ILLINOIS STATE BAR ASSOCIATION

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General Practice, Solo & Small Firm

The newsletter of the Illinois State Bar Association's General Practice, Solo & Small Firm Section

Chair's column

BY MARY ANNE GERSTNER

At the General Practice, Solo and Small Firm Section Council meeting on August 19, 2017, Champ Davis, Senior Counsel at Davis McGrath LLC, in Chicago, Illinois, was presented with the 2017 ISBA Matthew Maloney Tradition of Excellence Award.

In his remarks, Champ reflected on his experiences in ISBA activities going back to his participation in the ISBA Young Lawyers Division. Champ said that he has benefitted from ISBA membership, and pointed out that ISBA membership has given him the opportunity of meeting lawyers from throughout the State. Champ recognized several of the lawyers on the General Practice, Solo and Small

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E-mail: Why can't I keep my free account?

BY CARL R. DRAPER

The age of e-mail has been with us for a generation. The simple joy we felt about 30 years ago upon starting up the AOL account and hearing, "You've got mail" has long lost it luster. The movie has been on cable television so much that it too has lost its charm. For the practicing bar, it is time to step back and assess the attachment so many of us have in those free accounts that we started decades ago.

E-filing and e-service is a game-changer

Effective this year, the Supreme Court has mandated that we serve pleadings on all counsel by e-mail. It seems like just a few years ago that fax service was authorized, but only with permission. In its day, that was considered a great benefit of technology. Today we have no choice as Supreme Court Rule 11 now provides:

> **Rule 11. Manner of Serving Documents Other Than Process and Complaint on Parties Not in Default in the Trial and Reviewing Courts**

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Chair's column

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Firm Council Roster whom he has met through the ISBA. In addition, Champ and John Phipps of Champaign, Illinois, a longstanding member of General Practice, Solo and Small Firm and Co-Editor of this Newsletter, were law school classmates. We congratulated Champ and thanked him for his dedication to the legal profession.

One of the missions of General Practice, Solo, and Small Firm is to promote professional excellence through education relating to substantive practice areas and to provide opportunities for the exchange of pertinent information. An article which relates to both the estate planning and family law practice areas from the General Practice, Solo & Small Firm-August, 2017 Newsletter appears in the October 2017 issue of the *Illinois Bar Journal.* The article is "5 estate planning steps for divorcing clients" by Lauren Evans DeJong.

In the area of ethics, although payment of attorney fees in bitcoin may not be pertinent to you or to most lawyers, according to a recent Nebraska Ethics Opinion a growing number of lawyers in other jurisdictions accept bitcoin as payment for services. This Nebraska Ethics Opinion, while it does not affect Illinois lawyers, explains "digital currencies" such as bitcoin, and provides, among other things, that lawyers may receive digital currency such as bitcoin as payment for legal services but must convert the digital currency to U.S. dollars immediately upon receipt. See, Nebraska Ethics Advisory Opinion For Lawyers No. 17-03, released September 11, 2017. ■

Chair Mary Ann Gerstner with 2017 ISBA Matthew Maloney Tradition of Excellence Award winner Champ Davis.

About the Author: Mary Anne Gerstner practices law with the Law Offices Gerstner & Gerstner, 53 W. Jackson Boulevard, Suite 1538, Chicago, IL 60604. She is engaged in general practice with a focus on general litigation and commercial litigation, labor and employment, and wills and trusts. She is Chair of the Illinois State Bar Association General Practice, Solo, and Small Firm Section Council for the 2017-2018 bar year. Mary Anne Gerstner can be reached at 312-435-0040, or at magerst@sbcglobal.net.

General Practice, Solo & Small Firm

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E-mail: Why can't I keep my free account?

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(a) On Whom Made. If a party is represented by an attorney of record, service shall be made upon the attorney. Otherwise service shall be made upon the party.

(b) E-mail Address. An attorney must, and a self-represented party may, include on the appearance and on all pleadings filed in court an e-mail address to which documents and notices will be served in conformance with Rule 131(d).

~~(b)~~**(c) Method.** Unless otherwise specified by rule or order of court, ~~D~~documents shall be served electronically. Electronic service may be made either through the court electronic filing manager or an approved electronic filing service provider, if available. For all parties for which such service is not available, the filer shall make service to the e-mail address(es) identified by the party's appearance in the matter. If service is made by e-mail, the documents may be transmitted via attachment or by providing a link within the body of the e-mail that will allow the party to download the document through a reliable service provider.

And we have been under this requirement since July 1, 2017. Are you in compliance?

Not only are all pleadings being served by some form of electronic submission, we need to start filing in court with one of the electronic filing services available now for all appellate filings and for many Circuit Courts. By January 1, 2018 it will be universal. Without getting into all of the steps for meeting these new procedures, what every law office should re-examine is the e-mail service and office procedures affected by these 21st century changes. We no longer live in the world of the dial up modem.

Why change now?

Under the new rule provisions, e-mail will be more important than ever. For attorneys who have practiced for 30 years or more, reminders to attend to pleadings, motions or notices often is managed under the "Inbox Method." We learned this bad habit as young lawyers. When litigation (or transaction) documents arrived, they were always on paper. The document would hit the Inbox everyday with mail delivery. The Inbox would stare the attorney in the face and seem to say, "Pay attention to these items. You need to read and respond to them." Papers either stayed in the Inbox until addressed or got discarded, delegated or filed. The reminder of what needed to be done was the pile of papers in the box right there on the desk.

E-mail mimics the old Inbox but for many it has not been as well-adapted to the task. One reason for that is a failure by many lawyers to separate business e-mail addresses from personal ones. Almost everyone carefully uses home addresses for personal postal mail and business addresses strictly for business. Personal financial mail arrives at home along with greeting cards, shopping catalogs and family correspondence. Lawyers use their business street addresses mostly for business. Not so with e-mail and social media. Too many lawyers have a single e-mail address that is not only used for work but also for friends, family, shopping, social media and much more. Since this one account is usually running on the computer desktop all day, it is tempting to use the same account for everything. This makes it a distraction from business and clutters up our legal recordkeeping.

For most lawyers, the e-mail Inbox is chaos that is hard to control. While users can set up folders for organization and rules to automatically sort incoming e-mail. But the arrival of e-mail is unending and important items arriving at 9:00 in the morning are usually still in the Inbox but off the screen by 11:00 – and hard to remember by 4:00. Take a test of your own office. Look at the paper Inbox on your desk and estimate the number of documents in it. Then write on a piece of paper what you guess is the number of e-mails still sitting in your e-mail Inbox. After writing down your estimate, check it. Many respected and organized lawyers end up with and Inbox containing 1000's of items. Especially if many of these are not related to the law practice, it is likely that important items will be out of sight and out of mind before they receive appropriate attention.

Security, efficiency and ethics

The reason to re-evaluate e-mail systems are several. Especially because important documents and pleadings will eventually all arrive electronically, organization systems based on paper will diminish. Law offices must handle incoming digital documents with the same care as paper. The service rules and the e-filing systems will depend on reliable e-mail systems. That means a professional e-mail service and not the casual and free programs offered by Google, MSN, Yahoo, AOL and others. The reasons include security. Free e-mail has far fewer expectations of privacy and protection from the service provider than paid subscriptions. Those who doubt this should review the Terms of Service Agreement that was the final click of the mouse when the account was established. Even as lawyers, we are no more likely to review this contractual agreement than our clients.

We have ethical obligations now to be competent at use of technology. It is important to note that the free services store the e-mail on giant computer data farms spread throughout the world. Even when some steps are taken to secure data, breaches have been widely known. The last election is still generating news of e-mail accounts being hacked and released. While it is less likely that a small law firm would be deliberately targeted like a prominent world figure, the easier systems to be hacked would be free services. Protections like data encryption and stronger security for access are built into business accounts that may not be available to free services.

Office policies

Just making sure that a reliable and business appropriate service is used will not ensure compliance with the duties of securing client data and properly docketing and tracking our work. Office staff are vital for tracking deadlines, unfinished work and communicating with courts, other counsel and clients. Every office should insist that office e-mail accounts be used for office work only. Fortunately, it is easy and free for staff to have personal accounts. They need to remember at all times to keep personal accounts separate. It is easy to just use the account that they have open all day for a few personal items. The more that this happens, the greater influx of unwanted or distracting e-mail in the Inbox. And law offices may consider additional e-mail addresses limited to litigation and legal transactional work that is separate from office administration work.

For organizational purposes and docket control, many larger law firms, the Illinois Attorney General, some State's Attorneys and courts have e-mail accounts associated with service of litigation documents that is separate from any particular lawyer. Under the new rules (and as allowed in the federal rules) service can be directed to at least 2 addresses. That can be the lawyer involved and a legal assistant. But some have created an address like: legal.notices@lawfirm.com. Such an account can be accessed by a number of appropriate staff including the person who has primary responsibility for the firm's calendar and docket system. This small change alone may help lawyers avoid the risk of an important pleading getting lost in the overloaded digital Inbox.

What should you have?

At a minimum you should have e-mail services that are not full of ads. Some of the most common risks to phishing or other malware is clicking on an unsafe download. Ads are the price for "free" services. The temptation in the ads can lead to office staff, or, you the owner of the business, clicking on attractive ads to get information. The more that this happens, the greater the chance that there will be some malware hidden in a link. If nothing else, your e-mail Inbox will have a higher chance of spam. Spam and secure e-mail communications are simply not compatible.

The paid services should be storing

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e-mail on a secure data farm. It is good to find out whether the e-mail on the provider's end is secured against intrusion with good firewalls and by encryption on that end.

Service is important. If an e-mail account gets hacked or is compromised, will the service provider help rebuild the e-mail folders? The free services are unlikely to provide all of the help you need. And if your computer e-mail is hacked and turned into a bot churning out spam, you have a high chance of other recipients blocking your incoming e-mail messages. There are rating services that look for sources of spam and malware and identify them on a risk index. Since you must serve litigation documents by e-mail, it is important to have a service that will not be blocked by other law firms or businesses.

Finally, do it because it does not have to be expensive and it can be more professional looking. Since even small law firms have websites, it can be valuable to promote your "brand" or image by having your e-mail addressed to you at your own lav firm domain. Think about making it easy for people to remember so that they can write to you or refer others to do so.

Conclusion

"You've Got Mail," was a fun movie. But we live in a business world that demands more. Now is the time to review your e-mail service and office policies. Get professional about both the service provider and the professional, ethical and beneficial use of e-mail in your office. ■

About the Author: Carl R. Draper practices law at FeldmanWasser in Springfield, Illinois where he focuses his practice on labor and employment law, administrative law and civil rights for individuals. Carl can be found at www.feldman-wasser.com or cdraper@feldman-wasser.com.

Golden nuggets in marijuana decision

BY JEWEL N. KLEIN

I don't know about the rest of you, but there are not enough hours in my days for me to read all of the advance sheets. I try to keep up with the ISBA's eclips, but even there, my eyes glaze over when the topic is an area of the law that I don't encounter in my practice. On infrequent occasions, I read about cases outside of my general practice and occasionally I find a golden nugget. Most often, I read the administrative law decisions because it is always so fascinating to watch our government at work.

Recently, the eclips squib on *Three v. Dep't of Public Health*, 2017 IL.App (1st) 162548, caught my eye because my husband had applied for permission to use medical marijuana to counter chronic back pain and his application was denied. Helping people use marijuana is not part of my practice, but the case caught my interest.

Pot users don't always like to identify themselves, so the plaintiff was John Doe Three and he petitioned for use of medical marijuana claiming that he suffered from "chronic post-operative pain" (CPOP). The Director of the Department denied the claim and Three sought administrative review.

Initially, the trial court reversed the Director's decision and remanded to the Department for further proceedings. In a good example of that famous legal maxim "be careful what you ask for," the Department filed a motion to reconsider based on a newly adopted amendment to the Compassionate Use of Medical Cannabis Pilot Program Act (the "Act").[1] The trial court granted the motion to reconsider and then outright reversed the Director's decision and ordered the Director to add CPOP to the list of "debilitating medical condition" within 30 days. The trial court relied upon section 45 of the Act.

Under the version of the Act in effect when Three filed his petition, the Department's rules provided that an advisory board would review petitions and make recommendations to the Director about adding debilitating conditions or diseases that would benefit from cannabis. Following Three's petition, a public hearing was held and the Advisory Board members voted 7 to 3 to add CPOP to the list of conditions and to approve Three's petition. The Director, however, using his own criteria, his own investigation and medical judgment, ignored the Advisory Board's recommendation and denied the petition.

After Three had filed his petition, but prior to the Director's decision, the Act was amended and the Department adopted an emergency amendment to its own rules. In its motion to reconsider, the Department argued that the trial court should review the Director's final decision based on the amended Act and the emergency amendments.

The foregoing factual situation led to Appellate Court decisions on several areas of law of interest not only to those who do administrative law, but to general practitioners as well.

On appeal, the Department argued that there was no subject matter jurisdiction, because Section 45 of the Act did not explicitly allow for administrative review. The Appellate Court was unpersuaded and provided answers from principles of statutory interpretation for someone handling a state government decision when the governing statute does not explicitly provide for review under the Administrative Review Law[2] ("ARL").[3] The government argued that the section of the

Act cited by the trial court in its opinion no longer applied. To reach the decision that the Act did allow administrative review, Justice Connors cited a different section of the Act, i.e., the one which provides that "All final decision of the Department … are subject to direct judicial review under the provision of the [ARL]."[4] To reach that conclusion, Justice Connors had to overcome § 3-102 of the ARL which provides that administrative review is permitted only where such review is expressly included in the statute creating or conferring power on the agency. To do so, he relied on the proposition that when interpreting a statute, no part of it shall be rendered meaningless.[5] Thus, the trial court's reliance on Section 45 of the Act was irrelevant since Section 155 permitted judicial review of all the Defendant's final decisions.

As the General Assembly repeatedly amends statutes to take care of specific issues or problems, the issues of the standard of review and statutory interpretation are often key to deciding a case. On appeal, as noted in *Three*, the court must determine whether the issue is one of fact, law or is a mixed question of law and fact.[6] As for statutory interpretation, another golden nugget is the *Three* reminder that "Words and phrases [in a statute] should not be considered in isolation, rather they must be interpreted in light of other relevant provisions and the statute as a whole."[7]

The other issue of general interest was whether the amendments to the Act applied retroactively as the government contended. To answer that question, the opinion recites a three-tier test to determine whether the amendments are procedural or substantive in nature. Those tests are: "whether the legislature clearly indicated the temporal or retroactive reach of the amended statute;" if procedural, the amendments may be applied retroactively, and if procedural, does the amendment have a "retroactive effect." The determination is one of statutory construction and the court's review is *de novo*.[8] Given the recent and sweeping changes in the Illinois Marriage and Dissolution of Marriage Act,[9] the language and citations in *Three* provide a good starting point for further research.

After analyzing the amendments, the Appellate Court found that the amendments were substantive, not procedural and not retroactive. The Court then affirmed the trial court's opinion holding the Director's decision invalid but reversed the trial court's decision ordering the Director to add CPOP by rule within 30 days. Instead, the court remanded the case to the Director for consideration in accordance with the pre-amendment statute and the Department rule then in effect.

Bottom line: reading appellate court decisions outside of one's practice area can be helpful and fun. ■

About the Author: Jewel N. Klein is a sole practitioner handling real estate, probate, family matters, and administrative review. She is a long-time member of the General Practice Section Council and the Administrative Law Section Council.

1. 735 ILCS 5/3-101 *et seq*.
2. 735 ILCS ILCS 5/3-101 *et seq*.
3. If review under the ARL is not possible, Carl Draper's form Complaint for Common Law Writ of Certiorari is available to Administrative Law Section Council members for free and to other ISBA members for a small fee.
4. 410 ILCS 130/155.
5. *In re Marriage of Kates*, 196 Ill. 2d 156. 267 (2001).
6. *Three*, 2017 IL App(1st) 162548 at ¶ 25, citing *AFM v. Messenger Service, Inc.*, 198 Ill. 2d 380, 390 (2001).
7. *Three*, 2017 Il App (1st) 162548 at ¶ 20, quoting from *County of DuPage v. Ill. Labor Relations Board*, 231 Ill.2d 593, 604 (2008).
8. *Three*¸ 2017 IL App(1st) 162548, at ¶33 (citations omitted).
9. 750 ILCS 5/101 *et seq*.

Upcoming CLE programs

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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 4:30PM.

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. 8:30-4:00.

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.

Tuesday, 03-13-18 – LIVE Webcast— Don't Panic – What to do When a Letter Arrives from the ARDC. Presented by ARDC. 2:00-3:00 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.

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 – LIVE Webcast—Interns and Externs: Training, Supervision and Professionalism Issues. Presented by LEAC. 12:00-2:00.

May

Thursday and Friday, 05-03 to 05-04, 2018 – ISBA Chicago Regional Office—17th Annual Environmental Law Conference. Presented by Environmental Law. All day. ■

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Agenda

8:00 a.m.—Complimentary Continental Breakfast

8:15 – 8:30 a.m.—Welcome and Introductions

8:30 – 9:00 a.m.—PDF Tips for E-Filing*

9:00 – 9:45 a.m.—Illinois E-Filing Nuts and Bolts*

9:45 – 10:00 a.m.—Break with Exhibitors (Refreshments provided)

10:00 – 10:45 a.m.—Cybersecurity*

10:45 – 11:30 a.m.—Dealing with Difficult Clients*

11:30 a.m. – 12:30 p.m.—How to Own Your Practice & Not Have It Own You*

12:30 – 1:00 p.m.—Lunch and Special Guests (No MCLE credit)

1:00 – 1:15 p.m.—Break with Exhibitors (Refreshments provided)

1:15 – 2:15 p.m.—Featured Speaker: Billing and Collections*

2:15 – 2:35 p.m.—Break with Exhibitors (Refreshments provided)

2:35 - 3:35 p.m.—Best Practices Rapid Fire Table Clinics*

3:35 – 3:55 p.m.—Break with Exhibitors (Prizes Awarded at End of Break)

3:55 – 4:55 p.m.—The Best Of: Table Clinic Tips on Running Your Practice, E-Filing, Client Management, Stress Reduction, and More!*

For more information:

www.isba.org/cle/upcoming

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