended judicial estoppel to a Chapter 13 bankruptcy. There, plaintiff filed a charge of discrimination and three years later filed for Chapter 13 protection. Plaintiff did not disclose her then-pending lawsuit against her employer. The employer moved for summary judgment on judicial estoppel grounds and the motion was granted. The court of appeals affirmed.[33] The court held that there was no distinction between Chapter 7 and 13 bankruptcies, since both chapters require the full disclosure of assets.[34] The court also disregarded the plaintiff's argument that she did not intentionally fail to disclose the lawsuit, stating that her subjective intent was irrelevant.[35]

A district court in the Northern District of Illinois found that plaintiff was barred by judicial estoppel. There, the court found that plaintiff, who had filed for Chapter 13 bankruptcy, failed to amend line 21 of Schedule B of his bankruptcy schedules to disclose his claims against others.[36] The court also found that plaintiff's response to line 25 of his amended Schedule B did not disclose that he had a conversion or theft claim against defendants.[37] The court also rejected plaintiff's argument that he was not required to disclose the lawsuit since it was not yet filed, because that argument was undermined by the fact that he filed suit against defendants just weeks after the bankruptcy case

25 *New Hampshire v. Maine*, 532 U.S. 742, 121 S.Ct. 1808 (2001).
26 *New Hampshire v. Maine*, 532 U.S. 742, 121 S.Ct. 1808 (2001).
27 *See Heiser v. Woodruff*, 327 U.S. 726, 732, 83 S.Ct. 1028 (1946); *Taylor v. Sturgell*, 553 U.S. 880, 128 S.Ct. 2161, 2171 (2008) ("The preclusive effect of a federal-court judgment is determined by federal law"); accord *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1284 (11th Cir. 2002) (Applying federal judicial estoppel when prior case was in bankruptcy court); *Gann v. William Timblin Transit, Inc.*, 522 F.Supp.2d 1021, 1027 (N.D. Ill. 2007) ("Where a dispute exists over whether a lawsuit is precluded by a previous lawsuit filed in federal court, the federal rules of claim preclusion apply").
28 *Dailey v. Smith*, 292 Ill. App. 3d 22, 684 N.E.2d 991 (1st Dist. 1997).
29 *Dailey v. Smith*, 292 Ill. App. 3d 22, 684 N.E.2d 991 (1st Dist. 1997).
30 *Dailey v. Smith*, 292 Ill. App. 3d 22, 684 N.E.2d 991 (1st Dist. 1997).
31 *Cannon-Stokes v. Potter*, 453 F.3d 446 (7th Cir. 2006).
32 *Cannon-Stokes v. Potter*, 453 F.3d 446 (7th Cir. 2006).
33 *Becker v. Verizon North, Inc.*, 2007 WL 1224039 (7th Cir. 2007). *See also Leon v. Comcar Industries, Inc.*, 321 F.3d 1289 (11th Cir. 2003); *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598 (5th Cir. 2005) (Both *Leon* and *Jethroe* involved Chapter 13 bankruptcies).
34 *Becker v. Verizon North, Inc.*, 2007 WL 1224039 (7th Cir. 2007).
35 *Becker v. Verizon North, Inc.*, 2007 WL 1224039 (7th Cir. 2007).
36 *Thompson v. Bryant,* 2008 WL 1924954 (N.D. Ill. 2008).
37 *Thompson v. Bryant,* 2008 WL 1924954 (N.D. Ill. 2008).

was dismissed.[38]

In another district court case that was similar to *Cannon-Stokes*, the plaintiff actually amended his bankruptcy schedules after being caught failing to disclose a contingent and unliquidated claim.[39] However, that did not help plaintiff, as the court granted summary judgment to defendant. Reopening a bankruptcy case to disclose an asset does not demonstrate inadvertence or mistake, inasmuch as it shows that one has been caught and better make amends.[40] Thus, allowing a reopening of a bankruptcy case to amend a disclosure would only serve to foster litigants to conceal an asset and hope not getting caught. If they are caught and could remedy the situation by amending their schedules, there is really no incentive to be truthful in the first instance.[41]

Other federal courts have been faced with situations where a debtor has failed to list causes of action on his bankruptcy schedules and the outcomes have been the same.[42] Thus, courts have not shown much gratitude toward parties who fail to disclose assets in a bankruptcy case no matter what parties' excuses or their intent.

The application of judicial estoppel in a Chapter 13 bankruptcy does not require that the court confirm the Chapter 13 plan or enter an order discharging the debtor's debts. Under *New Hampshire*, there is no requirement that a bankruptcy court enter an order or final decision before the doctrine is applied.

The failure to disclose a cause of action in a Chapter 13 case is devastating to creditors. The creditors rely on the schedules and statement of financial affairs when reviewing the debtor's plan.[43] If the debtor paints a bleak picture of his finances, creditors may go along with the plan and fail to negotiate higher settlement for their claims.[44] A valuable cause of action also affects the creditors because, for instance, a debtor may ask the court for permission to prosecute the claim outside of the bankruptcy court and the court could grant such a request.[45] The creditors would stand to gain from that lawsuit if there is a settlement or judgment. In a Chapter 13 case, this is why courts are apt to apply judicial

38 *Thompson v. Bryant,* 2008 WL 1924954 (N.D. Ill. 2008).

39 *Bland v. Rahar,* 2008 WL 109388 (C.D. Ill. 2008).

40 *Bland v. Rahar,* 2008 WL 109388 (C.D. Ill. 2008).

41 *Bland v. Rahar,* 2008 WL 109388 (C.D. Ill. 2008); *Eastman v. Union Pacific R. Co.*, 493 F.3d 1151 (10th Cir. 2007).

42 *Hamilton v. State Farm Fire & Casualty Co.,* 270 F.3d 778 (9th Cir. 2001); *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598 (5th Cir. 2005) (Lawsuit pending while bankruptcy case was still open); *Lott v. Sally Beauty Company, Inc.*, 2002 WL 533651 (M.D. Fla. 2002) (Irreconcilable to deny being a party to an administrative proceeding while having filed an EEOC charge one month earlier); *Chandler v. Samford University*, 35 F.Supp.2d 861 (M.D. Ala. 1999) (collecting cases).

43 *In re Hoffman*, 99 B.R. 929 (N.D. Iowa 1989).

44 *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corporation*, 337 F.3d 314 (3rd Cir. 2003).

45 *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corporation*, 337 F.3d 314 (3rd Cir. 2003).

SIDEBAR: CIVIL PROCEDURE

Rule 216/Requests to Admit. *Oelze v. Score Sports Venture, LLC,* 401 Ill.App.3d 110, 126, 927 N.E.2d 137, 151 339 Ill.Dec. 596, 610 (1st Dist. 2010) , appeal denied by *Oelze v. Score Sports Venture, LLC*, (Table, No. 110346) (Text not available on WESTLAW). Reversing the trial courts denial of motion to deem facts admitted the 1st District found: "[I]n answering a request to admit, a party is not just supposed to make a formulaic assertion quoting [boilerplate] language. It is not supposed to state an answer lacking any detail of the extent of the "reasonable inquiry" it asserts that it made or why the "information known and readily obtainable" by it was insufficient to enable it to admit or deny the requests. The responding party must explain why its resources are lacking to such an the extent that it cannot answer the requests. Defendant did not do so. Accordingly, its failure to answer in detail results in admission of the requested facts.... [I]f defendant considered plaintiff's requests to admit to be inadequate, defendant should have filed a written objection to those requests. It chose not to do so. The court erred in denying plaintiff's motion to deem the facts admitted.

Amendments to Rule 216 and Rule 222. Since the decision in Oelze, the most recent case in which an appellate court found that failure to comply with the rule could result in admission, Rule 216 has been amended to better ensure that litigants are aware that a Rule 216 request has been filed and must be answered. New Rule 216, which takes effect January 1, 2011, limits the number of requests that may be filed without leave of court to 30, requires that the requests be served in a separate document and include a warning notice on the first page of the document. The notice must be in 12 point type or larger, in bold and read as follows: "WARNING: If you fail to serve the response required by Rule 216 within 28 days after you are served with this paper, all the facts set forth in the requests will be deemed true and all the documents described in the requests will be deemed genuine." Rule 222 is also being amended to provide that requests to admit under Rule 216 are allowed in cases involving limited discovery but that the requests must be served no later than 60 days before trial.

Employer liability/Notary Training. *Vancura v. Katris*, 391 Ill. App. 3d 350 (October 7, 2010) (Illinois Supreme Court reversed and remanded, finding the Illinois' Notary Public Act, unlike the Model Act, does not require employers to train notaries. If undertaken, however, any training provided should comport with the Illinois' Act rather than the Model Act).

estoppel – it prevents the bankruptcy court from properly administering the Chapter 13 plan and destroys the integrity of the equitable distribution of assets.[46]

For instance, a debtor could file for bankruptcy protection, omit assets on his schedules, have his case dismissed, and then proceed with a cause of action that should have been disclosed. A debtor would then argue that he received no benefit because his case was dismissed. Courts have systematically rejected such an approach.[47]

How to Avoid the Problem. Judicial estoppel is a rarely used doctrine, but given the rise in bankruptcy filings, "an ounce of prevention is worth a pound of cure." Based on the cited authorities, even an inadvertent mistake in the bankruptcy forum may prove costly. Inexperienced laypersons should not be filing *pro se* bankruptcy petitions, let alone completing their bankruptcy schedules. Since a party's intent is irrelevant when applying judicial estoppel, liability is virtually strict.

Plaintiffs' attorneys should ask their clients about recent bankruptcy filings and explain why that information is necessary for litigation purposes. Clients may feel uncomfortable or embarrassed in disclosing that information, but the ramifications could be severe. Clients should be advised to keep their attorney apprised of any bankruptcy filings that arise during the course of the representation because it could impact their case. By doing this, the practitioner can protect himself and it at least memorializes that the advice was given. If a client does come to you for bankruptcy advice and you do not regularly practice in that area, referral to a bankruptcy attorney should be automatic.

Aside from trying to avoid the problem, defense attorneys have a weapon at their disposal. It also does not hurt to ask in discovery whether the plaintiff has filed for bankruptcy within the past seven years. The question is indeed relevant, as what items might be disclosed are unknown. Electronic research databases also include bankruptcy filings as part of their public records. One could also research an individual on the various bankruptcy courts' websites. This will disclose any bankruptcy petitions, the schedules and statement of financial affairs of which can be printed. A little research does not hurt, because based on the authorities, the judicial estoppel weapon is close to indefensible in this area of the law. □

46 *Rosenshein v. Kleban*, 918 F.Supp. 98 (S.D.N.Y. 1996).

47 *Rosenshein v. Kleban*, 918 F.Supp. 98 (S.D.N.Y. 1996); *In re Hoffman*, 99 B.R. 929 (N.D. Iowa 1989); *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corporation*, 337 F.3d 314 (3rd Cir. 2003).

LAW OFFICES

DiTommaso ♦ Lubin

CLASS ACTION LITIGATION

In our prosecution and defense of class actions throughout the United States in Federal and State Courts, we are proud of our recent accomplishments, which include the following:

Recent Class Actions

Walczak v. Onyx Acceptance Corporation
Class certification order affirmed by the Appellate Court. 365 IllApp3d 664. Represented class with co-counsel in claims involving alleged violations of Illinois automobile repossession laws. Case settled with each of the over 7,600 class members able to claim up to $2000, and forgiveness of automobile debt totaling $6.5 million.

S37 Management, Inc. v. Advance Refrigeration, Inc.
Court certified claims involving allegedly deceptively labeled, non-tax charges called government processing fee in the tax line of customer bills.

Terrill v. Hilton
Court certified a class of all customers of Hilton's Oakbrook Terrace Hotels. Following successful interlocutory appeal (788 NE2d 789), judgment in favor of the class for millions of dollars in damages, prejudgment interest and all attorneys' fees. Affirmed on appeal. Class received in excess of 90% of overcharges following win on appeal.

Morales v. Verve Global
Court certified class of all students who took a medical sonography course but did not obtain jobs in the field. Class alleges violations of Illinois vocational school and consumer fraud acts for school's alleged failure to disclose that very few students obtain jobs in the field.

Brown v. lululemon
Representing plaintiff employees in claims that clothing retailer allegedly violates a number of different states' wage laws for allegedly failing to pay sales clerks as to tasks and work they are required to perform without pay.

Boudas v. Abercrombie & Fitch
Representing consumers that received a $25 purchase reward card that did not contain an expiration date but which defendant claims should have contained an expiration date and will no longer honor.

Erickson v. Ameritech
Court certified consumer fraud claims for failure to disclose hidden voice mail charges. In 2005, Crain's Chicago Business listed the settlement as the third highest settlement/verdict in Illinois.

Defense
Defended national marketing company in four Fair Credit Reporting Act class claims seeking over $100,000,000 brought in federal court in Chicago and Maryland. Defended national residential mobile home rental chain in consumer fraud claims. Defended a number of large to mid-size companies in class claims throughout the country including defending a landlord in class claims alleging violations of Illinois security deposit laws and a municipality in claims involving alleged illegal fines. Also act as advisors and co-counsel with attorneys who have asked us to assist them in defending their clients in class-claims.

We are also Investigating the Following Potential Claims...

...and enter into referral and co-counsel agreements with attorneys who assist us in prosecuting class claims:

Manufacturers, retailers and advertisers who materially misrepresent how a product works or performs.

Vocational Schools where students don't obtain work as a result of the course and the school fails to provide the poor job statistics in the enrollment agreements.

Excessive late fees charged by rental apartment complexes, including late fees on common area utility bills, rent payment bills and assessments.

Violations of Federal and state Wage claim laws by failing to pay overtime to salaried employees.

Violations of automobile repossession laws.

Areas of Interest:

Healthcare Product Fraud
Defective Car & Vehicle Products
Insurance Fraud
Fair Credit Reporting Act–FCRA
Fair Debt Collection Practices Act–FDCPA
Privacy Violations
Violation of Car Repossession Statutes
Vocational School Deception
Excessive Late Charges
Wage & Hour Overtime Violations
Infomercials & Deceptive Advertising
Federal and State Wage Claim Laws

DiTommaso Lubin, P.C. | Principal Counsel: Vincent L. DiTommaso, Peter S. Lubin
17 W. 220 22nd Street, Suite 200 | Oakbrook Terrace, Illinois 60181 | Tel: 630-333-0000 | Fax: 630-333-0333
E-mail: classaction@ditommasolaw.com | www.ditommasolaw.com

Is The Illinois Vehicle Forfeiture Statute Unconstitutional?

BY ALEXANDER J. GEOCARIS

In Illinois, the law permits the seizure of any vehicle that was used in the commission of certain crimes by the sheriff of the county of seizure and could result in possible forfeiture proceedings.[1] To illustrate, a person who gets arrested for driving under the influence (DUI) of alcohol, while their license is suspended because of a prior DUI, can be charged with an aggravated DUI. Under the Illinois forfeiture statute, the arrested person's vehicle can be seized by the county sheriff and a forfeiture proceeding could also result.[2] At the time of the arrest, the sheriff seizes the person's vehicle since it was used for the commission of the aggravated DUI. The State's Attorney in the county could bring a forfeiture proceeding against the person and, if successful, the proceeds of any sale of the vehicle would go to the county.[3] However, a problem arises because the statute does not require a pre-seizure or a post-seizure hearing to allow the vehicle to be seized by the sheriff. For that reason, in this author's opinion, the statute should be held unconstitutional.

The Eighteenth Judicial Circuit Court (DuPage County) held in *People v. One 1998 GMC*[4] that the Illinois Vehicle Statute violated "the Due Process Clause of the Illinois Constitution and the Fifth and Fourteenth Amendment of the United States Constitution."[5] The court held that when depriving a person of his property, the State is required to have either a pre-seizure hearing or a post-seizure hearing since depriving a person of property has been a long protected right.[6] Two Illinois Appellate Courts disagree with the circuit court's conclusion.

The Second District Appellate Court of Illinois in *People v. 1998 Ford Explorer*[7] affirmed the judgment of the circuit court of Kane County that the Illinois Vehicle Statute is

1 See 720 ILCS 5/36-1 et seq. (2008); 720 ILCS 5/36-2 (2008).

2 Under the statute, certain offenses are listed from the Illinois Vehicle Code, such as: 625 ILCS 5/11-204.1 ("Aggravated fleeing or attempting to elude a peace officer"); 625 ILCS 5/11-501(d)(1)(A) ("Aggravated driving under the influence of alcohol, other drug or drugs . . . ."); 625 ILCS 5/11-501(d)(1)(G) (Getting a DUI while the defendant's driving privileges were revoked or suspended); 625 ILCS 5/6-303 ("Driving while driver's license, permit or privilege to operate a motor vehicle is suspended or revoked."); 625 ILCS 5/6-101 (Driving without a license or permit).

3 See 720 ILCS 5/36-2 (2008).

4 *People v. One 1998 GMC*, 2009 WL 3856411, at *1 (18th Cir. Nov. 17, 2009).

5 *People v. One 1998 GMC*, 2009 WL 3856411, at *2 (18th Cir. Nov. 17, 2009).

6 People v. One 1998 GMC, 2009 WL 3856411, at *19 (18th Cir. Nov. 17, 2009).

7 People v. 1998 Ford Explorer, 399 Ill. App. 3d 99, 926 N.E. 2d 999 (2d Dist. 2010).

not unconstitutional.[8] The appellate court held that a pre-seizure hearing or a post-seizure hearing is not required since a forfeiture proceeding satisfies due process.[9] Similarly, the First District Appellate Court of Illinois in *People v. 1998 Lexus GS 300* [10] affirmed the judgment of the circuit court of Cook County holding that the statute is constitutional, and no pre-seizure or post-seizure hearing is required.[11] The appellate court did not go as in-depth as the Second District since it merely relied on the Second District's analysis in *1998 Ford Explorer.*[12] Even though both appellate courts held that the statute was constitutional, the Eighteenth Judicial Circuit Court of DuPage County makes a strong argument that the forfeiture statute is unconstitutional.

In examining the Illinois Vehicle Forfeiture Statute and the decisions from the Eighteenth Judicial Circuit Court and the Second District Court, the rationale articulated by the Circuit Court makes a stronger argument that the forfeiture statute is unconstitutional.

The Illinois Vehicle Forfeiture Statute. Section 36-1 of the statute states, "Any vessel, vehicle or aircraft used with the knowledge and consent of the owner in the commission of, or in the attempt to commit as defined in Section 8-4 of this Code, an offense… may be seized and delivered forthwith to the sheriff of the county of seizure."[13] If a person commits one of the offenses listed by the statute with his vehicle or an owner of a vehicle had knowledge and gave consent to a person to use his vehicle in the commission of one of the offenses listed, then that vehicle used in commission of the offense could be seized and delivered to the sheriff of the county of seizure.[14]

Section 36-1 further states that the sheriff must give notice of the seizure within fifteen days after delivery of the vehicle "[u]pon each such person whose right, title or interest is of record in the office of the Secretary of State, the Secretary of Transportation . . . by mailing a copy of the notice by certified mail to the address as given upon the records of the Secretary of State . . . . Within that 15 day period the sheriff shall also notify the State's Attorney of the county of seizure about the seizure."[15]

Section 36-1 allows a spousal exception to forfeiture if the spouse of the owner of the vehicle can "make a showing that the seized vehicle is the only source of transportation and it is determined that the financial hardship to the family as a result of the seizure outweighs the benefit to the State from the seizure."[16] In which case, the vehicle may be turned over to the spouse or family member and the title to the vehicle should be transferred to the spouse or family member who is properly licensed and who requires the use of the vehicle for employment or family transportation purposes

Alexander J. Geocaris, obtained his B.A. from Augustana College in 2008, and is currently a J.D. Candidate for graduation in May 2011 from Northern Illinois University College of Law. He is currently Managing Editor of the Northern Illinois University Law Review.

The requirements for a forfeiture action are set forth in Section 36-2. Paragraph (a) grants the State's Attorney the discretion to determine whether there exist any mitigating factors which would justify causing the sheriff to release the vehicle back to the owner.[17] If the State's Attorney "finds that such forfeiture was incurred without willful negligence or without any intention on the part of the owner of the vessel, vehicle or aircraft . . . to violate the law, or finds the existence of such mitigating circumstances as to justify remission of the forfeiture. . . ." the State's Attorney may cause the sheriff to remit the vehicle "upon such terms and conditions as the State's Attorney deems reasonable and just."[18] Section 36-2 also provides that "[t]he State's Attorney shall give notice of the forfeiture proceeding by mailing a copy of the Complaint in the forfeiture proceeding to the persons, and upon the manner, set forth in Section 36-1."[19]

The State bears the burden to prove "by a preponderance of the evidence" that the vehicle was used in the commission of an offense set forth in Section 36-1.[20] The owner of a vehicle, however, may also show "by a preponderance of the evidence" that the owner did not know or have reason to know the vehicle was used in commission of a crime.[21] If the State proves its burden, then the vehicle can be destroyed, sent to a State agency, or sold at a public auction with the proceeds going to the county of seizure.[22] The same discretion conferred upon the State's Attorney prior to an action for forfeiture, is afforded to the Attorney General under Section 36-4, which provides that a person or

8 1998 Ford Explorer, 399 Ill. App. 3d at 100.
9 1998 Ford Explorer, 399 Ill. App. 3d at 103.
10 *People v. 1998 Lexus* GS 300, ___ Ill. App. 3d ___, 930 N.E.2d 582 (1st Dist. 2010).
11 1998 Lexus GS 300, 930 N.E.2d at 587.
12 1998 Lexus GS 300, 930 N.E.2d at 587.
13 720 ILCS 5/36-1 *et seq*. (2008).
14 720 ILCS 5/36-1 *et seq*. (2008).
15 720 ILCS 5/36-1 *et seq*. (2008).
16 720 ILCS 5/36-1 *et seq*. (2008).
17 720 ILCS 5/36-2 (2008).
18 720 ILCS 5/36-2 (2008).
19 720 ILCS 5/36-2 (2008).
20 720 ILCS 5/36-2 (2008).
21 720 ILCS 5/36-2 (2008).
22 720 ILCS 5/36-2 (2008).

interested person can file a petition for remission of forfeiture with the Attorney General before the sale or destruction of vehicle that was seized.[23] Remission should be granted if the Attorney General finds that there was no willful negligence or intention on part of the owner to violate the law, or if there is some mitigating circumstances.[24]

The Statute is silent as to whether a pre-seizure or a post-seizure hearing is required prior to a full forfeiture proceeding. Section 36-2 only states that the State's Attorney should give prompt notice when exercising discretion on whether to bring an action for forfeiture.[25] Once a vehicle is seized, a person is deprived of his vehicle, which could be for a substantial amount of time. It is at the seizure stage that the constitutionality of the statute is questioned.

> ...the Eighteenth Judicial Circuit Court of DuPage County makes a strong argument that the forfeiture statute is unconstitutional.

The DuPage Circuit Court's Reasoning That the Forfeiture Statute is Unconstitutional. The Eighteenth Judicial Circuit Court in *One 1998 GMC* found that the forfeiture statute was unconstitutional.[26] In *One 1998 GMAC*, three cases were consolidated to one trial in which all three of the claimants challenged the forfeiture statute as violating "the Due Process Clause of the Illinois Constitution and the Fifth and Fourteenth Amendments of the United States Constitution because it fails to provide a mechanism to challenge the State's right to seize and hold their vehicles while awaiting trial on the merits of the State's claim."[27]

To analyze whether the statute violates the Due Process Clause of the Fourteenth Amendment, the court looked at three factors established by the Supreme Court in *Matthews v. Eldridge:*[28]

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[29]

In its conclusion, the Circuit Court discussed the importance of property rights and the protections of a person's property. The court found, "The right to own and to possess property free from governmental interference is as old as the Magna Carta and is bedrock to the Anglo-American legal system."[30]

The Circuit Court cited the U.S. Circuit Court in *Krimstock v. Kelly*.[31] In *Krimstock*, the court applied the *Matthews* factors to a New York City ordinance that permitted vehicle forfeiture proceedings.[32] The court in *Krimstock* found that once a person challenges the validity of a seizure before a trial, if the government cannot "establish probable cause for the initial seizure or offer post-seizure evidence to justify continued impoundment, retention of the seized property runs afoul of the Fourth Amendment."[33] According to the DuPage County Circuit Court, "*Krimstock* reasoned, therefore, that a procedural mechanism must exist to enable a person deprived of his or her property to test the government's rights to hold the seized property during the pendency of the forfeiture proceeding."[34]

When applying the *Matthews* factors, the DuPage County Circuit Court found that the private interest affected would be significant.[35] The court reasoned that the loss of use and possession of using ones vehicle while waiting for a forfeiture action on the merits is a serious interest that is affected in today's

23 720 ILCS 5/36-4 (2008).
24 720 ILCS 5/36-4 (2008).
25 720 ILCS 5/36-2 (2008).
26 *People v. One 1998 GMC*, 2009 WL 3856411, *1 (18th Cir. Nov. 17, 2009).
27 *People v. One 1998 GMC, 2009* WL 3856411, *4 (18th Cir. Nov. 17, 2009).
28 *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976).
29 *Matthews*, 424 U.S. at 335.
30 *People v. One 1998 GMC*, 2009 WL 3856411, *5 (18th Cir. Nov. 17, 2009). The court also stated the protection of property "is echoed in Thomas Jefferson's paraphrase of John Locke's statement of the inalienable rights of mankind—'life liberty and property'—contained in the Declaration of Independence. It is preserved, verbatim, in the Bill of Rights of the Illinois Constitution, the Fifth Amendment to the United States Constitution and made applicable to all 50 states by the Fourteenth Amendment: '[N]o person shall . . . be deprived of life liberty or property, without due process of law.'" Id. at *5.
31 306 F.3d 40 (2d Cir. 2002).
32 One 1998 GMC, 2009 WL 3856411, at *4-5.
33 *Krimstock v. Kelly*, 306 F.3d 40, 50 (2d Cir. 2002), quoting *Marine Midland Bank, N.A. v. United States*, 11 F.3d 1119, 1125 (2d Cir. 1993).
34 *People v. One 1998 GMC*, 2009 WL 3856411, *5 (18th Cir. Nov. 17, 2009). The court in Krimstock provided a good example of why a post-seizure hearing would be warranted. "For example, at a retention hearing, the City might succeed in showing that police officers had probable cause for seizing the vehicle of a DWI arrestee, yet be unable to establish the probable validity of continued deprivation pendente lite in the face of proof of innocent ownership or evidence that the Breathalyzer test had registered inaccurate results." *Krimstock*, 306 F.3d at 49.
35 *One 1998 GMC, 2009* WL 3856411, at *7.

society.[36] The court also found that, "[The forfeiture statute] runs substantial risks of erroneously depriving owners of their property pending trial. It fails to provide either a meaningful, timely or procedurally correct mechanism to test the State's right to hold their vehicles as required by the Due Process Clause of the Illinois and United States Constitutions."[37]

The court recognized the government's interest in enforcing the forfeiture statute to deter crime and the administrative burden for requiring such hearings. However, the court found that the government's interest is "overshadowed by the importance of the right at stake."[38] The court thus concluded that the forfeiture statute violates the Due Process Clause of the Illinois Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.[39]

The Second District's Reasoning As to the Constitutionality of the Forfeiture Statute. In an unrelated case, the Second District Illinois Appellate Court came to the opposite conclusion. The Second District in *1998 Ford Explorer,* found that the Illinois forfeiture statute is constitutional.[40] Similar to the DuPage County case, in *1998 Ford Explorer*, three Kane County cases were consolidated into one trial in which all three claimants alleged the forfeiture statute violated their due process rights by not providing a post-seizure hearing.[41] The appellate court started its analysis by looking at the *Matthews* factors, but then did not apply those factors. The court looked instead to a Supreme Court case that dealt with delays in forfeiture proceedings,[42] *United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in United States Currency*.[43]

In *$8,850*, the Supreme Court held that an 18 month delay from the seizure of the claimant's currency from the time the forfeiture action is filed did not violate the claimant's due process rights.[44] The Court held that the delay was reasonable based on a four-part test set forth in *Barker v. Wingo*.[45] The Court found, "Under *Barker*, a speedy trial case, a court must weigh four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant."[46]

The Court thus held that, 18 months was a substantial time, the delay was justified since the Government made reasonably diligent efforts to process the petition for forfeiture and the claimant did not assert her right to an earlier forfeiture proceeding or show the delay prejudiced her ability to defend against the forfeiture.[47]

The Second District, in reliance on *Barker,* held in *1998 Ford Explorer* that the claimants did not meet the *Barker* factors or argue that the delays were unreasonably long from the seizure of their vehicles to the time that the orders of forfeiture were entered.[48] The court noted that the claimants had argued they were deprived of the use of their vehicles during the delay, but the court stated "the Supreme Court has held that a forfeiture proceeding satisfying the *Barker* test satisfies any due process right with respect to the vehicle itself."[49] The court concluded that the claimants did not make a showing that the delayed forfeiture proceedings prejudiced them and therefore affirmed the Kane County circuit court.[50]

The DuPage Circuit Court Makes a Stronger Argument for Holding the Forfeiture Statute Unconstitutional. One of the main reasons that the DuPage Circuit Court makes a stronger argument than the Second District Illinois Appellate Court is the Circuit Court's conclusion that *$8,850* does not apply when a claimant is seeking a prompt pre-seizure or prompt post-seizure hearing to challenge the seizure of a claimant's vehicle.

The facts of *$8,850* are distinguishable from the facts in *Krimstock*, *1998 Ford Explorer*, and *One 1998 GMC*. There is a unique difference when the forfeiture is for currency and when the forfeiture is for a person's vehicle.[51] In *$8,850*, the seizure was of currency which occurred after the claimant lied to customs inspectors about not having currency over $5,000.[52]

36 *One 1998 GMC, 2009* WL 3856411, at *7 ("Automobiles have been recognized as the means by which citizens get to work, take their children to school, purchase groceries and other necessities of life and attend medical appointments.... The loss of the use and possession of a vehicle is often compounded by the fact that payments are owed on those vehicles. The loss of use of that vehicle may result in that person's inability to hold a job and generate the income necessary to maintain those payments. In such a situation, the owner may lose the vehicle to a bank or finance company whether or not the State prevails on its claim and continue owing their creditor on any deficiency that may result on the loan").

37 *One 1998 GMC*, 2009 WL 3856411, at *15. The court found that the safeguards in the forfeiture against erroneous deprivation were not enough since there are no deadlines for the forfeiture hearing to take place once the action is filed. *Id.* at *8. The State argued that the statute protects erroneous deprivation with Sections 5/36-1, 5/36-2, and 5/36-4 but the court argued that these Sections set no time limits and 5/36-4 does not have a "promptly" time requirement like 5/36-2. *Id.* at *9.

38 *One 1998 GMC*, 2009 WL 3856411, at *16. The court reasoned that "we are dealing with a right regarded by the Constitution as worthy of due process protection and historically fundamental to our legal system. Providing a forum to ensure the protection of such rights is what courts do." *Id.*

39 *One 1998 GMC*, 2009 WL 3856411, at *16.

40 *People v. 1998 Ford Explorer*, 399 Ill. App. 3d 99, 100, 926 N.E. 2d 999 (2d Dist. 2010).

41 *1998 Ford Explorer*, 399 Ill. App. 3d at 101.

42 *1998 Ford Explorer*, 399 Ill. App. 3d at 101.

43 *United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in United States Currency* 461 U.S. 555, 103 S.Ct. 2005 (1983).

44 *$8,850, 461 U.S.* at 556.

45 *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972).

46 *1998 Ford Explorer*, 399 Ill. App. 3d at 102, citing *$8,850*, 461 U.S. at 564.

47 *$8,850*, 461 U.S. at 569-70.

48 *1998 Ford Explorer*, 399 Ill. App. 3d at 103.

49 *1998 Ford Explorer*, 399 Ill. App. 3d at 103, citing *United States v. Von Neumann*, 474 U.S. 242, 251, 106 S.C.t. 610 (1986).

50 *1998 Ford Explorer*, 399 Ill. App. 3d at 103-04.

51 *The court in One 1998 GMC* recognized this in finding, "[a]s *Krimstock* noted, 'the particular importance of motor vehicles derives from their use as a mode of transportation and, for some, the means to earn a livelihood.'" *One 1998 GMC*, 2009 WL 3856411, at *9, quoting Krimstock, 306 F.3d at 61.

52 *$8,850*, 461 U.S. at 558.

The issue argued by the claimant was not that the seizure proceeded without a hearing, but that his due process rights were violated due to the 18 month delay between the initial seizure and the filing of the forfeiture proceeding.[53]

The argument presented by the claimants in both *1998 Ford Explorer* and *One 1998 GMC* was that the Illinois forfeiture statute is unconstitutional because it does not provide for a pre-seizure or post-seizure hearing to allow the claimant to challenge the initial seizure of the vehicle. The court in *$8,850*, on the other hand, analyzed whether the delay between the seizure and forfeiture proceeding was unreasonable in light of the *Barker* factors. The *Barker* factors should not apply to cases like *1998 Ford Explorer* and *One 1998 GMC,*[54] as the *Barker* factors deal with the Sixth Amendment right to a speedy trial, not the Fifth Amendment Due Process right.[55] Accordingly, the Second District Illinois Appellate Court in *1998 Ford Explorer* should not have looked to *$8,850* nor the factors set forth from *Barker*.

Instead, the Second District should have applied the same analysis that the DuPage Circuit Court applied in *One 1998 GMC,* following *Krimstock*'s analysis and evaluating the *Matthews* factors. The *Matthews* factors "should be used to evaluate the adequacy of process offered in post-seizure, pre-judgment deprivations of property in civil forfeiture proceedings."[56] The court in *Krimstock* stated that the seizure of one's property even in the civil forfeiture context is also protected by the Fourth Amendment's protection against unreasonable seizures.[57] The *Krimstock* court stated that:

> "[A]t a minimum, the hearing must enable claimants to test the probable validity of continued deprivation of their vehicles, including the City's probable cause for the initial warrantless seizure. In the absence of either probable cause for the seizure or post-seizure

53 *$8,850*, 461 U.S. at 560-61.

54 The court in *Krimstock* stated, "[t]he Constitution, however, distinguishes between the need for prompt review of the propriety of continued government custody, on the one hand, and delays in rendering final judgment, on the other." 306 F.3d 40, 68 (2d Cir. 2002).

55 The Supreme Court in *$8,850* acknowledged this but proceeded to apply the *Barker* factors to the forfeiture of the currency since the claimant was challenging the length of time between the seizure and the forfeiture proceeding. *See* 461 U.S. at 564.

56 *Krimstock*, 306 F.3d. at 60.

57 *Krimstock*, 306 F.3d at 49. The court stated, "[s]ome risk of erroneous seizure exists in all cases, and in the absence of prompt review by a neutral fact-finder, we are left with grave Fourth Amendment concerns as to the adequacy of an inquiry into probable cause that must wait months or sometimes years before a civil forfeiture proceeding takes place. Our concerns are heightened by the fact that the seizing authority in this case 'has a direct pecuniary interest in the outcome of the proceeding.'" *Id.* at 50-51, *quoting United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55-56, 114 S.Ct. 492 (1993).

WORKING TO WIN

We invest 100% of our time and energy to delivering first-class service to our clients. As a result, our valued clients and friends refer their family, friends and work associates to us for advice on their legal matters. We build strong, life-long relationships one person at a time.

Family Law | Traffic Matters | Criminal Defense

WWW.IllinoisDivorcetips.com

WWW.YourAffordableDefense.com

630.472.9700

WWW.OakBrookLaw.com

1200 Harger Road, Suite 706, Oak Brook, IL 60523

evidence supporting the probable validity of continued deprivation, an owner's vehicle would have to be released during the pendency of the criminal and civil proceedings."[58]

Unlike in *Krimstock*, the claimants in *One 1998 GMC* and *1998 Ford Explorer* requested that the Illinois forfeiture statute be declared unconstitutional for not providing a pre-seizure or post-seizure hearing. The DuPage Circuit Court in *One 1998 GMC* so held that the statute was unconstitutional applying the *Matthews* factors.[59]

Conclusion. The DuPage County Circuit Court in the case of *One 1998 GMC* makes a very strong argument that the Illinois Vehicle Forfeiture Statute is unconstitutional. The protections against depriving a person of property without due process of law have been a protected right as old as the Constitution itself. The forfeiture statute provides limited protections against erroneous deprivation, but not enough given the importance of the property rights at stake and the importance of vehicles in today's society. There should be a requirement for a pre-seizure or post-seizure hearing to challenge the continued seizure of a person's vehicle. The DuPage Circuit Court in *One 1998 GMC* was correct to rely on *Krimstock*, rather than the case of *$8,850*, since the relevant issue is the continued deprivation of property, rather than the delay of the forfeiture proceeding. The Illinois Second District in *1998 Ford Explorer* should not have relied on the case of *$8,850,* since the *Matthews* factors are much more applicable than the *Barker* factors. A person in Illinois should be afforded the right to challenge the continued seizure of his vehicle prior to a forfeiture proceeding, and the failure of the forfeiture statute to do so should render it unconstitutional. □

58 *Krimstock*, 306 F.3d. at 69.

59 *One 1998 GMC*, 2009 WL 3856411, at *19 ("[T]he *Krimstock* litigants did not request that the New York City Ordinance be declared unconstitutional. Instead, they requested that the court grant them a post-seizure, pre-trial hearing to test the city's right to hold their vehicles.").

FEATURES

The Teddy Bear Lawyers
Compassion, Comfort, Care

Law ElderLaw, LLP

Serving Seniors and Those Who Love Them In the Chicagoland Area

Estate Planning, Disability, VA, & Medicaid Assistance Lawyers

Don't Hurt Grandma

Rick Law

Elder law attorneys, organizations for the disabled, the Alzheimer's Association, pooled disability trusts, Illinois State Bar Association, Cook County Public Guardian, and tens of thousands of Illinois senior citizens—all have a stake in the new nursing home Medicaid rules proposed by the Illinois Department of Healthcare and Family Services (HFS). Diana Law, Esq. of Law ElderLaw LLP and Kerry Peck, Esq. of the downtown Chicago firm of Peck Bloom serve as co-chairs of a multi-member organization entitled the Task Force for Senior Fairness (TFSF). The task force has a resource-rich website at www.donthurtgrandma.com.

The task force has been working in conjunction with the Illinois chapter of the National Academy of Elder Law Attorneys (NAELA). We attended a public hearing in Chicago on September 16 and in Springfield on September 28. The HFS website states that the proposed rules are mandated by federal law to close loopholes. The task force agrees that HFS must comply with federal Medicaid law. Unfortunately, HFS' proposed rules go far beyond compliance and actually result in obstructing protections and incentives built into the Medicaid laws by the United States Congress and various administrations. Those protections and incentives are not "loopholes."

Due to the state budgetary nightmare, it appears that HFS has been "mandated" to build barriers so as to provide excuses to be able to deny and delay legitimate Medicaid applicants' claims.

Estate planning attorneys need to be aware that proposed Medicaid rules will cause penalty periods of ineligibility when clients gift assets under the traditional multiple-year strategies. In addition, HFS is no respecter of charitable gifts, including charitable annuities. Under the new rules, the State of Illinois must be named as the primary beneficiary of all annuities when and if an individual has qualified for Medicaid nursing home benefits. Transfers of interest in real estate and bank accounts can create penalty periods of ineligibility. At this time, HFS has not shown a willingness to provide any reasonable way to provide evidence to refute the presumption that gifting within a family was for the sole purpose of qualifying for Medicaid.

Kiplinger Reports has called the current economy "the Great Recession." Thousands of seniors have sacrificially depleted their assets to assist loved ones who have lost jobs and homes. As attorneys we need clarity so that we can advise clients regarding intra-family and intergenerational gifts.

Here at Law ElderLaw LLP we continue to advocate for frail seniors and persons with disabilities of all ages. If you have questions in our area of concentration, please feel free to contact me at ricklaw@lawelderlaw.com or Diana Law at diana@lawelderlaw.com.

Felony Division: The Honorable Kathryn E. Creswell

BY SEAN MCCUMBER

This month we continue our series on each division of the courthouse and its presiding judge with the Felony division and Circuit Judge ***Kathryn E. Creswell****.*

Had her organic chemistry class not taken a toll on her, Judge Creswell, who was a pre-med major at the time, might now be known as Dr. Creswell. Two of Judge Creswell's professors urged and persuaded her to pursue law school, however, and she heeded that encouragement and applied to DePaul University College of Law in Chicago. Then, while in law school, Judge Creswell held a part-time position at the American Bar Association, where she was involved with the Model Rules of Professional Conduct. She also worked in the Cook County State's Attorney's Office, under a Rule 711 license handling criminal matters at 26th and California in Chicago.

In 1985, then DuPage County State's Attorney **Jim Ryan** offered Judge Creswell a job in the State's Attorney's Office. There, she found what she loved about the practice of law – the opportunity to work in the courtroom every day. Like almost all Assistant State's Attorneys, Judge Creswell began in traffic and then moved to misdemeanors. She was later named head of the Domestic Violence Unit. Her appetite for the courtroom growing, she offered to work on any trial in the office. The result was Judge Creswell's handling more criminal trials than any other attorney in the office at that time. Eventually named Chief of the Special Prosecutions Division, her voracious trial appetite continued with her handling several capital cases.

After almost ten years with the State's Attorney's Office, Judge Creswell decided to pursue a career on the bench. In February 1995, she was appointed as an associate judge in the Eighteenth Judicial Circuit. In 2001, she was appointed by the Illinois Supreme Court to fill the circuit judge vacancy that occurred when the Honorable **Thomas E. Callum** was appointed to the Second District Appellate Court. She subsequently won the election for that seat.

Though she practiced criminal law and later presided over criminal matters as a judge, Judge Creswell did serve as a judge in the Domestic Relations Division for a period of time. She said she recalled sitting at her bench when she first started, noticing a calculator and wondering why it was there. She learned soon thereafter how often it would get used in that division. Judge Creswell returned to the felony division, where she currently presides for a second time.

She told us that, as a judge, "one of the biggest challenges is to keep educating oneself." She noted that "judges only know what the parties are going to tell the court." When asked if she finds it difficult to separate that challenge from dealing with what is not presented to the Court, Judge Creswell said, "no, the judge's job is to deal with the case as it is presented, not how the judge thinks it should be

photo © REP3.com

HONORABLE KATHRYN CRESWELL
CONTINUED ON PAGE 55 »

Gaffney, Chief Judge Stephen Culliton, DCBA President Steven M. Ruffalo

Justice Louis Rathje, Former DCBA President Glenn

Justice Anne Jorgenson, Former Supreme Court

For the past eight years, the *DCBA Brief* has consistently asked the same photographer, Robert E. Potter III, to shoot its most important covers.

When the *DCBA Brief* wants a memorable image that will withstand the test of time and show its people in the best light, the editors turn to Robert E. Potter III.

www.REP3.com

For portrait, architectural, and evidence photography, if you want to look your best, the number to call is 312-226-2060.

» **HONORABLE KATHRYN CRESWELL** CONTINUED FROM PAGE 53

presented or argued." Felony judges, along with arraignments and trials, also review search warrants, set bonds, and address post-conviction relief petitions. Judge Creswell said, "these petitions are time-consuming and difficult to handle. An inmate may file a post-conviction petition while his or her case is on appeal. The Court file has to be retrieved from the Appellate Court and the Judge has 90 days to address the petition. Inmates are not entitled to counsel on a post-conviction petition, so they often file one or more petitions. No matter how lacking the argument may be, the Court must still address the petition."

Judge Creswell said that she presiding over the Felony Division is not particularly difficult because "all of the judges in the division are great and hardworking and very few complaints are received." In addition to her own case load in Courtroom 4014, however, there are a number of other obligations she must attend to as Presiding Judge. She told us that the meetings she holds for the felony division judges focus on "communication and idea sharing, discussing legal arguments and case issues." She also has meetings with the ancillary departments of the criminal justice system, including regular meetings with the State's Attorney's and Public Defender's Offices, and with jail personnel. Monthly meetings with the Department of Probation and Court Services are also part of the package, as are communicating problems and suggestions from the judges and discussing concerns and suggestions from probation officers. She also meets from time to time with the Clerk of the Circuit Court regarding such issues as restitution and computerization of court orders and presides over the Grand Jury.

During this interview, Judge Creswell expressed high regard for the DuPage County Bar Association. "Early in my career," she said, "I was active in the DCBA, serving on the Publication Board of the DCBA Brief and on the Judiciary Committee. The work of the DCBA, particularly on the Judiciary Committee, is very valuable in the judicial candidate selection process." About the attorneys she sees everyday in court, she said, "The caliber of lawyers handling felony cases is excellent," she said. "They are prepared, professional, and are appropriately respectful to the Court."

Despite her caseload, her presiding judge obligations, and her personal schedule, Judge Creswell still manages to maintain her involvement in the advancement of the legal profession. A member of the Illinois Supreme Court Committee on Capital Cases, she is also a faculty member at the semiannual Capital Litigation Series seminars, a biannually required seminar for all Illinois judges hearing capital cases.

She has previously served on the Illinois Courts Commission and presently sits as a Commissioner on the Illinois Supreme Court Commission on Professionalism, as she has since its inception.

One issue which Judge Creswell had concern with, finally, is the availability of cell phones with cameras. The nature of cases in the Felony Division causes Judge Creswell "serious concern" about any plans to permit the general public to bring camera phones into the courthouse. There is a dilemma, she said, between denying the public access to telephone communication and protecting undercover officers and witnesses, whose photographs should be avoided. Police officers regularly come before the Court regarding warrants or to provide testimony, she pointed out. As courtrooms are open to the public, there is very little that could be done if a defendant or their cohort were to click a camera phone picture of an officer or witness and send it to others. She pointed out that other judges in the criminal courts are likely to agree with her. "The potential for intimidation of witnesses," she pointed out, "or of compromising investigations strikes a chord with many of the felony division judges. I believe that the Sheriff, who is responsible for the safety of the occupants of the building, should have the last word on the issue." □

Sean McCumber is a partner at Sullivan Taylor & Gumina, P.C. in Wheaton, Illinois. He concentrates his practice in family law, adoptions, and juvenile law. He presently serves as the Chair of the Family Law and Practice Committee and the Vice Chair of the Media Committee of the DCBA. In addition to practicing law and raising two children, he is the lead singer of the Judges' Nite Band and part of a five-man a cappella choir at his church.

» **LOOKING BACK** CONTINUED FROM PAGE 15

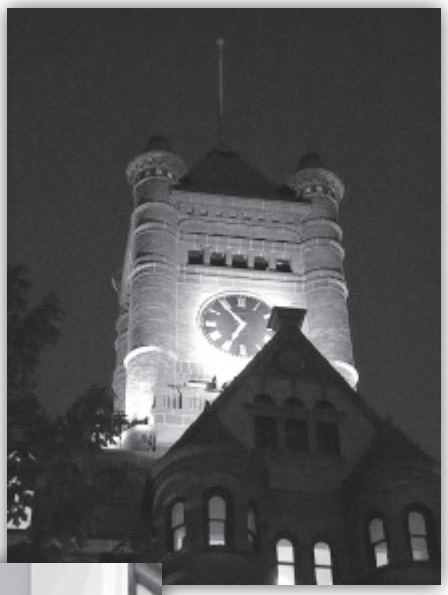
courtrooms. We had really outgrown the place. Juvenile court was out on County Farm Road, Chancery was getting moved around, we were all split up. Everybody was happy but there was no place to hear cases."

Birkett, like many of the people visiting the old courthouse that night, remembered well how hot the building could get because of poor ventilation. "There was no air conditioning in a lot of the courtrooms, so you'd be sweating. I remember I was trying a murder case killed a wasp with his 38'. "

Mike Nigro, the senior partner with Nigro, Westfall & Gryska, P.C. and a practicing attorney for almost 40 years, had similar memories. "We were just talking about when the trains went by you would have to stop everything because you couldn't hear a thing," he said. "They didn't have air conditioning then so they had the windows open all summer."

Judge **Dorothy French** had fond memories of those same windows. "Seeing all these windows makes me really jealous," she said. "I wish we had more windows in the new courthouse, that you could open. You got fresh air and it was wonderful. I tried many cases here. I loved the windows, the natural light and the fresh air. It was wonderful."

The windows, the stairwells, the front entry way, the facade and even the old clock tower still look just as they did as many of the visitors witnessed as they wandered through the building. "I remember making my first appearance in the courthouse as an attorney," we overhead one man say, "and it was also where I made my only appearance as a defendant, when I had to appear in court here as a kid for a curfew violation."



Judge **Bonnie Wheaton** laughed when we asked her what she remembered most about the old courthouse. "I'm not sure if I can tell you any stories that are fit to print," she said in jest before adding that yes, she remembered Judge McLaren wearing his kilt under his robe sometimes.

"We really learned a lot here," and during jury selection, they opened the windows and a wasp came in. I took my criminal code book and smacked it and the judge said 'let the record reflect that Mr. Birkett just

Birkett said later on in the evening. "Obviously we're all grateful for the Courthouse we have now but there are a lot of good memories in this place."

Attorney **Jeffrey B. Fawell** had a few such memories, remembering when his father was a judge in the old courthouse (Judge **Bruce Fawell**, who served as Chief Judge in the early 1980s) and he would go with his dad to night court. "I remember my dad had this huge desk and he was very meticulous," Fawell said. "He had these baseball cards under every inch of the glass. They were all from the thirties, because he was born in 1927. I remember one attorney telling me he was sent out on a pre-trial, he was really nervous, he was a Chicago lawyer and had heard how tough my dad was. He had heard my dad would find lawyers in contempt and whatnot. When he came in to my father's office he was so relieved because he knew baseball, he said, 'I don't know about my opposing counsel but I know I'm okay'

photos John F. Knobloch, Melissa Piwowar, and Ted Donner

Judge Wheaton became a Judge in 1988, just before the move to the new courthouse in 1991. She worked first in Field Court and then in Misdemeanor, and then at the County Building and the Annex, so she never had a chance to work in the old courthouse as a judge, but she did practice there. "I remember one year we had a flood," she said. "I don't know what year it was, but it was a very, very big flood in the summertime. I remember parking a couple blocks away and taking off my shoes and wading through the water to get to the courthouse."

"Back in those days," she continued, "the Judges heard the criminal and the civil cases together, which is how we all got to know each other. You'd go into the courtroom with a civil motion and it was like the Federal system. The judges heard everything. I'd sit there in court and there would be **Tony Mannina**, **Jack Donahue, John Darrah** -- people who handled divorce, criminal, civil matters. You got to know everybody if you worked here in those days because we were all in the courtroom together.

For administration, it's better to have assigned courts," Judge Wheaton concluded, "but for collegiality, nothing could beat being in the same courtroom with everybody." For one night, this last October, everybody was back in the same courtroom. The judge's bench and clerk's desk had been replaced with living room furniture, but there was still a great deal about the place which harkened back to the way things were when the old courthouse was thriving with legal work. For collegiality, it was still true, nothing could beat it. □

LEGAL AID UPDATE

Cy Pres Awards: A Vital Part of Legal Aid Funding

BY BRENDA CARROLL

Legal Aid Funding Problems. In 2003 we began to receive *Cy Pres* awards through the efforts of the law firm of DiTommaso and Lubin, PC. *Cy Pres* awards allow unclaimed funds from class action settlements to be donated to charities. **Vincent DiTommaso** and **Peter Lubin** represented guests of various hotels who had been incorrectly charged for costs which should have been attributable to the hotels and not their customers. The law suits took some years to reach their final dispositions but, by 2007, the DuPage Legal Assistance Foundation received over $216,000.00 from all of the cases filed and won by Vincent and Peter.

In September 2010, another *Cy Pres* award took the spotlight upon the final settlement of a ten year nationwide lawsuit against an insurance company which had incorrectly raised their rates. The Chicago law firm of Schad, Diamond & Shedden, P.C. was lead counsel for the plaintiff class which saw $95 million dollars was awarded to 54,000 class members in 49 states as well as the District of Columbia and Puerto Rico. Ninety five percent of the funds were able to be distributed to the class members leaving $3.26 million unclaimed. In Illinois the legal assistance agencies receiving the *Cy Pres* monies were as follows: Legal Assistance Foundation of Metropolitan Chicago: $550,000; The Chicago Bar Foundation: $450,000; Illinois Bar Foundation: $421,486; Land of Lincoln Legal Assistance Foundation: $200,000; and Prairie State Legal Services, Inc: $200,000.

Another 111 legal aid organizations throughout the rest of the United States will be receiving the remainder of the award in the coming months less attorneys' fees and costs.

The Chicago Bar Foundation will be using their *Cy Pres* award to continue their Circuit Court of Cook County *pro se* help programs such as the Expedited Child Support and Paternity Help Desk, The Guardianship Assistance Desk for Minors and the Chancery Division Advice Desk at the Daley Center.

The Legal Assistance Foundation of Metropolitan Chicago (LAF) which is Cook County's largest provider of free legal services is restructuring their offices to meet the needs of their clients while responding to their declining financial resources. According to **Diana White**, Executive Director of the LAF, they plan to use this money to shore up their reserves and to "…create a full-time community engagement unit to collaborate with social service providers throughout Cook County to reach out to people who might not otherwise find us."

It is no secret that not for profit organizations are struggling for funds. Some have had to cut back on their staffs and services. Prairie State Legal Services, Inc. is having the same issues and will be withdrawing their funding to the DuPage Legal Assistance Foundation in 2011. In the coming year, the DuPage Bar Legal Aid Service Program will be struggling to maintain the *status quo*.

Could there be another *Cy Pres* award in our future? Awards such as these can make all the difference for an organization such as ours. We remain grateful to DiTommaso and Lubin, PC. for the work they've done on behalf of this organization and we hope for support from other lawyers in the DCBA who are involved in any case in which a *Cy Pres* award may be made. If you need information about Legal Aid for use in any submission to the court, please contact us at your convenience and we will be happy to help.

Jim Reichardt appointed to the Board of Directors of Lawyers Trust Fund. The Supreme Court of Illinois, the Chicago Bar Association and the Illinois Bar Association each appoint three directors to the LTF Board. This year, world traveler, legal aid activist and friend to all, **Jim Reichardt** was appointed to the Board of Directors by Justice **Robert Thomas** for a three year term. Jim's commitment to legal aid is well demonstrated and he has been member of the Illinois Bar Foundation for twelve years and a member of the DCBA legal aid committee for much longer than that. □

Brenda Carroll has been the DuPage Legal Assistance Director since 1988 and on the DCBA Board of Directors since 2004. She earned her JD at IIT-Chicago Kent College of Law in 1986. She was admitted in Illinois and the Northern District in 1986 and to the U.S. Supreme Court in 2005. She serves as an Officer/Secretary of the Child Friendly Courts Foundation and is a Past President and current Board Member of the DuPage Association of Women Lawyers.

CLASSIFIEDS

LEGAL ASSISTANT/PARALEGAL

Immediate opening in Lombard, sole practitioner, general law firm concentrating in bankruptcy, corporate, family law, probate and real estate. Responsibilities include intake calls, client interface, drafting legal documents, dictation, billing, general office management, organizational skills, and ability to work independently. Computer skills a must. Minimum 30 hours a week with hourly pay and standard holiday schedule. **E-mail resume to stauberlaw@comcast.net.**

LEGAL SECRETARY

Wheaton Law Firm dealing solely with Family Law Cases is in need of a full-time Legal Secretary with 2 years Family Law experience. Candidate needs to be pleasant, well organized, and work well independently as well as with others. Proficiency in Microsoft Word and Excel are necessary for this position, knowledge of TimeSlips would be beneficial. **Please send resume to the attention of Mary McSwain either by fax (630) 653-8078 or via email at mcswainlaw@aol.com.**

SECRETARY/PARALEGAL – PART-TIME

Lisle Law Firm with Tax & Bankruptcy practice needs Part-Time Secretary/Paralegal. Duties include bookkeeping and office management. Computer literacy, attention to detail and good organizational skills required. **Email resume to tman@irstax.com**

DOWNERS GROVE (Downtown)

Office and secretarial space (furnished or unfurnished); share conference room, reception area, law library, office equipment (photocopier and fax machine); and ample parking. Ideal for solo attorneys, accountants and other professionals. Four other attorneys in building. **Contact Dondi at (630) 968-5553.**

Naperville (near Washington Street and Aurora Avenue)

11' x 14' executive office for rent, newly remodeled, Class A, small building law office suite. Rent $900.00 per month. **Call Mike 630-717-7877**

LISLE

Professional Office Building on Rt. 53 in Lisle, next to River Bend Golf Course. About 500 sq. ft. of exclusive space available, plus use of common areas, including waiting room and kitchenette. Close to I-355 and I-88. Broadband Internet connection available. Ideal for solo attorneys, accountants, and other professionals. Five other attorneys in building. Client referrals possible. **(630) 960-0500**

ITASCA LAW OFFICE

Office space (9.5 x 14). Use of conference rooms, copier & kitchen. Furniture available for purchase. Ample parking. Excellent location. **(630) 760-4612.**

OAK BROOK

Space For Services. Oak Brook firm seeks experienced civil trial lawyer for of counsel, space for services arrangement. **Send resume and/or inquiries to frontdesk@dcba.org. Include Box # 100824 in the subject line.**

ITASCA LAW OFFICE

Office Suite available. Four offices (600 sq ft.) with reception area (48.5 sq. ft.), including enclosed storage area (200 sq. ft.). Use of conference rooms, copier & kitchen. Some furniture may be available for purchase. Ample parking. Exc. location. **(630) 760-4612**

To run your classified ad in this space, please contact the DCBA or send your content to: classifieds@dcbabrief.org. Pricing for regular and display classifieds appears in the advertising section of our website, dcbabrief.org

WHERE TO BE IN DECEMBER

Annual DCBA Holiday Party Slated for Maggiano's in Oak Brook

The annual DCBA Holiday Party will be held on December 16, 2010 at Maggiano's Little Italy in Oak Brook Center. "We have the single best room in the house for our exclusive use," said DCBA President, **Steve Ruffalo**. "This mixer will be held 'open house' style to encourage our Bar Members to get in some shopping before or after coming to the event, in true multi-tasking fashion. No speeches, no skits, just a good old fashioned cocktail party hosted for you by your bar association. The festivities will start at 5:30 p.m. and end at 8:30 p.m. We will have an impressive selection of hand passed hors d'oeuvres and heavy appetizer stations along with a couple of fully stocked and fully manned bars which will of course be open for the duration."

(top) Lisa Giese; (center) Umberto Davi, Justice Ann Jorgensen, Richard Felice; (bottom center) Dion Davi, Judge Jane Mitton, Umberto Davi

In keeping with longstanding tradition, Lawyers Lending a Hand asks attendees to bring one or more toys to donate to underprivileged children in DuPage County. According to Ruffalo, "The gift of a toy at Christmas to a child who does not expect one, well that's uplifting, it's part of the magic of the season, and it gives us a great way to demonstrate that the spirit of giving, the spirit of the season is alive and well among the members of the DuPage County Bar."

Toys should be unopened and unused. They can be brought to the party or dropped off at the Bar Center at any time up to December 16. Volunteers to help Lawyers Lending a Hand wrap the toys should contact the Bar Center. □

WKKP
We are lawyers
who golf poorly

KICKAPOO DAM CHALLENGE
TRIATHLON
October 2, 2010
Ed and Jim after
24 miles

Walsh, Knippen,
Knight & Pollock
CHARTERED
ATTORNEYS AT LAW

Winfield Community Bank

Locally Owned and Managed

A Lawyer's Trust Fund "Honor Roll" Bank

.....

Proud to be a Premium Corporate Sponsor of the DCBA for 6 years running!

WINFIELD COMMUNITY BANK
27W111 Geneva Road
Winfield, Illinois 60190

Phone: 630-871-9711
Fax: 630-871-9690

FREE!

Remote Deposit Capture is Free for One Year!

Add Remote Deposit Capture to your new or existing Winfield Community Bank business checking account and take advantage of the convenience and savings of Remote Deposit Capture.. for FREE! Call us today for details.

...From Your Office

Access your customized business checking account at your convenience with our **Free Online Banking.**

Make your deposits without leaving your office with our **Remote Deposit Capture!**

...From Your Home

Competitive Checking, Money Market and Savings accounts designed to fit your needs.

Unlimited account access with our **Free Online Banking**.

Simplify your monthly bills with our **Free Bill Pay**.

Open your accounts today!

Great Location

Now Available: Private Entry Office Space

Adjacent to Winfield Community Bank
930sq.ft., perfect for offices, client meetings, closings, depositions and more!
Flexible Leases Available
1.5 miles from DuPage County Courthouse!

Call Jennifer at 630-871-9711 for more information.