ILLINOIS STATE BAR ASSOCIATION

FEBRUARY 2018 VOL 48 NO. 8

Bench & Bar

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

The ARDC's proactive program for better practice management

BY DEANE B. BROWN, PARTNER

At the ISBA Midyear Meeting in December 2017, the Bench and Bar Section Council welcomed special guest Wendy Muchman, the Chief of Litigation and Professional Education at the Attorney Registration and Discipline Commission (ARDC). Ms. Muchman explained that consistent with the ARDC's mission to promote the integrity of the legal profession, the ARDC is focusing on helping lawyers stay on track and minimize the risks that trigger disciplinary action and malpractice issues, rather than prosecuting them for ethics violations, which she described as a "last resort." The ARDC's efforts to educate

Continued on next page

Upholding or striking consumer mandatory arbitration clauses—What is the current trend?

BY DAVID W. INLANDER AND DEBORAH JO SOEHLIG

In the first year of the Trump Administration, significant public attention was directed to certain controversial legislation, most notably in the areas of health care and changes to the tax code. These issues involved enormous hours of public debate and vitriolic comments.

Less well-known, and far less discussed, are the changes the administration made in the realm of alternative dispute

Continued on page 3

The ARDC's proactive program for better practice management

CONTINUED FROM PAGE 1

and counsel attorneys include: (a) sponsoring over 250 Continuing Legal Education (CLE) programs per year; (b) referring attorneys with substance abuse or mental health problems to the Lawyers Assistance Program (LAP); and (c) taking remedial actions, such as putting lawyers on probation, mentoring them, and having them go to "ethics school."

Notably, the ARDC's focus on education and counseling seems to be working. Ms. Muchman observed that in 2016, there were only 83 public prosecutions of attorneys at the ARDC—a decrease from prior years. However, the ARDC remains concerned that the vast majority of those prosecutions were against either solo practitioners (solos) or small firm lawyers. Ms. Muchman further noted solos often do not have legal malpractice insurance. While lawyers are not required to have legal malpractice insurance in order to practice law in Illinois (but are required to report to the ARDC whether or not they are insured), Ms. Muchman expressed concern that 41% of solos do not have legal malpractice insurance. Lawyers who have not obtained legal malpractice insurance have not gone through the insurance application process requiring a lawyer to review and analyze the risks associated with the practice of law.

Thus, the ARDC has taken a proactive approach to assist solos and other lawyers who are uninsured. In accordance with the January 2017 amendments to Illinois Supreme Court Rule 756(e), effective January 1, 2018, Illinois became the first state in the country to adopt a mandatory program for all lawyers in private practice who do not maintain legal malpractice insurance, in order to register for 2019. The mandatory program is known as Proactive Management Based Regulation (PMBR), and is a free, four-hour online self-assessment course regarding law firm operations. Administered by the ARDC and accessible from the ARDC website (www.iardc.org), the PMBR course is an interactive educational program divided into eight learning modules, which lawyers may take on most electronic devices at various times and in various increments.

The PMBR course will cover many topics, including: (a) Technology and Ethics; (b) Client Relationships; (c) Fees, Costs and Billing; (d) Trust Account and Record Management; (e) Conflicts of Interest; (f) Civility; (g) Diversity and Inclusion; and (h) Attorney Wellness. The topics of Diversity, Inclusion, and Attorney Wellness are consistent with the recent amendment to the Illinois Minimum Continuing Legal Education (MCLE) Rules which currently require that a minimum of six hours of the total CLE hours for each two-year reporting period be in the area of professionalism, civility, legal ethics, diversity and inclusion, or mental health and substance abuse. Ms. Muchman observed that approximately 30% of the ARDC's cases involve attorney wellness issues.

Ms. Muchman advised that when programs similar to the PMBR course were instituted in Australia, Canada, and Wales, the number of complaints against attorneys decreased as did the number of public prosecutions. Ms. Muchman stressed that the ARDC wants Illinois lawyers to succeed in the practice of law and accordingly, encourages all attorneys—including those who have legal malpractice insurance as well as lawyers who are not in private practice—to complete the PMBR course, which qualifies for MCLE professional responsibility credits. ■

Bench & Bar

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

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

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

EDITORS
Hon. Edward J. Schoenbaum (ret).
Evan Bruno
Edward Casmere

MANAGING EDITOR / PRODUCTION
Katie Underwood
kunderwood@isba.org

Upholding or striking consumer mandatory arbitration clauses

CONTINUED FROM PAGE 1

resolution—particularly in the consumer products field. Of course, because few actually read the fine print in their credit card agreements or other consumer paperwork, virtually no one even knows they should be focusing on this topic impacting individuals' rights.

For years many consumer contracts—auto loans, credit, cell phone, and cable TV agreements, for example—have provided that disputes are to be arbitrated rather than litigated. The Federal Arbitration Act promotes arbitration as an efficient means of resolving disputes, and was often cited as the basis for upholding those provisions. The Supreme Court weighed in on several occasions, and upheld mandatory arbitration clauses. The trend clearly was moving toward more arbitration of consumer matters, and less litigation. Additionally, these clauses were generally touted as consumer friendly, as individuals were able to afford arbitration but might not be able to finance costly litigation against large corporations.

However, around 2007, limitations on mandatory arbitration clauses in consumer agreements began appearing. Congress passed the Military Lending Act which prohibited mandatory arbitration clauses in some loans made to service-members. Then Dodd Frank prohibited mandatory arbitration clauses in most residential mortgage transactions. As part of Dodd Frank, in 2010, the Consumer Financial Protection Bureau (CFPB) was charged with rulemaking relative to mandatory arbitration clauses in consumer financial products, and was instructed to conduct a study to determine whether arbitration was in reality more beneficial or detrimental to consumers. There was a concern mandatory arbitration clauses reflected a deliberate effort to both limit companies' exposure and discourage consumers from enforcing their rights.

The CFPB released its preliminary report in 2013 and then in May 2017, it finally promulgated its rules, which among other recommendations, prohibited companies from barring class actions when the applicable consumer agreement requires mandatory arbitration. The rule was set to become final in November, 2017, but was revoked by Congress in H.J Res. 111, which was then signed by President Trump in late October, 2017.

What does this mean for our court systems? Recent cases have addressed situations which call into play the issues raised by mandatory arbitration clauses and class action waivers in 'form' agreements.

On January 4, 2018, the 5th Appellate District in Illinois issued an opinion following an interlocutory appeal of the denial of a motion to compel arbitration in an assignee's suits for unpaid credit card charges. *Midland Funding, LLC v. Raney*, 2018 IL App (5th) 160479 (January 4, 2018). The assignee, Midland, sued 2 Sears credit card holders for unpaid balances. Both Defendants filed counterclaims for violations of the Collection Agency Act (225 ILCS 425/1 *et seq*.), the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq*.), and the Fair Debt Collection Practices Act (15 U.S.C. §1692 *et seq*.), based on Midland's alleged practice of filing suits with insufficient proof of ownership of the debt. *Id*., ¶ 6.

Midland responded by moving to dismiss the counterclaims on the basis the credit card agreements contained a class action waiver and to compel arbitration pursuant to the credit card agreements' mandatory arbitration provisions. Both plaintiffs testified in depositions that they had not read the updates which added the relevant provisions, and the documentation Midland produced did not include any proof of delivery to plaintiffs. After the cases were consolidated, Midland's motion to dismiss and compel arbitration was denied, and Midland appealed. The appellate court first reiterated the long-standing principles that arbitration is favored, arbitration agreements are enforceable, and agreements to arbitrate are to be construed as any other contracts. *Id.*, ¶¶ 19-22. However, in this case, the Appellate Court found Midland "did not demonstrate when or how the generic Card Agreement containing the arbitration provision pertained to [plaintiffs] or that it was communicated to [plaintiffs] prior to the subsequent credit card use." *Id.*, ¶ 24.

Additionally, Midland had argued the Circuit Court was not entitled to determine the validity of the Card Agreement or its arbitration provision but instead that issue was itself subject to arbitration. *Id.*, ¶26. This claim was rejected at the trial level because there was no clear agreement to arbitrate anything, according to the Court. *Id.*, ¶ 27. The Appellate Court affirmed the denial of the motion to dismiss and to compel arbitration. *Id.*, ¶ 28.

Likewise, in November, 2017, the Supreme Court of Appeals of West Virginia reviewed a denial of a motion to dismiss and to compel arbitration in a dispute relative to a gas lease which contained an arbitration provision. *SWN Prod. Co., LLC, v. Long*, 2017 W.Va. LEXIS 892 (November 7, 2017). Using the Federal Arbitration Act (9 U.S.C. §2) as its starting point, the Court began with the premise that "only if a party to a contract explicitly challenges the enforceability of an arbitration clause within the contract as a whole . . . is a trial court permitted to consider the challenge to the arbitration clause."*Id.*, at p.1. The property owners sued the gas lessee for allegedly unpaid payments. SWN brought a motion to dismiss and compel arbitration. The owners responded that references in the lease to "any court of competent jurisdiction" and "a civil action" invalidated the arbitration provision. *Id.*, at p. 3. The trial court agreed, but the appellate court reversed and remanded to be sent to arbitration.

SWN argued the language the owners referred to was in other, unrelated sections of the agreement at issue (the severability and forfeiture clauses), and hence, did not create any ambiguity sufficient to make the arbitration provision unenforceable. The owners argued the entire contract had to be read together, and the use of contradictory

terms could allow unsophisticated parties to not understand what arbitration meant in light of the various terms in the contract. The Appellate Court found the actual arbitration clause was not ambiguous, and therefore it was unnecessary to look to the remainder of the contract to determine its meaning, and hence, whether it was enforceable. *Id*. at pp. 11-12. The court relied on a decision interpreting the same provision out of the United States District Court for the Northern District of West Virginia, which came to the same conclusion. *Dytko v. Chesapeake Appalachia, LLC*, No. 5:13CV150, 2014 U.S. Dist. LEXIS 73706, 2014 WL 2440496 (N.D.W.Va. May 31, 2014).

And, earlier in 2017, the Supreme Court sent a case back to the Supreme Court of Kentucky (the second such case out of Kentucky) holding that the Kentucky Court's refusal to uphold a mandatory arbitration clause in a nursing home contract was improper. In *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S.Ct. 1421 (2017), the Justices took the Kentucky state court to task for its refusal to enforce a consumer arbitration agreement. At issue was whether Kentucky Supreme Court's 'clear statement rule' that in order for an agent to waive a principal's state constitutional rights to a trial by jury and access to the courts, the power of attorney must specifically include the power to enter into arbitration agreements violated the Federal Arbitration Act.

In *Kindred Nursing*, the pre-dispute arbitration contracts were between nursing homes and residents, but many residents had not personally signed the agreement, their agents under powers of attorney did. The Kentucky court refused to enforce the agreements, claiming that the powers of attorney were not broad enough to include arbitration agreements, which involved waiving a fundamental constitutional right to a trial by jury. The nursing homes argued to the Supreme Court the decision 'discriminated' against arbitration agreements in violation of the Federal Arbitration Act (9 U.S.C. 1 *et seq*.).

In a 7-1 decision, the Supreme Court firmly rejected the state court decision which adopted a clear-statement rule under which a general power of attorney, valid to authorize the execution of contracts generally, would not validly authorize execution of an arbitration agreement unless the power of attorney explicitly addressed that topic. A leading legal pundit on Supreme Court decisions noted: "the opinion shows a Supreme Court bristling at the lack of candor shown by state courts that disagree with its favorable treatment of pre-dispute arbitration agreements."[1]

The take away from *Kindred Nursing* is that a law which prohibits arbitration of a particular type of claim, as well as "any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements" is unenforceable.

These cases, and the revocation of the CFPB rules limiting arbitration provisions in consumer contracts, continue the growing trend to remove many types of cases from the traditional litigation arena, when arbitration was contracted for between the parties. It remains to be seen whether consumers will take advantage of the alternative dispute forums or simply forego their rights due to the financial reality of pursuing a nominal claim. Likewise, one wonders whether arbitration will ultimately work to consumer's benefit, or even indirectly benefit the court system by removing any significant volume of cases. What is most likely is very few consumers realize they may be agreeing to waive their rights to litigate, jury trials, or participate in class actions. One thing is certain: there appears to be insignificant discussion of the meaning and implication of arbitration clauses in consumer contracts, and the impact of legislation and regulations impacting the rights of businesses and individuals. ■

1. Ronald Mann, *Opinion analysis: Justices rebuff Kentucky rule invalidating arbitration agreements signed under power of attorney*, SCOTUSblog (May. 15, 2017, 4:44 PM), http://www.scotusblog.com/2017/05/opinion-analysis-justices-rebuff-kentucky-rule-invalidating-arbitration-agreements-signed-power-attorney/.

A preliminary review of the Mandatory Initial Discovery Pilot Program

BY MARIANGELA SEALE & SARAH FINCH

As those who regularly litigate in federal court in Chicago know, the Northern District of Illinois is participating in the Mandatory Initial Discovery Pilot Program ("MIDPP") with the support of the Federal Judicial Center.[1] Along with the District of Arizona, the MIDPP launched in the Northern District on June 1, 2017. The three-year pilot program applies to all civil cases filed thereafter, except for multi-district litigation, those brought under the Private Securities Litigation Reform Act, patent cases, and cases exempt by Federal Rule of Civil Procedure 26(a)(1)(B).[2] A majority of district court judges and all magistrate judges are participating in the MIDPP.[3]

The MIDPP was approved at the 2016 Judicial Conference and endorsed by Chief Justice John Roberts who emphasized the district judge's role in early and effective case management. He indicated that the MIDPP was designed to emphasize effective use of the 2015 amendments to the Federal Rules of Civil Procedure and to improve case management to promote Rule 1 which requires that the Federal Rules be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

The MIDPP supersedes the initial disclosure requirements of Rule 26(a)(1),[4] borrowing from Arizona state civil procedure rules that have been in place for 25 years and are designed to test whether early substantial disclosure can reduce costs and expedite case resolution.

With over half a year of the pilot program behind us, a review of the nuts and bolts of the MIDPP and a look at its practical application are in order.

Navigating the MIDPP[5]

A few key differences in practice that are required under the MIDPP include:

- Parties must file answers, counterclaims, and cross-claims in accordance with Federal Rule of Civil Procedure 12(a)(1)-(3) *regardless* of whether a motion to dismiss or other preliminary motion is filed or anticipated to be filed, with limited exceptions.[6]
- All parties must serve their mandatory initial disclosures 30 days after the first responsive pleading is filed and file notice of service with the court.
- The mandatory initial disclosures must be discussed at the Rule 26(f) conference and included in Rule 26(f) reports.
- Parties must produce information as to facts and documents that are relevant to the parties' claims and defenses, whether favorable or unfavorable, and regardless of whether they plan to use such information.
- Electronically stored information ("ESI") must be produced 40 days after the mandatory initial disclosures are filed – 70 days after the first responsive pleading is filed.
- Any additional discovery – interrogatories, document production, requests for admission, and depositions – is ongoing *after* the mandatory initial discovery is served.
- The mandatory initial discovery disclosures may be deferred *once* for 30 days, if the parties certify that they are seeking to settle the dispute with a good-faith belief that the dispute will be resolved within 30 days of the due date of their disclosures.
- The parties are exempt from providing the mandatory initial disclosures if the court approves a written stipulation by the parties that *no discovery* will be conducted in the case.
- A party is not excused from providing its initial disclosures because it has not fully investigated the case, challenges the sufficiency of another party's disclosure, or because another party has not provided its disclosures.
- If a party limits the scope of its disclosures on the basis of privilege or work product, the party must produce a privilege log as required by Rule 26(b)(5) unless the parties agree or the court orders otherwise.
- If a party limits its response on any other basis, including an objection that providing the required information would involve disproportionate expense or burden, it must explain with particularity the nature of the objection and its legal basis, and provide a fair description of the information being withheld.

The MIDPP's Impact Thus Far

While formal evaluation of the MIDPP's implementation in the Northern District of Illinois is expected within the first year of the pilot, the court and practitioners are only eight months in to this experiment. Awaiting the court's review, we focus on anecdotal feedback and publicly available information. Some defense attorneys assert that the MIDPP puts them at a disadvantage and have advised clients not to remove cases – particularly class actions that have voluminous discovery – to the Northern District of Illinois, even when the court has jurisdiction and it would be the more convenient forum. That trepidation appeared to play out in the number of cases filed in the Northern District in the second half of 2017. A PACER search revealed that almost 800 fewer cases were filed from June 1, 2017 to December 31, 2017 than were filed during the same time frame in 2016.[7]

Despite the reduction in cases and

apparent apprehension by some attorneys, the day-to-day impact of the MIDPP has not been as disruptive to the early stages of litigation as anticipated. A search of the dockets in the Northern District of Illinois revealed that almost all judges participating in the pilot program have granted motions for extensions of time to answer, thereby extending the initial disclosure timeline. Further, some judges have granted motions to extend the mandatory initial disclosure deadline or to stay the disclosures all together. Many judges are using their inherent discretion to implement the pilot program and grant reasonable extensions to the mandatory initial disclosure deadlines when appropriate. While it may be some time before there is a formal report on the effectiveness of the MIDPP, it seems that the judges are allowing for a reasonable implementation.

A Few Practice Pointers

One thing is for sure, both plaintiffs and defendants will benefit from having a clear understanding of what the mandatory initial disclosures require, and the scope of information and documents in their possession. While the court appears to have been flexible at the outset of the program (e.g., by issuing orders gently reminding defendants to file an answer after a motion to dismiss was filed), such leniency may not last. Accordingly, litigants benefit themselves and their clients when they:

- Engage in early client counseling regarding the MIDPP requirements, particularly as it relates to early discovery and ESI.
- Conduct a thorough investigation prior to filing suit to determine whether litigation in federal court is most effective.
- Take note of any opportunities to provide the district with feedback regarding the effective or ineffective application of the MIDPP to a particular case. ■

_____

1. An introductory video to the MIDPP produced by the FJC can be accessed at: www.fjc.gov/content/321101/midpp-introduction-video

2. Rule 26(a)(1)(B) exempts the following cases from initial disclosures: (1) an action for review on an administrative record; (2) forfeiture *in rem* arising from a federal statute; (3) a petition for habeas corpus petitions or any other proceeding to challenge a criminal conviction or sentence; (4) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision; (5) an action to enforce or quash administrative summons or subpoena; (6) an action by the United States to recover benefit payments; (7) an action by the United States to collect on a student loan guaranteed by the United States; (8) a proceeding ancillary to a proceeding in another court; and (9) an action to enforce an arbitration award.

3. A complete list of participating judges can be found at: www.ilnd.uscourts.gov/_assets/_documents/MIDP%20Participating%20Judges.pdf.

4. A history of discovery reform and the evolution of Rule 26(a)(1) can be found at: https://judicialstudies.duke.edu/wp-content/uploads/2017/08/Judicature-Fall2017-Sutton-1.pdf.

5. A Federal Bar Association CLE on the MIDPP lead by Judges Dow, St. Eve, and Valdez is available at: http://www.ilnd.uscourts.gov/Pages.aspx?page=VideoM.

6. The court may defer time to answer if a motion to dismiss challenges subject-matter or personal jurisdiction or asserts immunity.

7. There were 6,013 civil cases filed from June 1, 2016 to December 31, 2016 and 5,220 civil cases filed from June 1, 2017 to December 31, 2017.

Making the record

BY HON. KEVIN T BUSCH

February 10 - 18 was national court reporter week and although many of us deal with court reporters daily, the week typically passes us by with little fanfare. Having been married to an official court reporter for over 30 years however, I know how hard they work and their dedication to ensuring that we, as judges and lawyers, have the best record of the proceedings as is possible.

Unfortunately, we often take for granted what goes into the *making* of the record. While the reporter has a duty to take down all that is said, the true burden of making a record rests with us, the judges and attorneys. So what can we do to make a better record? Well, having spent a career in the courtroom, and having eavesdropped on more than one court reporter's conversations, I think I can pass along a few suggestions.

You may ask, "Why should we even care?" After all, isn't what happens in court what really matters? While the battle at hand may be your focus, a complete and accurate record may mean the difference between success and failure in future proceedings, or on appeal. So while you may win the battle, your lack of diligence in making your record, could result in your losing the war. To borrow a phrase from computer programmers: "garbage in, garbage out!" In other words, your record is only as good as you make it! It would not be the first time that a well thought out ruling or argument was overturned on appeal because the court or counsel failed to perfect their record.

So what makes a good record? Simply put, clarity! There should be only one voice speaking at a time, in an easily understood and audible tone. If it is worth saying, say it so that everyone in the courtroom can hear and understand it. While it sounds simple enough, in practice, it is not always so easy.

So what are the basics? Start with always identifying yourself and your client, "for the record." Don't assume the reporter knows you, or knows how to spell your name. Be aware of where the reporter is seated. They will usually be situated so that conversations and testimony directed to the judge or jury can be easily heard. Avoid turning your back to the reporter or the trier of fact.

Resist the urge to keep talking as you scan the courtroom for your client, or search for that document in your brief case. The judge, jury and the reporter will appreciate it. Remind your witness to speak up, and avoid situations that result in the witness turning their back to the reporter.

Remember the rule, *only one voice at a time.* While it may be necessary in limited situations to interrupt a witness to prevent inadmissible testimony from being heard, it is generally never a good practice to speak when someone else is. Whether interrupting a witness or opposing counsel, it is a bad practice and poor form. Remember, when making the record you want the reporter to hear and understand what is being said. When two or more voices are speaking at once usually none of them are heard, *or* understood. Moreover, do not assume that the reporter understands what is being said. While reporters are taught to interrupt witnesses or counsel when things get out of hand, they may not always be able to do so. The responsibility rests with the court and counsel to ensure that there is only one person speaking at a time. Be patient, you will get your chance to speak. Not only will the reporter appreciate it, but you will also win points with the trier of fact.

Be aware of *what* you are saying. Many names for example sound alike: Petersen/Peterson, Mariann/Maryann/Marianne, and Hoffman/Aufman. So spell the words slowly. But be aware that many letters sound alike: M and N, B and D and V, F and S, and P and T may all cause confusion. So sometimes, it may be necessary to use identifying words such as: "the letter M as in Mary" or, "the letter N as in Nancy." Also, take greater care when you are talking about numbers. While it may sound perfectly natural to say "twelve forty-five," what were you actually talking about? Is it an amount, dollars and cents, or is it time? There is a big difference between 1,245 and $12.45; or, 12:45 AM and 12:45 PM. So use the correct identifying language to make your numbers clear. The same can be said for dates. When you say "January twenty fourteen," did you mean January 2014 or January 20, '14?

Pay attention to the actions of your witness or the exhibits that you are referencing. If a witness demonstrates something with their hand while saying "and he did this," how will anyone reading the transcript know what *"this"* is unless you describe the action "for the record?" Ask the court: "May the record reflect that the witness was pointing her finger in front of her in the shape of a pistol?" Or, when the witness says, "she slapped me here," you must say something like: "your Honor, may the record reflect that the witness is pointing to an area on the right side of his cheek?" When you show the witness an exhibit, remember to identify it. Don't say: "Mr. Jones do you recognize this?" Instead say: "Mr. Jones, I'm showing you Plaintiff's Exhibit Number 1, do you recognize it?" Or, when a witness who is identifying an item in a photo says: "that's it right there," don't forget to describe what happened for the record. For example: "Mr. Jones, are you pointing to the red car that appears in the lower right-hand corner of Plaintiff's Exhibit 1?" Descriptions such as these will never leave a reader of the transcript wondering what actually occurred in court.

Remember, you and your witnesses need to speak words instead of using sounds or gestures. While some reporters may note that a witness nodded in response to an answer, not all reporters will. More importantly, the reporter cannot interpret gestures. It is the responsibility of the attorney or the court to remind the witness to answer yes or no. Similarly, while reporters will take down all sounds that they can hear, sounds that are not words or that have no meaning will remain meaningless, unless you clarify them. So while you may think you understand the witness when they say "uh-uh," anybody reading the transcript would only be guessing. Ask the witness: "did you mean yes or no?"

The use of interpreters also poses unique problems. The interpreter is not the witness but merely a translator of everything the questioner says, and the answers that are given. Never say to an interpreter: "ask her to state her name." Instead, have a conversation directly with the witness, just as you would any other. Speak slower to give the interpreter time to understand you, and then wait for the interpretation and the translation to be completed before you ask your next question. Also, if your interpreter starts the translation with the phrase "she said...," then either you or the court must stop the interpreter immediately and remind them to repeat what the witness said verbatim.

Sometimes it is necessary to read or quote something from a text or a prepared script. Keep in mind that when we do so, we have a tendency to speak faster than we would if we were choosing our words as we speak. Slow down and be mindful of your pace when you are reading, quoting something, or merely reciting a prepared monologue. Also be aware of your normal speech patterns and habits. If you talk fast or if you drop off at the end of your sentences, your every word might not always be heard. If you speak in low or soft tones, you may often be misunderstood. The proceedings are not a secret. They are for public consumption. You want to be understood. So speak up, speak clearly, and make sure your reporter is able to hear and understand you.

While these tips should go a long way in helping you build a better record, even the most practiced of us misspeak from time to time. In fact, in the heat of battle, we may misspeak and not even realize it. We may ask questions and not obtain or even wait for an answer. We may intend to ask a question and forget to.

Remember the reporter can only take down what he or she hears. That includes all of the false starts, misstatements, urns, and uhs. So the next time you read a transcript, avoid the urge to grade your reporter since it is most likely they took down everything that you said, and only what was said.

Taking a moment to become and remain aware of your reporter will go a long way toward helping you build a better record. Keeping these tips in mind the next time you're "on the record" should result in a clear and more complete report of the proceeding. So in honor of the hard work that our official court reporters do, join me in thanking them, and let us all make a better record! ■

This article was originally published in the January 2018 issue of the ISBA's Family Law newsletter.

Bicentennially speaking…

BY JUDGE BARB CROWDER

Perhaps it is the excitement caused by seeing the Lincoln portrait that we hope to help the Illinois State Historical Society hang in a courthouse in every Illinois County and being named by Illinois Judges' Association President Coady to co-chair the IJA Bicentennial committee with Justice Michael Hyman. Or perhaps it is because I live in the same county as one of the Lincoln-Douglas debate venues (Alton IL is in Madison County). Whatever the reason, this history nerd is pretty excited about all the bicentennial information that is available during this year.

For instance, have you noticed the State of Illinois seals that hang in our courtrooms say August 26, 1818? But if one checks, Illinois actually became a state on December 3, 1818. So what gives? Fun fact: Illinois' first constitution was signed on August 26, 1818. Shortly thereafter, on December 3, 1818, President James Monroe signed the congressional resolution making Illinois the 21st state. So the Seal in our courtrooms celebrates the first constitution (our rule of law), but the bicentennial date that actually marks our statehood is December 3rd.

But I digress. All of you have the ability to learn fun bicentennial facts throughout the year and the point of this article is to tell you how. The State of Illinois has a bicentennial website at Illinois200@illinois.gov. The Lincoln Presidential Library and Museum in Springfield is also the state's official historical library. It has documents, newspapers, photographs and artifacts that tell the story of Illinois. www.illinois.gov/alplm/. And of course Lincoln is not the only President we have had with ties to Illinois. The museum will have a special exhibit from March 23, 2018 through December 31, 2018 called "From Illinois to the White House: Lincoln, Grant, Reagan, Obama" located in the Illinois Gallery in the Abraham Lincoln Presidential Museum. This exhibit is one of the centerpieces of the commemoration of the Illinois Bicentennial. It will feature the ties these four presidents have to Illinois and discuss how Illinois' history, location and population make it a training ground for national leaders.

The Illinois State Museum, also in Springfield, hosts an Illinois Legacy Collection that includes more than 13.5 million objects documenting Illinois' life, land, people and art from 500 million years ago to today. Learn more about it at www.illinoisstatemuseum.org.

Finally, "Bicentennial Minutes" started airing January 1st. Each day, take a minute and listen about a person, place or story from Illinois history. Bicentennial minutes may be available on your local radio stations or you can access them through www.wmay.com/Illinois200.

Please take these opportunities to not only learn more about Illinois during its bicentennial but think about having some fun with the information. Courtroom quizzes or fun facts to share as you attend events around your community should be something everyone can do. And please, attend the ceremony for the Lincoln portrait at your local courthouse or the one in some other county to help show that lawyers and judges are actively participating in the Bicentennial. We are the 3rd branch of state government, after all. ■

Illinois celebrates 200 years of statehood in 2018

Bicentennial to focus on our historical, cultural, economic, and political contributions

BY CHRISTINE ZEMAN

The 200th birthday of the adoption of the Illinois Constitution on August 26, 1818, followed by admission of Illinois to the Union on December 3, 1818, allows an opportunity to celebrate our rich history, while recognizing too its share of tragedy and notoriety.

Pre-statehood

Prior to statehood, the Illinois prairie was populated by native peoples, initially of two main tribes, the Illiniwek (or Illinois) and Miami. Maps of the state reflect other local tribes: Winnebago, Potawatomi, Fox, Kickapoo, Shawnee. The Sioux were deemed particularly hostile. *Native Americans: American Indian Tribes of Illinois.* www.museum.state.il.us.

The first non-native explorers were French Canadians, Father Marquette, a Jesuit priest, and Louis Joliet, a fur trader, who recognized the importance of the Chicago and Illinois Rivers for portage and were the first to map the Mississippi River in the late 1600's. *Then & Now: Louis Joliet and Jacques Marquette*, www.theherald-news.com. During their journey, the Illinois Indian tribe gave them a peace pipe or "calumet" which helped them when they encountered other Indian tribes. They returned north, passing by what is now Chicago, to avoid Spaniards farther south on the Mississippi River. *Marquette &*

Joliet Explored the Mississippi River, www.robinsonlibrary.com.

In 1803, as part of their exploration of the American West for Thomas Jefferson, Meriwether Lewis and William Clark crossed the Ohio River into Illinois territory. At Fort Massac, they hired an interpreter of French Canadian and Shawnee heritage, fluent in several languages. They next arrived in St. Louis, a settlement of French Canadians four decades old that served the region's fur trade, then crossed the Mississippi River east to trading posts at Cahokia and Wood River and to Fort Kaskaskia for supplies and their careful selection of men. Their expedition to find passage to the Pacific Ocean became known as the Corps of Discovery and included a slave named York, a dog named Seaman and Sacagawea, a Shoshone woman. Their treacherous journey and the roles of men whose names today are known for locations in the area—Soulard, St. Clair, Chouteau, are given life by Stephen E. Ambrose in *Undaunted Courage*: *Meriwether Lewis, Thomas Jefferson, and the Opening of the American West,* published by Simon & Schuster.

Meanwhile, in the late 1700's, Jean Baptiste Pointe Du Sable, a French-educated mixed-race man believed to have been born in what is now Haiti, travelled up the Illinois River, helping to settle Peoria. He later married a Potawatomi woman in a Catholic ceremony in Cahokia. Even before Fort Dearborn was built in 1803, he understood the importance to trade of the mouth of the Chicago River, then known as "Eschikagoa" meaning wild onion. With an appreciation for culture and languages, he became a wealthy trader who settled his home and commercial buildings near what is now the Tribune Tower, creating a center for trade in the area. But he sold his properties, returned to Peoria and then to St. Charles, Missouri, where he died poor in 1818, the same year Illinois became a state. In 1968 he was recognized by the City of Chicago and the State of Illinois as the first permanent resident and founder of the City of Chicago. *Jean Baptiste Pointe Du Sable,* www.blackhistorynow.com.

Illinois capitals

In 1818, as a prelude to statehood, Illinois adopted its first Constitution and selected Kaskaskia as its first state capital. Settled by French Jesuits, Kaskaskia was an important trading post and the capital of the Illinois territory. But Kaskaskia as our capital was short-lived; it is now an island with a population of less than 100. *The Story of Kaskaskia Island, Illinois' First State Capital,* by Isaac Smith, www.thesouthern.com.

In 1820, the state capital was moved 80 miles east to a site selected by land speculators on an unpopulated bluff on the Kaskaskia River. Then known as Reeve's Bluff, Vandalia had 3 different buildings that served as the capitol for 20 years. Local businessmen built one of them, hoping to sway the General Assembly to remain in Vandalia as rumors circulated of its potential move. Abraham Lincoln, then a legislator elected from Sangamon County, began his historic political career in the last capitol building constructed in Vandalia in 1836, which still stands today. *Old State Capitol,* www.vandaliaillinois.com.

As the state's population grew northward, Lincoln helped convince colleagues to move the capital. Several locations were considered and a popular vote was taken. But instead of the popularly approved location, Lincoln convinced officials to move the capital to Springfield, centrally located within the State. These legislators were known as the "Long Nine" for their collective height.

The first capitol building in Springfield, begun in 1837, was the location of Lincoln's "House Divided" speech and debates with Stephen A. Douglas. It was moved from its original location stone-by-stone in 1961. Carefully researched for authentic restoration, it is deemed "one of the most handsome and historic buildings in Illinois" where historic and cultural events in downtown Springfield take place, including citizenship ceremonies. *Past Illinois Capitols*, copied from the 1975-1976 Blue Book at *The Illinois State Capitol*, www.ilstatehouse.com. Barack Obama announced his candidacy for President at this Old State Capitol building, and later his choice of Joe Biden to serve as Vice President. Obama was one of four Presidents from Illinois, starting with the renown and respected Abraham Lincoln, whose homes in New Salem and Springfield have carefully been restored, then Ulysses S. Grant and Ronald Reagan, whose Illinois homes have also been preserved.

The current Statehouse was authorized in 1867; it is the sixth capitol building of Illinois. *The Illinois State Capitol,* www.ilstatehouse.com.

Illinois Constitutions, from the ISBA's *Understanding Illinois Constitutions, 2001 Edition*

Like its capitals, Illinois' four constitutions, too, have changed over time, reflecting changes in its population and governmental goals. With three branches of government like that established by the US Constitution, each maintained Illinois' basic structure. The Illinois Constitution of 1818 created a strong legislature, with less powerful executive and judicial branches. Local government was barely mentioned, reflecting the rural nature of the agricultural economy. Illinois' first constitution prohibited slavery in the new state, except in its main industry of the time, the southern Illinois salt mines operated by slaves, but then only until 1825.

Another constitution followed in 1848, three times as long as the original, reflecting a growing northern population, as defeat of the Indians in the Black Hawk war in 1832, and their removal, opened the north for settlement. Chicago became chartered in 1833. While Illinois' southern settlers hailed from Kentucky, Ohio and Indiana, many northerners were from eastern states where townships were a primary form of local government. But due in part to an economic downturn, government spending became unpopular. Accordingly, the Constitution of 1848 recognized townships, but limited government through term limits, low salaries for government officials and restrictions on the organization of banks.

After the Civil War, Chicago grew rapidly. Railroads and the Michigan canal enhanced commerce throughout Illinois and agriculture became mechanized. By 1870, citizens disliked the restrictions on banks and government spending under the Illinois Constitution of 1948. More lawyers than farmers helped to rewrite the state constitution in 1870. While local government still was restricted, banking and government spending limits were relaxed; power of the judicial and executive branches

grew. The Illinois Constitution of 1870 lasted 100 years.

By 1969, a new Constitutional Convention, Illinois' sixth, met at the Old State Capitol, now with greater racial, gender and professional diversity, which included 13 blacks and 15 women. It was important to the drafters that the process be open and transparent, with an emphasis on compromise, especially given varying views on important issues. To that end, some issues were decided by the convention through bipartisan cooperation, while certain controversial issues such as capital punishment and whether to grant 18-year-olds the right to vote were decided by voters through a special issues ballot; capital punishment was retained, but 18-years-olds were not given the vote.

With the growth of suburbs, the power of local government took on increased significance as multiple taxing bodies by various government agencies also grew. Support of Chicago Mayor Richard Daley was deemed critical, but was conditioned on giving Home Rule power to the larger cities and counties. Retaining the nomination of judges, at least in their initial terms, was another condition for the Mayor's support. Cumulative voting was supported, while the governor's power was enhanced through the executive veto. The 1970 Illinois Constitution also gave Illinois citizens the right to be free from discrimination and the right to a healthful environment, this latter provision encouraging the argument that the state constitution provides standing for an independent constitutional environmental claim, an argument rejected by our court.

The Illinois State Bar Association (ISBA) and its Illinois LEARN program are responsible for an authoritative report on Illinois' constitutions, intended to serve as a supplemental text for students, giving the procedural, historical, political and cultural background of each, as I have attempted to summarize above. *Understanding the Illinois Constitution,* 2001 Edition by Frank Kopecky and Mary Sherman Harris. www.isba.org. These authors even note the anecdote that before Chicago became chartered, the Bank of Shawneetown in southern Illinois rejected a loan request of a group of Chicagoans, in part due to Chicago being so far from the then-economic engine and populace of the state, noting too that this former Shawneetown bank is now just a historic site in southern Illinois. Illinois' population drive from the south to north is also demonstrated in the historic County Boundary maps published by the Illinois Secretary of State by each year of statehood. *Illinois County Boundaries 1790-present*, www.ilgv.org. In *1970 Constitutional Convention Shaped Illinois' Future* at gconline.com, author Tom Emery notes that the Convention's bipartisan cooperation was followed by political scandal, with four of Illinois' governors imprisoned on felonies, some committed while in office, while a shoebox full of cash was discovered in a closet following the death of an Illinois Secretary of State and more recently, a Speaker of the US House of Representatives from Illinois was imprisoned on felonious charges.

Bicentennial Celebration

The bicentennial would not be complete with an executive order or two establishing a commission to help celebrate our statehood's 200th. See Executive Order 2016-11 at www2.illinois.gov/Pages/government/execorders/2016_11.aspx. The celebration now includes a bicentennial brew and logo. www.Illinois200.com. ■

The Code of the Order of the Brethren

BY HON. BRIAN R. MCKILLIP

In *Pirates of the Caribbean: The Curse of the Black Pearl*, Elizabeth Swann is taken captive by Captain Hector Barbossa. She cites the Code of the Order of the Brethren for authority that she must be taken to shore. Captain Barbossa declines, saying:

> First, your return to shore was not part of our negotiations nor our agreement so I must do nothing. And secondly, you must be a pirate for the pirates' Code to apply and you're not. And thirdly, *the Code is more what you'd call "guidelines" than actual rules.*

(Emphasis added). A recent decision by the appellate court is an opportunity to re-examine how closely the Rules of Professional Conduct resemble the Code of the Order of the Brethren.

Vandenberg v. Brunswick Corporation, 2017 IL App (1st) 170181, is a fascinating read for any trial lawyer or judge. The most recent decision in the case concerned an appeal by Brunswick Corporation of a circuit court order vacating prior orders and reinstating a settlement agreement between the parties. At the trial court level, Brunswick had successfully sought to vacate the settlement agreement. Brunswick's theory alleged, in part, the fraudulent concealment of material facts by the plaintiffs' attorney.

In short, the defendant alleged that, while deliberating, the jury sent a question to the judge concerning allocation of fault, indicating it might return a verdict that would preclude a recovery for the plaintiff. The plaintiff's attorney, with knowledge of both the existence and content of the jury's question, accepted the settlement offer without disclosing any information about the question to the defendant's insurance carrier. The defendant's success, however, was short-lived when a new judge[1] vacated the order and reinstated the settlement.

On appeal, the appellate court defined fraudulent concealment:

> The elements needed to prove fraudulent concealment are (1) concealment of a material fact, (2) intent to induce a false belief where there exists a duty to speak, (3) that the other party could not have discovered the truth through reasonable inquiry and relied upon the silence as an indication that the concealed fact did not exist, (4) that the other party would have acted differently had it known of the concealed information, and (5) that its reliance resulted in an injury. *Id.* ¶ 31

It would seem that all of the elements but for number two had been met by Brunswick. The difficulty for Brunswick was establishing a duty on the part of the plaintiffs' attorney to speak. The appellate court ruled that the duty to speak would arise from a special or fiduciary relationship on the part of the attorney. Brunswick did not argue that the plaintiffs' attorney had a fiduciary duty to Brunswick nor that he was in a special or confidential relationship with Brunswick. Rather, Brunswick argued and the circuit court had originally found that the plaintiffs' attorney's duty to speak arose under "court rules and rules of professional conduct."

The appellate court acknowledged the Supreme Court's exclusive authority to regulate attorney conduct and discipline attorneys accordingly. The process, including the Rules of Professional Conduct and the ARDC are part of a "comprehensive program to regulate attorneys and punish their misconduct."

However, the appellate court cited the Preamble to the Rules of Professional Conduct and two attorney malpractice cases decided by the appellate court in holding that the Rules of Professional Conduct did not create a duty on the part of the plaintiffs' attorney to disclose material facts to the defendant or defendant's attorney. In the absence of such a duty, Brunswick could not "prove fraudulent concealment as a means to vacate the parties" settlement agreement." *Id.* at ¶ 34.

The current Rules of Professional Conduct were adopted by the Supreme Court in 2010. They superseded the Rules of Professional Conduct which had been adopted in 1990. Those Rules had replaced the Code of Professional Responsibility. This article has no intention of examining the differences between and among the separate sets of rules. And although different sets of rules have been adopted over the years, it is hard to imagine that the Supreme Court would view them any differently today than it did in 1988 when, in a disciplinary case, *In re Demuth*, 126 Ill. 2d 1 (1988), it stated:

> The Code of Professional Responsibility is not precatory; its rules are mandatory rules of conduct. Attorneys who fail to understand them or follow them do so at their peril. *Id.* at 14.

Nevertheless, Paragraph 20 of the Preamble to the Rules of Professional Conduct reads, in part, as follows:

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached…The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

In addition to the above Preamble, the *Vandenberg* court relied on *Nagy v. Beckley,* 218 Ill. App. 3d 875 (1st Dist. 1991) and *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340 (1st Dist. 2000).

In *Nagy*, the plaintiffs had filed a four count complaint against their former attorney. The first count alleged malpractice for the negligent failure to advise the plaintiff of a defense in an underlying case and of a possible conflict of interest with the other parties in that case. The plaintiff made the same factual allegations in Count II, but included an allegation that the defendant's

failures violated Canon 5 of the Code of Professional Responsibility. In affirming the trial court's dismissal of Count II as duplicative, the court found no authority which would permit "ethical malpractice" to be a separate cause of action.

The plaintiff in *Owens v. McDermott, Will and Emery* alleged that the defendants had violated Rule 1.9 of the Illinois Rules of Professional Conduct. That Rule relates to a lawyer's obligation to a former client. The defendants had represented the plaintiff in his divorce, and then represented a close corporation in the plaintiff's unsuccessful attempt to exercise a right of first refusal on its stock his ex-wife had received from him in the divorce. The trial court had dismissed the count, and the appellate court affirmed. The appellate court conceded that the defendants may have violated Rule 1.9, but stated "the mere fact that an attorney may have violated professional ethics does not, in and of itself, give rise to a cause of action for damages."

Generally stated, the attorney-client relationship creates a fiduciary duty on the attorney as a matter of law, and it provides the basis for a cause of action against an attorney when a breach of that duty results in damages. Therein lies the basis of many a legal malpractice action. In such cases "while the rules of legal ethics may be relevant to the standard of care in a legal malpractice suit, they are not an independent font of tort liability." *Nagy v. Beckley*, 218 Ill. App. 3d 875, 881(citations omitted).

The absence of any fiduciary duty owed by Vandenbergs' lawyer to Brunswick or its lawyers doomed Brunswick's attempt to establish fraudulent concealment and vacate the settlement agreement.

It must be considered, however, that had the *Vandenberg* court found that the Rules imposed upon the plaintiff's lawyers the duty to disclose to the defendant and its lawyers, the final result would have harmed the plaintiffs, the very parties to whom the lawyer owed his first obligation.

So you see, we are all part of the brethren and bound to follow its rules at our peril and a fiduciary duty cloaks our clients with its mandate as well — sort of. Opposing parties, however, may find themselves in the same spot as Elizabeth Swann – citing rules which provide no protection, much less transport to safety.

In researching this issue, I came to consider two cases which, although they do not seem to add much to the discussion, came as a surprise to me. In *Coughlan v. SeRine*, 154 Ill. App. 3d 510 (1st Dist. 1987), an attorney sued his former client for fees which drew a counterclaim for malpractice. The trial court dismissed the second amended counterclaim for failure to state a cause of action.

On appeal, the First District noted that Count I of the second amended counterclaim "sounds in attorney malpractice." The counter-plaintiff alleged that he had been overcharged by his attorney—a very novel argument by a disappointed former client. The appellate court found that an attorney is under a duty not to charge exorbitant or excessive fees and that a breach of that duty "is cognizable as malpractice and actionable because it literally fits the action's definition." *Id.* at 514. Further, the fact that the client had already paid the fees did not constitute a waiver of the breach of the duty.

I've been unable to find a subsequent case which cites *Coughlin* for the principle that excessive billing by an attorney may constitute malpractice.

In a more recent Rule 23 decision, *Porro v. Esposito*, 2013 IL App (1st) 120546–U, the defendants had obtained a default judgment on behalf of the plaintiff and over the next six years made occasional representations to the plaintiff that efforts at collection of the judgment would be made. In fact, the defendants made no efforts in that regard.

Seven years after the judgment was entered, the plaintiff hired a new attorney who served the judgment debtor with a citation to discover assets. The citation drew a motion to vacate the judgment based on lack of personal jurisdiction. The judgment debtor successfully challenged the special process server's return of service. The judgment was vacated.

The new attorney's efforts on behalf of the plaintiff failed when the trial court dismissed the suit pursuant to Illinois Supreme Court Rule 103(b) requiring diligence in service of process.

The plaintiff's malpractice suit against the prior attorneys was dismissed, with the trial court emphasizing the failure to appeal the Rule 103(b) dismissal. While the appellate court addressed the issue of failure to appeal, another aspect of the opinion is important. The appellate court noted that the attorneys had "effectively [withdrawn] as Porro's counsel, without notice to Porro" and breached Rule 1.16(d) of the Rules of Professional Conduct. That neglect could support a finding of the loss of claim against the judgment debtor and the consequential legal malpractice.

Whether or not, and the extent to which an attorney represents a client post-judgment is a matter for another day. Furthermore, the *Porro* case, not only because it is a Rule 23 decision, but because it is so fact intensive, may be of little guidance in the future. However, the appellate court's reliance on an alleged breach of the Rules of Professional Conduct as the basis of a legal malpractice action is food for thought. ■

1. My discussion of the *Vandenberg* case is intentionally short on facts. You must read the opinion to get the full flavor of what occurred at the trial court level. There were three different judges involved from the jury trial through the entry of the order of dismissal by reason of the settlement and until the time the case was on its way to the appellate court.

The thousand-foot rule

BY E. KENNETH WRIGHT, JR.

Recently the Illinois Supreme Court issued a seminal ruling examining the constitutionality of the Illinois statute addressing the crime of unlawful use of weapons within 1,000 feet of a public park. Such a violation is subject to an enhanced charge as a class 3 felony. 720 ILCS 5/24-1(a)(4), (c)(1.5). This section in the unlawful use of a weapon (UUW) law was successfully challenged as an illegal intrusion on the right to bear arms, as guaranteed by the Second Amendment of the U.S. Constitution. *People v. Chairez*, 2018 IL 121417, February 1, 2018.

The Court examined a recent line of cases from the U.S. Supreme Court beginning with *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), that recognized a guaranteed individual right to possess and carry weapons in case of confrontation based on the Second Amendment. *Heller* cautioned that the right is not unlimited. *Id.* at 626. *Heller* was quickly followed by the Court revisiting the topic and announcing that the Second Amendment's guarantee of the right to bear arms was applicable to the states through the Fourteenth Amendment. *McDonald v. City of Chicago,* 561 U.S. 742, 750 (2010). The Court pointed out that the Seventh Circuit enhanced and broadened *Heller* and *McDonald* rulings by invalidating other sections of the UUW statute that were unconstitutional since they prohibited carrying ready-to-use firearms outside of a person's home. *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). Ultimately, the Court recognized that Chicago has over 600 parks, and applying the 1,000-foot restriction zone would virtually preclude a person from driving within the city of Chicago while in possession of a firearm. *Chairez*, 2018 IL 121417, ¶ 55.

The Illinois Supreme Court addressed the defendant's constitutional challenge with a two part test. The first part asks the question if the restriction in the law is within the historical protection of the Second Amendment at the time it was ratified. Clearly the 1,000-foot rule is an ambiguous restriction. In such cases the court applies a "heightened means-ends scrutiny" test to consider the government's justification for the restriction of the right to keep and bear arms. *Chairez*, 2018 IL 121417, ¶ 21.

The court then examined a series of cases which held limitations placed upon Second Amendment rights as unconstitutional: *Moore*, at 942 found unconstitutional a prohibition upon carrying a ready-to-use firearm outside a person's home; *People v. Aguilar,* 2013 IL 112116, ¶ 21, found unconstitutional a prohibition on carrying a firearm on one's person or in any vehicle outside the home uncased, loaded, and immediately accessible; *People v. Mosley*, 2015 IL 115872 ¶ 25, extended the *Aguilar* protection to carrying a loaded weapon in the public way and stated the Second Amendment protects an individual's right to carry a ready-to-use gun outside the home with certain restrictions.

The Court applied recent cases to the challenged UUW law which prohibits possessing a firearm within 1,000 feet of a public park, the Court considered the State's argument that the restriction was not in violation of the Second Amendment because it was merely following a statement in *Heller*, 554 U.S. 626. Laws forbidding the carrying of firearms in sensitive places such as schools and government buildings do not violate the Second Amendment rights of those prosecuted.

Notwithstanding the obvious answer to the first part that the 1,000-foot restriction is unconstitutional, the Court continued to the second part—making a determination of the level of scrutiny to be used in the examination of the challenged law. The Court dismissed the rational basis test and adopted a heightened level of scrutiny test. The State had argued for an intermediate scrutiny test to uphold the statute's ban on possessing a firearm within 1,000 feet of a public park to further an important government objective in preventing harm to children and other vulnerable populations. *Chairez*, 2018 IL 121417, ¶ 34. The Court settled on a hybrid test stating that, *Mosley* and *Aguilar* asserted that the argument is not strict versus intermediate scrutiny but rather how rigorously to apply intermediate scrutiny, to Second Amendment cases. This approach allows this Court to evaluate the restriction the government has chosen to enact and compare with the public-benefits the restriction seeks to achieve.

The Court preferred a final analysis to determine the breadth of the law and the severity of its burden on the Second Amendment. The State insisted that the core protection of the Second Amendment is "in defense of hearth and home". The statute is not a ban on carrying arms for self-defense in public. In discarding this test as misplaced, the Court stated that the 1,000-foot restriction not only directly implicates the core right to self-defense by banning possession of firearms in public, but does so in a severe manner that covers a vast number of areas where individuals enjoy second amendment rights. Chairez, 2018 IL 121417, ¶ 48.

The Court referred to the prohibition as one that does not provide an exception for law-abiding individuals. *Chairez*, 2018 IL 121417, ¶ 49. In satisfying an elevated intermediate scrutiny test, the State failed to establish a close fit between the 1,000-foot firearm restriction around a public park and the actual public interest it serves. The State cannot assert that guns are dangerous and it has a duty to protect children, but must rather provide evidentiary support for its claims that the 1,000-foot prohibition would reduce the risks it identifies. *Chairez*, 2018 IL 121417, ¶ 54.

The statute challenged in this litigation has been amended to allow for some exceptions to carrying firearms within 1,000 feet of a school. Concealed carry is one such exception.

The UUW statute contains several other

sections with the 1,000-foot prohibition that the Supreme Court did not address. The Court relied on its interpretation of the rules of statutory construction that allows it to sever the challenged section alone. The Court determined that the invalid section dealing with the 1,000-foot rule and public parks was not inseparably connected to the remaining portions of the statute.

This UUW statute will most like be revisited because the 1,000-foot provision continues to apply to "public transportation facility" that includes in its definition bus stops. Another section applies the 1,000-foot rule to residential property owned, operated or managed by a public housing agency. How does a person walking, driving, riding a bike, etc. know where such properties are located? Or worse, where 1,000 feet begins in relation to said property.

Justice Karmeier said it best: "Innocent behavior could swiftly be transformed into culpable conduct if an individual unknowingly crosses into a firearm restriction zone." One of the things that make Chicago great is its parks and schools, laws that communalize closeness cause confusion and traps for the innocent and unknowing. I have often wondered how 1,000 feet would be measured. ■

A call for written admonishments in criminal cases

BY EVAN BRUNO

Illinois Supreme Court Rule 605 (titled "Advice to Defendant") sets forth the admonishments a judge must give to a defendant at the time of imposing sentence—the critical moment when the defendant is told exactly what he must do to take an appeal. The instructions are as intricate as they are important. Yet, they are delivered only once—orally, and without an opportunity for the defendant to take notes or ask clarifying questions. The typical practice of orally delivering admonishments to a lay defendant ignores the glaring reality that virtually no human being—whether lay person or lawyer—is capable of retaining and recalling detailed information after hearing it only once. Why do the criminal courts indulge in this fantasy when such important rights are at stake?

I suggest a simple supplement to oral admonishments in criminal cases. The Illinois Supreme Court should reduce to writing the information its rules require judges to deliver in open court. At the time of sentencing, the judge can orally deliver the admonishments and simultaneously confirm the defendant has received a written version. For example, the judge would say, "You are now being provided a written copy of the admonishment for Rule 605(b). That rules requires I advise you of the following…." This extra step would not be very complicated. Not too expensive. Not too time-consuming.

Rule 605—and any other rule requiring the delivery of complicated instructions to a defendant—should be taken seriously. As is true of a chocolate chip cookie recipe, assembly steps for an IKEA dresser, or directions to the family cabin upstate, humans usually need their instructions to be in writing. The important instructions in a criminal case should be no exception. ■

Recent appointments and retirements

1. Pursuant to its Constitutional authority, the Supreme Court has appointed the following to be Circuit Judge:
   - Hon. Joseph V. Salvi, 19th Circuit, 5th Subcircuit, January 2, 2018

2. The following Judges have retired:
   - Hon. Brian P. Hughes, Associate Judge, 19th Circuit, January 5, 2018
   - Hon. Luther W. Simmons, Associate Judge, 3rd Circuit, January 5, 2018
   - Hon. Robert P. Brumund, Associate Judge, 12th Circuit, January 14, 2018
   - Hon. Susan Fox Gillis, Associate Judge, Cook County Circuit, January 16, 2018
   - Hon. Susan M. Coleman, Associate Judge, Cook County Circuit, January 24, 2018
   - Hon. Gregory R. Ginex, Associate Judge, Cook County Circuit, January 26, 2018
   - Hon. John J. Fleming, Cook County Circuit, 8th Subcircuit, January 30, 2018
   - Hon. Hon. D. M. Flack, Associate Judge, 3rd Circuit, January 31, 2018 ■

Upcoming CLE programs

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

March

Thursday, 03-01-18 - Webinar— Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

Friday, 03-02-18 – ISBA Chicago Regional Office—9th Annual Animal Law Conference. Presented by Animal Law. 9:00AM to 5:00PM.

Monday, 03-05-18 – LIVE Webcast—Nuts & Bolts of a DUI Blood Draw Case. Presented by Traffic Law. 12:00-1:00 PM.

Tuesday, 03-06-18 – LIVE Webcast—The Ethics of Social Media for Attorneys and Judges. Presented by Bench and Bar. 1:00-2:30 PM.

Wednesday, 03-07-18 – LIVE Webinar—Fixing the Underperforming Practice. Presented by LOME. 12:00-1:00 PM.

Thursday, 03-08-18 – ISBA Chicago Regional Office—The Complete UCC. Master Series, Presented by the ISBA. 8:25-4:45.

Thursday, 03-08-18 – LIVE Webcast—The Complete UCC. Master Series, Presented by the ISBA. 8:30-5:00.

Thursday, 03-08-18 Webinar— Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

Friday, 03-09-18 – ISBA Chicago Regional Office—Malpractice Avoidance Program. Presented by Trusts and Estates. 8:30-4:00.

Friday, 03-09-18 – Webcast— Malpractice Avoidance Program. Presented by Trusts and Estates. 8:30-3:45.

Monday, 03-12 to Friday, 03-16— Pere Marquette Lodge, Grafton IL—40 Hour Mediation/Arbitration Training. Master Series, presented by the ISBA—WILL NOT BE ARCHIVED. 8:30 -5:45 daily.

Monday, 03-12-18 – Webcast— Safeguarding Voter Rights and Constitutionally Drawn Voting Districts: When Do Regulation and Party Mapping Cross the Line into Suppression and Discrimination? Presented By: REM. 12:00-1:00 PM

Tuesday, 03-13-18 – LIVE Webcast— Don't Panic – What to do When a Letter Arrives from the ARDC. Presented by ARDC. 11:30AM – 12:30 PM.

Thursday, 03-15-18 – Webinar—Hello My Name is PAC: An Introduction to the Attorney General's Public Access Duties. Presented by Local Government. 12:00-1:00 PM.

Thursday, 03-15-18 – Webinar— Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

Friday, 03-16-18 – Holiday Inn & Suites, Bloomington—Solo and Small Firm Practice Institute. 8:00-4:55.

Monday, 03-19-18 – LIVE Webcast—2018 Traffic Law Update. Presented by Traffic Law. 11:00 AM – 12:00 PM.

Wednesday, 03-21-18 – LIVE Webcast—Topics in Professionalism 2018: Mental Health and Substance Abuse Impacting Lawyers, and Diversity and Inclusion in the Legal Profession. Presented by General Practice. 12:00-2:00 PM.

Friday, 03-23-18 – ISBA Chicago Regional Office—Applied Evidence: Evidence in Employment Trials. Presented by Labor and Employment. 9:00 am – 5:00 pm.

Friday, 03-23-17 – LIVE Webcast— Applied Evidence: Evidence in Employment Trials. Presented by Labor and Employment. 9:00 am – 5:00 pm.

Friday, 03-23-18 – Quincy—General Practice Update 2018: Quincy Regional Event. Presented by General Practice. All day.

April

Wednesday, 04-04-18 – LIVE Webcast—Hot Topics in Trial – Session 1 – Jury Selection and Jury Questions. Presented by Tort Law. 12:00-1:30 PM.

Wednesday, 04-11-18 – LIVE Webcast—Tips and Traps in UCC Compliance. Presented by Commercial Banking. 12:00-1:00 PM.

Thursday, 04-12-18 – ISBA Chicago Regional Office—Secrets of the Citation Act and Tips for Enforcing Judgement. Presented by Commercial Banking. 8:45 AM – 12:15 PM.

Thursday, 04-12-18 – LIVE Webcast— Secrets of the Citation Act and Tips for Enforcing Judgement. Presented by Commercial Banking. 8:45 AM – 12:15 PM.

Thursday, 04-13-18 – NIU Hoffman Estates—Spring 2018 DUI and Traffic Law Program. Presented by Traffic Law. All day.

Wednesday, 04-18-18 – LIVE Webcast—Mastering the Dead Man's Act. Presented by Trusts and Estates. 2:00-3:15.

Thursday, 04-19-18 – Chicago Regional Office—Juvenile Court Topic – title TBD. IJC/ISBA/CCBA Joint CLE Program. 5:30-7:00 p.m. ■

Bench & Bar
Illinois Bar Center
Springfield, Illinois 62701-1779
February 2018
Vol. 48 No. 8

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