

# Bench & Bar

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

## Bench & Bar addresses attacks on the rule of law

BY DAVID W. INLANDER

For much of this year, the Bench and Bar Section Council has focused discussion on attacks on the rule of law. At the recent Midyear Meeting held in Chicago, ISBA President Hon. James F. McCluskey generously took the time to address our group of judges and practicing attorneys on this topic. Judge McCluskey highlighted strong public statements made by him and several of his predecessors, including Richard D. Felice, Vincent F. Cornelius, and immediate ISBA past

president and Bench & Bar Council member, the Hon. Russell W. Hartigan (ret.), on behalf of the ISBA responding to various political actions and comments by public officials viewed by many as outrageous, defamatory, and damaging to our democratic institutions.

The section council then discussed constructive steps we can adopt to counteract these negative forces on our profession, and enhance the standing

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## Efficiency, economy, and consistency: 2018-2019 amendments to the Federal Rules

BY ERIN GASPARKA

The Advisory Committee on Civil Rules (Advisory Committee) further demonstrated its commitment to rule amendments that are responsive to modern realities of litigation in its recent changes made to Rules 5, 23, 62, and 65.1 of the Federal Rules of Civil Procedure. The updates to these Rules, approved by the U.S. Supreme Court last April, and made effective December 1, 2018, are straightforward and narrow. The

2018 amendments continue to focus on practicality.

### Amended Rule 5: Serving and Filing Pleadings and Other Papers

Most important among the 2018-2019 amendments are the changes made to Rule 5 and the Advisory Committee's further embrace of electronic efficiency.

Rule 5(b)(2)(E) previously required consent in writing to electronic service,

based on an historic concern that electronic communication could be unreliable and sporadic. The 2018-2019 amendments remove this requirement for written consent as it relates to registered users of the federal court's electronic filing system ("ECF"). Worth noting is that the ultimate responsibility as to the success of ECF service still lies with filer – service may be completed but won't be

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of the judiciary and legal profession as a whole.

Among the suggestions put forth in our meeting were: advocating for the reinstatement of civics classes in our schools, promoting non-partisan elections of judges, maximizing educational opportunities with jurors both before and after trials, courtroom to classroom seminars, an active lawyers speaker's bureau, concerted social media efforts, preparation of pamphlets, fliers and videos explaining to the public the meaning of our judicial system, and many more.

This year, as an initial responsive action, our section council created a video outreach committee. We'll report more

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effective if the filer or sender learns that the document did not reach the person to be served. As the Advisory Committee Notes make clear, the court is not responsible for notifying the filer in the event of a failed ECF transmission. Also, written consent to electronic service is still required in instances when service is made by electronic means outside of ECF (*e.g.*, for discovery responses).

The Rule 5(d) amendments reflect the predominance of electronic filing in today's federal practice. For starters, it is the end of an era (and an extra page): revised Rule 5(d)(1)(B) removes the requirement of a certificate of service for filings that are served via ECF. For all non-ECF service, a certificate of service identifying the date and manner of service still must be filed with the document or within a reasonable time after service. Under the former Rule 5(d)(3), documents could be filed, signed, or verified by electronic means *if* permitted by local rule, and as long as the local rule contained reasonable exceptions. In practice, most courts' local rules had already evolved to require registered users to file electronically. (*See e.g.* N.D. Ill. LR5.2(a)). As the Advisory

on these concrete efforts in the months to come. In addition, we'll continue to focus on education and advocacy on behalf of the profession both within our section council meetings, and in seminars. For example, the next Bench and Bar sponsored CLE program on civility and professionalism will take place at the University of Illinois on April 4th will be open to law students as well as members of the bar.

We welcome suggestions from all our newsletter readers to propose other constructive actions we can advance to both protect and promote our judicial system. Your valuable input on this vitally important topic is especially welcome. ■

Committee Notes proclaim regarding the revamped Rule 5(d)(3)(A), "[t]he time has come to seize the advantages of electronic filing by making it generally mandatory in all districts for a person represented by an attorney." The local practice of so many courts thus has been universalized. Finally, Rule 5(d)(3)(C) instructs that a valid signature is executed when a person authorizes a filing made through her or his ECF account and her or his name appears on the signature block.

### New Rule 5 Recap

- Serve registered ECF users using ECF.
- No certificate of service is needed for an ECF filing.
- Parties represented by counsel must use electronic filing absent a contradictory local rule or good cause.

### Amended Rule 23: Class Actions

The amendments to Rule 23 economize resources devoted to class settlement by expanding methods for providing notice to class members, revising factors a district court should consider in approving a

## Bench & Bar

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proposed class settlement, removing the need for court approval to withdraw class settlement objections, and asserting the finality of district court approval of class notice procedures.

In another nod to the reality of modern of communication, Rule 23(c)(2)(B) now expressly acknowledges that the court employing “the best notice that is practicable under the circumstances” to communicate a proposed settlement to class members may entail notice through electronic means in addition to United States mail or “other appropriate means.” The Advisory Committee Notes instruct courts to “consider the capacity and limits of current technology” when selecting a notice method. Rule 23(c)(2)(B) also makes evident that Rule 23(e)(1) notice initiates the opt-out period in Rule 23(b)(3) class actions.

Rule 23(e)(1) now requires the court to direct notice of proposed settlement, dismissal, or compromise to class members *if giving notice is justified* by the parties’ showing that the court will likely (i) approve the proposed resolution under Rule 23(e)(2) and (ii) if it has not previously certified a class, certify the class for purposes of judgment on the proposal. Effectively, this provision conditions the court providing class notice of a proposed settlement on the likelihood of final approval, which underscores an understanding articulated in the Advisory Committee Notes that “[t]he decision to give notice of a proposed settlement to the class is an important event ... [that] should be based on a solid record.”

The amendments make clear that parties are responsible for submitting sufficient information for the court to use in determining whether to notify the class of the proposed resolution. In making its determination, the court should focus on the extent and types of benefits a proposed settlement would give class members and consider such factors as the contemplated claims process, anticipated rate of claims, distribution of unclaimed funds, the range and risks of protracted litigation, and attorneys’ fees.

In an effort to decrease the potential for unjustified or half-cooked objections that can slow down and even dismantle settlements, amended Rule 23(e)(5)(A) now allows an objector to withdraw objection without court approval.

The remaining Rule 23 amendment comes in Rule 23(f), which makes a ruling under Rule 23(e)(1) regarding the form of notice to a class of a proposed settlement un-appealable, at least until the district court decides whether to certify a class.

#### **New Rule 23 Recap**

- The court should only give notice of a proposed settlement if settlement approval is likely and the class has been certified or likely will be certified.
- Parties are responsible for providing the court with information to determine whether sending notice of a proposed settlement is justified. Settlement objectors can withdraw their

objections without court approval.

#### **Amended Rule 62: Stay of Proceedings to Enforce a Judgment and Rule 65.1: Proceedings Against a Security Provider**

Consistency is a mark of good rule making: Rules 62 and 65.1 have been amended to resolve previously confusing timing issues. Fixing an “apparent gap,” Rule 62(a) now extends an automatic stay from 14 days to 30 days following the entry of a judgment (unless the court orders otherwise). This change to 30 days coincides the time for filing most appeals, thereby giving a would-be appellant the full appeal time period to also benefit from an automatic stay. Amended Rule 62(a) cautions however, that a court has authority to dissolve or supersede an automatic stay.

Rule 65.1 was amended by replacing “surety” with “security” to track Rule 62’s tweaked language allowing a party to obtain a stay or judgment “by providing a bond or other security.”

#### **New Rules 62 and 65.1 Recap:**

- The automatic stay after judgment is 30 days unless the court orders a different stay period.

#### **Conclusion**

The 2018-2019 amendments to the Federal Rules of Civil Procedure communicate a steady resolve to have the Rules evolve with the times through principles of efficiency, economy, and consistency. ■

# Thoughts on human nature and attorney discipline

BY HON. STEVE PACEY (RET.)

Long ago I made an observation (certainly not the first person to do so) and have since frequently expressed it to relatives, colleagues, friends, judicial consumers and even strangers: We (our species) make the highest and best use of our gray matter when we are rationalizing or excusing our conduct. Without being substantiated by any scientific

data, 44 years of anecdotal legal profession experience persuades me that my belief is, in fact, an axiom.

We all realize that the economics of the practice of law has changed dramatically: large law school debt, fewer jobs, increasing office overhead, particularly for support staff and technology, cost conscious clients/

consumers, and time demands for mentoring and supervising young attorneys or managing a law office.

My limited experience hearing cases as a member of the ARDC Hearing Board (going on two years), together with reviewing the recommendations of all the other panels hearing cases, leads me to this conclusion:

the combination of economic pressures and my “gray matter” maxim is a recipe for potential disaster. If you factor in the substance abuse or addiction which is found in too many disciplinary cases, something bad is almost guaranteed to happen. By no means am I excusing attorney misconduct. Some percentage (I would like to think relatively small) of disciplinary matters simply involve bad actors. Most (I would like to believe) misconduct is explained by some combination of the factors mentioned above, and perhaps other reasons.

Is there a solution to the too common disciplinary themes of “borrowing” from the estate or the client’s settlement funds, over charging or not returning unearned fees, misrepresenting the status of litigation, or failure to communicate with the client?

Our supreme court recognized some time ago that the purpose of mandatory continuing legal education was not just to update attorneys on changes in the law. The result was six hours of required updating in the areas of professionalism, civility, legal

ethics, diversity and inclusion, or mental health and substance abuse (these areas have, for the most part, become or acquired aspects of substantive law). Recently the supreme court amended the 6 hour portion of the MCLE requirement to include either an approved year long lawyer-to-lawyer mentoring program or one hour each in the areas of mental health/substance abuse and diversity/inclusion.

The ARDC has been a leader among national bar disciplinary agencies in moving toward resolutions of misconduct matters which involve mental health or substance abuse treatment, improvement of practice management and mentoring or supervision. The supreme court, in its disciplinary orders, has embraced the concept of protecting the public and holding respondents accountable, while allowing attorneys the opportunity to be rehabilitated.

Here are some ideas which are not necessarily a “solution” to the question posed above, but might help the disciplinary process to keep moving in the right

direction:

- Should the online Proactive Management Based Regulation program be required for all newly admitted attorneys and periodically as part of the bi-annual 30-hour requirement for all attorneys?
- LAP has reported a significant increase in referrals. Does the agency need more funding and more training for sponsors?
- Should trial courts be encouraged, in substance abuse and mental health dispositions involving attorneys, to make LAP referrals?
- Should the lawyer-to-lawyer mentoring program, perhaps less than one year in length, be required of all newly admitted attorneys as part of their CLE requirement?

I am relatively certain of two things. First, the supreme court can come up with better ideas than me. Second, both the court and the ARDC are committed to improving the profession and the disciplinary process. ■

## Recent appointments and retirements

1. Pursuant to its Constitutional authority, the supreme court has appointed the following to be circuit judge:

- Hon. Marina E. Amendola, Cook County Circuit, December 3, 2018
- Hon. Fredrick H. Bates, Cook County Circuit, 1st Subcircuit, December 3, 2018
- Hon. Michael A. Forti, Cook County Circuit, 8th Subcircuit, December 3, 2018
- Hon. Robert K. Villa, 16th Circuit, 3rd Subcircuit, December 17, 2018
- Lloyd James Brooks, Cook County Circuit, December 20, 2018
- Sondra N. Denmark, Cook County Circuit, 2nd Subcircuit, December 27, 2018

2. The circuit judges have appointed the

following to be associate judge:

- Jennifer J. Clifford, 17th Circuit, December 3, 2018
- Scott J. Black, 11th Circuit, December 17, 2018

3. The following Judges have retired:

- Hon. Rodney Hughes Brooks, Cook County Circuit, 1st Subcircuit, December 2, 2018
- Hon. Rosemary Collins, 17th Circuit, December 2, 2018
- Hon. Barbara Crowder, 3rd Circuit, December 2, 2018
- Hon. Richard P. Goldenhersh, 5th District Appellate Court, December 2, 2018
- Hon. Leslie J. Graves, 7th Circuit, December 2, 2018
- Hon. Debora J. Gubin, Cook County

Circuit, 8th Subcircuit, December 2, 2018

- Hon. Bobby G. Hardwick, 8th Circuit, December 2, 2018
- Hon. Ronald M. Jacobson, 15th Circuit, December 2, 2018
- Hon. Diane M. Lagoski, 8th Circuit, December 2, 2018
- Hon. Marvin P. Luckman, Cook County Circuit, 9th Subcircuit, December 2, 2018
- Hon. J. Edward Prochaska, 17th Circuit, December 2, 2018
- Hon. David W. Butler, Associate Judge, 11th Circuit, December 5, 2018
- Hon. Stephen R. Rice, Associate Judge, 20th Circuit, December 7, 2018
- Hon. James C. Hallock, 16th Circuit,

- 3rd Subcircuit, December 14, 2018
  - Hon. Margaret A. Marcouiller, Associate Judge, 19th Circuit, December 14, 2018
  - Hon. Lee Ann S. Hill, 11th Circuit, December 19, 2018
  - Hon. Thomas V. Gainer, Jr., Associate Judge, Cook County Circuit, December 31, 2018
  - Hon. Richard H. Gambrell, Associate Judge, 9th Circuit, December 31, 2018
  - Hon. Kay M. Hanlon, Cook County Circuit, 12th Subcircuit, December 31, 2018
  - Hon. Marianne Jackson, Cook County Circuit, 7th Subcircuit, December 31, 2018
  - Hon. W. S. McNeal, Associate Judge, 14th Circuit, December 31, 2018
  - Hon. Brian T. Otwell, Associate Judge 7th Circuit, December 31, 2018
  - Hon. Richard D. Russo, Associate Judge, 18th Circuit, December 31, 2018
  - Hon. Michael J. Sullivan, 22nd Circuit, December 31, 2018
  - Hon. Ronald D. Sutter, 18th Circuit, December 31, 2018
  - Hon. Michael A. Wolfe, Associate Judge, 18th Circuit, December 31, 2018
4. The terms of the following judges have expired:
- Hon. Diana L. Embil, Cook County Circuit, 15th Subcircuit, December 2, 2018
  - Hon. Michael P. Gerber, Cook County Circuit, 13th Subcircuit, December 2, 2018
  - Hon. Elizabeth A. Karkula, Cook County Circuit, December 2, 2018
  - Hon. Hon. Jeffrey S. MacKay, 18th Circuit, December 2, 2018
  - Hon. Rick A. Mason, 12th Circuit, December 2, 2018
  - Hon. John A. O'Meara, Cook County Circuit, 4th Subcircuit, December 2, 2018
  - Hon. Litricia Payne, Cook County Circuit, 1st Subcircuit, December 2, 2018
  - Hon. Bradford A. Rau, Sr., 6th Circuit, December 2, 2018
  - Hon. Travis Richardson, Cook County Circuit, 2nd Subcircuit, December 2, 2018
  - Hon. Robin Shoffner, Cook County Circuit, 8th Subcircuit, December 2, 2018
  - Hon. William D. Stiehl, 20th Circuit, December 2, 2018
  - Hon. Anthony Swanagan, Cook County Circuit, 15th Subcircuit, December 2, 2018
  - Hon. Oran F. Whiting, Cook County Circuit, December 2, 2018
5. The following were elected judges in the general election:
- Hon. Jacquelyn D. Ackert, 15th Circuit, December 3, 2018
  - Hon. Amanda S. Ade-Harlow, 4th Circuit, December 3, 2018
  - Michael B. Barrett, Cook County Circuit, 15th Subcircuit, December 3, 2018
  - Christopher Bauer, 3rd Circuit, December 3, 2018
  - Hon. Bruce C. Beal, 9th Circuit, December 3, 2018
  - Hon. Samuel J. Betar, III, Cook County Circuit, 13th Subcircuit, December 3, 2018
  - Hon. Christen L. Bishop, 19th Circuit, December 3, 2018
  - Tiana Blakely, Cook County Circuit, 2nd Subcircuit, December 3, 2018
  - Hon. Mark E. Bovard, 5th Circuit, December 3, 2018
  - Joseph P. Bruscato, 17th Circuit, December 3, 2018
  - Hon. Peter C. Cavanagh, 4th District Appellate Court, December 3, 2018
  - Joel Chupack, Cook County Circuit, 12th Subcircuit, December 3, 2018
  - Elizabeth Ciaccia-Lezza, Cook County Circuit, 4th Subcircuit, December 3, 2018
  - Hon. H. Yvonne Coleman, Cook County Circuit, 5th Subcircuit, December 3, 2018
  - Vincent F. Cornelius, 12th Circuit, December 3, 2018
  - Hon. Rene Cruz, 16th Circuit, 1st Subcircuit, December 3, 2018
  - Kevin P. Cunningham, Cook County Circuit, 3rd Subcircuit, December 3, 2018
  - Hon. ThomasW. Cunnington, 21st Circuit, December 3, 2018
  - Colleen Reardon Daly, Cook County 10th Subcircuit, December 3, 2018
  - Hon. Linda E. Davenport, 18th Circuit, December 3, 2018
  - Hon. Adrienne E. Davis, Cook County Circuit, 2nd Subcircuit, December 3, 2018
  - Hon. Tiffany E. Davis, 22nd Circuit, 1st Subcircuit, December 3, 2018
  - Hon. Kent Delgado, Cook County Circuit, 6th Subcircuit, December 3, 2018
  - Hon. David W. Dugan, 3rd Circuit, December 3, 2018
  - Hon. Bruce P. Fehrenbacher, 10th Circuit, December 3, 2018
  - Beatriz Frausto-Sandoval, Cook County Circuit, 14th Subcircuit, December 3, 2018
  - Hon. David Garcia, 12th Circuit, December 3, 2018
  - Hon. Carey C. Gill, 1st Circuit, December 3, 2018
  - Hon. Peter Gonzalez, Cook County Circuit, December 3, 2018
  - Amanda B. Gott, 1st Circuit, December 3, 2018
  - Ieshia Gray, Cook County Circuit, 2nd Subcircuit, December 3, 2018
  - Stephen Green, 1st Circuit, December 3, 2018
  - Jack J. Hagerty, Cook County Circuit, December 3, 2018
  - Hon. Charles C. Hall, 5th Circuit, December 3, 2018
  - Hon. Robert F. Harris, Cook County Circuit, 5th Subcircuit, December 3, 2018
  - Hon. Thomas M. Harris, 4th District Appellate Court, December 3, 2018
  - Hon. Toya T. Harvey, Cook County Circuit, 2nd Subcircuit, December 3, 2018
  - Hon. Jerry J. Hooker, 8th Circuit, December 3, 2018
  - Hon. Celia A. Horan, Cook County

- Circuit, December 3, 2018
- Lindsay Huges, Cook County Circuit, 8th Subcircuit, December 3, 2018
- Hon. Thomas Clinton Hull, III, 16th Circuit, 4th Subcircuit, December 3, 2018
- Hon. Preston Jones, Jr., Cook County Circuit, December 3, 2018
- Hon. Christopher T. Kolker, 20th Circuit, December 3, 2018
- Kathleen T. Lanahan, Cook County Circuit, December 3, 2018
- Hon. Amy C. Lannerd, 8th Circuit, December 3, 2018
- Hon. John S. Lowry, 17th Circuit, December 3, 2018
- Thomas F. McGuire, Cook County Circuit, December 3, 2018
- Scott McKenna, Cook County Circuit, 15th Subcircuit, December 3, 2018
- Hon. David R. Navarro, Cook County Circuit, 4th Subcircuit, December 3, 2018
- M. Noland, 16th Circuit, December 3, 2018
- Hon. John J. O’Gara, 20th Circuit, December 3, 2018
- Shannon P. O’Malley, Cook County Circuit, 13th Subcircuit, December 3, 2018
- Erika Orr, Cook County Circuit, 1st Subcircuit, December 3, 2018
- Hon. David K. Overstreet, 5th District Appellate Court, December 3, 2018
- Linda Perez, Cook County Circuit, 6th Subcircuit, December 3, 2018
- Hon. Marian E. Perkins, Cook County Circuit, 5th Subcircuit, December 3, 2018
- Hon. Clare J. Quish, Cook County Circuit, December 3, 2018
- Jeremy Richey, 6th Circuit, December 3, 2018
- Hon. Joanne F. Rosado, Cook County Circuit, 11th Subcircuit, December 3, 2018
- Hon. Randall B. Rosenbaum, 6th Circuit, December 3, 2018
- Hon. Heinz M. Rudolf, 20th Circuit, December 3, 2018
- Hon. Stephanie D. Saltouros, Cook County Circuit, 10th Subcircuit, December 3, 2018
- Hon. Joseph V. Salvi, 19th Circuit, 5th Subcircuit, December 3, 2018
- Hon. John W. Sanders, 1st Circuit, December 3, 2018
- Hon. Debra A. Seaton, Cook County Circuit, 2nd Subcircuit, December 3, 2018
- Hon. Patricia A. Seneff, 14th Circuit, December 3, 2018
- Hon. James A. Shapiro, Cook County Circuit, 8th Subcircuit, December 3, 2018
- Athanasios S. Sianis, Cook County Circuit, December 3, 2018
- Rosa M. Silva, Cook County Circuit, December 3, 2018
- Hon. Charles W. Smith, 19th Circuit, 1st Subcircuit, December 3, 2018
- Hon. Sarah D. Smith, 3rd Circuit, December 3, 2018
- Hon. Christy Solverson, 1st Circuit, December 3, 2018
- Hon. Ketki Shroff Steffen, Cook County Circuit, 13th Subcircuit, December 3, 2018
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