APRIL 2005, VOL. 33, NO. 6

# GENERAL PRACTICE, SOLO & SMALL FIRM

ILLINOIS STATE BAR ASSOCIATION

*The newsletter of the ISBA's General Practice, Solo & Small Firm Section*

## Chairman's corner: Proposals to help earning power

*By Timothy E. Duggan*

President Ole Bly Pace asked each Section Council to propose at least one practical idea to help members of that Section improve their earning power. This request is pursuant to the theme of his administration, "Making a Life and Living in the Law," announced at the Annual Meeting. President Pace discussed his goals in the July and September *IBJ* President's page. He noted that an economic survey of Illinois attorneys had been conducted, and a frequent answer to the survey question as to how to improve income was to improve public image. (Highlights of the survey results are published in the December 2004 *Bar Journal*). Yet the goal was larger than that. The goal was to determine methods of identifying and anticipating trends, as well as otherwise addressing the bottom line. Our Section Council made suggestions by e-mail prior to the Midyear meeting, and further suggestions were made at the meeting.

Other Section Councils are defined by a practice area, such as Commercial, Banking and Bankruptcy, and may focus their suggestions for improving income on that area of law. The General Practice, Solo and Small Firm Section Council, by definition, is not focused on one segment of the legal market. Therefore, our discussion addressed concepts applicable across the board.

The most controversial recommendation was that the Bar Association lead the charge for a unified Bar Association; that is, one in which membership is mandatory, and possibly in conjunction with the functions of the Attorney Registration and Disciplinary Commission as a condition of licensing and practice. This is proposed on the premise that larger membership and the funds from dues and fees provide benefits that flow back to all members from (a) greater bargaining power in benefit proposals, (b) more powerful legislative influence, and (c) a larger fund which allows the Bar Association greater latitude to obtain assistance or products that may help in marketing or practice, including, yes, improving public image.

Another suggestion was that the Bar Association provide a structure to actively promote mutually beneficial affiliations with other organizations. The Bar would promote to organizations the availability of attorneys who are willing to provide advice in newsletter/magazine columns, or as speakers. This relationship will enable lawyers who participate to become better attuned to legal needs of the organization members, and possibly identify otherwise unidentified needs or trends. Clearly, the attorneys who participate will make more contacts and develop a more refined understanding of the organization needs, but any such identified needs will find their way into the larger legal community. The organization model that prompted this suggestion is the Illinois Farm Bureau, which is a statewide organization with newsletters, radio shows and chapters in every county.

A suggestion directed foursquare to the concept of identifying trends was that a standing committee act as a clearinghouse to review the legal markets that are promoted to us. We all receive brochures promoting legal markets or management such as, recently, "Medicaid Practice Program" and "Elder Law." The immediate tendency may be to assume that the product requires more salesmanship than legitimate legal advise. Yet there may be a valuable kernel or more of a valid concept involved beyond what is commonly known. A trend may already be identified and we throw it in the trash because we aren't about to take the time and money to find out. If such marketing materials were forwarded to a central standing committee, to forward for investigation to the Section Council specializing in that area, we could all benefit by finding a

**Get the electronic version of this newsletter**

Go to www.isba.org/newsletters for details.

IN THIS ISSUE

valuable kernel or finding out what we are not missing.

In the spirit of improving public image it was suggested that legal advertising be reformed to safeguard the best economic interest of the profession. Those who advertise their legal abilities should at least have the experience to do that which is represented. The lack of any certification requirement allows any licensed attorney to advertise legal skills. Yet such representations may be misleading, which in turn may contribute to poor image perceptions.

It cannot be disputed that improved image is desired. The devil is in the details as noted by President Pace in his September President's page, and in a previous Chairman's corner of this newsletter. Responses to the economic survey have led President Pace to form a special committee to consider what action should be taken to address image. Other than the truth in advertising suggestion, we limit our suggestion here to the encouragement of members to participate; write editorials, and submit their ideas for any effective message.

On a very practical level it was suggested that lawyers be schooled in basic accounting, that seminars be more accessible through media such as DVD and the Internet, that the Bar Association coordinate with law schools as a source of basic legal information, and that lawyers who don't already accept credit cards should consider doing so.

I, as chairman, take the liberty of adding something that is fundamental: computer technology. If we do not have the comprehensive hardware and software that meets our level of need, acceptable learning curve, and willingness to spend, then we are not being as efficient and productive as we should be. Tech shows, sales pitches, and individual software reviews each serve their purposes, but they take time and don't give us the comprehensive model office that is compatible with our profiles. Professional consultants are often not as familiar as we are with the range of software available and the issues we face. The Bar Association can provide one more avenue for assistance by providing a Web discussion group dedicated to technology where experiences can be shared through ongoing discussions or search of archived discussions on a specific topic.

Clearly, we don't have the resources to immediately determine how to practically effectuate each idea, much less the resources to put each idea into practice. But there are plenty of ideas to work toward at some point. We thank President Pace for his initiative and the solicitation of our thoughts.

**About the Author: Timothy E. Duggan practices in Springfield with the firm Stine, Greer & Duggan (217-744-1000). A 1980 graduate of SIU School of Law, his practice includes general litigation, personal injury, family law, estates, transportation, real estate, criminal, and corporate work.**

# Editor's column: Computers—Is it time to upgrade?

***By John T. Phipps***

Lately I have been amazed to learn in personal computer magazines, newspaper ads and trips to various computer stores at how excellent computers, flat-panel monitors, printers and accessories can be obtained at incredibly low prices. Lightweight laptop computers with fast *Centrino* processors can be obtained at low prices and although the bargains are not as low as comparable desktops workstations, the values are excellent. We are now fortunate to be in a mature computer market boom, where what law offices need can be obtained for a fraction of what the comparable hardware cost two years ago.

The laptop evolution has made it possible for lawyers to use the once-expensive and delicate laptops as their primary computers. When placed on a docking station, a regular keyboard can be implemented for comfort typing and an additional flat-panel monitor can be installed to aid your aging eyes. With these minor and now inexpensive accessories, laptops can now function as a regular computer but with the advantage of then being portable. The laptops can then be used in your office, taken to court, business trips or even vacations and still function as a full office computer. The evolution of the laptop now allows lawyers the freedom to work when

they choose and lawyers are no longer chained to a desk, but can now work where and how they choose.

Recent program improvements in financial software such as Quick Books, Quicken and Money balance the ability to analyze financial evidence in divorce cases and business disputes. CaseMap, TimeMap, TextMap and other litigation support software have continued to evolve and now make it possible for solos and small firms to compete with larger firms. Recent enhancements to both Westlaw and Lexis have also made these programs more useful as well as easier to use. IICLE's Smartbooks just improved its search engine, making it an even better and more responsive electronic library with excellent forms.

Laptops in court have become a more frequent sight. They allow lawyers to access pertinent case information on demand and can reduce the need for bulky files for information. Wireless technology has also improved both in speed and reliability. Then there is the Internet. The availability of free quality legal information allows lawyers to access a world of information at the click of a button. To take full advantage of such improvement, systems more than four years old need to be upgraded.

Those lawyers and firms who have not upgraded in the last three or four years will be amazed at the enhanced productivity that upgrading to even the lower-end new computers will bring. For a slight investment, a firm should gain enough improvement in productivity that the investment will be returned in the short time and return a significant profit on the investment for many months. Take a look at what you can get for a $500 - $700 investment. You will be surprised at what such an investment can do for your office.

**About the Co-Editor: John T. Phipps is engaged in the general practice of law in Champaign, IL as John T. Phipps Law Offices, P.C. His primary emphasis is in the areas of family law, general civil litigation, real estate, criminal law, probate and business law. He is a past chair of the ISBA General Practice, Solo and Small Firm Section Council, Co-Editor of the Section's newsletter and a member of the ISBA Assembly. He is also the Chair of the ISBA Practice Transfer Committee.**

# Family law update

*By Anne M. Martinkus*

## I. Attorney fees—Interim fees and disgorgement orders not final or appealable.

***In re Marriage of Johnson v. Johnson, Leving and Weiman*, 812 N.E.2d 661 (1st Dist. 2004).**

In a dissolution of marriage case, a law firm claimed that the disgorgement statute, (750 ILCS 5/501(c-1)(3)), that authorizes a law firm to be required to disgorge interim fees paid by its client to the opposing party's attorney is unconstitutional. The Appellate Court did not decide the issue as it held it did not have jurisdiction. The Appellate Court ruled as follows regarding whether it had jurisdiction to entertain an appeal of a disgorgement order of interim attorney fees under 750 ILCS 5/501:

> The statute's plain language indicates that interim attorney fee awards provide *temporary* relief during divorce litigation. 750 ILCS 5/501 *et seq.* (West 2002). These interim awards are treated as interlocutory orders and are not subject to appeal. (Citation omitted).
>
> * * *
>
> Under the act, an interim attorney fees award grants temporary relief—disgorgement is simply a method the court uses to redistribute the necessary available funds when the obligated party cannot otherwise afford to pay the interim award. 750 ILCS 5/501(c-1)(2) (West 2002) Neither the interim award nor the disgorgement affects the attorney's claim for a final setting of attorney fees. 750 ILCS 5/508 (West 2002). By definition a disgorgement order is never a final adjudication of the attorney's right to fees—it merely controls the timing of payment, with no effect on whether, or how much, the attorney is entitled to collect at the conclusion of its services. 750 ILCS 5/501(c-1)(2) (West 2002); 750 ILCS 5/508 (West 2002); (Citation omitted). . . The order "terminates" at final judgment. 750 ILCS 5/501(d)(3)(West 2002); (Citation omitted).
>
> The act provides two procedures for presenting a claim for fees: (1) A party can pursue a contribution hearing to recover attorney fees paid to the opposing side; or (2) An attorney can file a section 508(c) petition to recover fees from a former client, 750 ILCS 5/501(c)-1)(2)(West 2002). Both a contribution order and a final setting for attorney fees are considered final judgments on fees for purposes of appeal. (Citations omitted) . . .
>
> The reason orders awarding contribution or a final setting of fees are appealable, while interim orders are not, is clear: the trial court can effectively *undo* any interim attorney fee award and related disgorgement by restoring fees to the attorney who previously relinquished his fees to opposing counsel. However, in the case of 508(c) petition, the former client, not the other side, pays to replace the disgorged fees. 750 ILCS 5/508(c) (West 2002). If the attorney is successful and recovers the disgorged fees through a final setting of fees against his former client, the end result of disgorgement is merely a delay in payment. If an attorney wants to avoid that delay, the immediate way he or she can contest on direct appeal the validity of a disgorgement order is to secure a contempt order by refusing to disgorge the fees. (Citations omitted). ("[i]n the absence of a contempt order, the issue would not otherwise have been reviewable, as orders addressing interim attorney fee awards are not subject to interlocutory appeal"). Or he or she might be able to persuade a trial judge to certify the question pursuant to Supreme Court Rule 308. (Citation omitted).

In summary, an interim attorney fee order under 750 ILCS 5/501 is not

**General Practice, Solo & Small Firm**

**Published at least four times per year.**

**Annual subscription rate for ISBA members: $20.**

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

**OFFICE**
Illinois Bar Center
424 S. 2nd Street
Springfield, IL 62701
Phones: (217) 525-1760 OR 800-252-8908

Web site: www.isba.org

**Co-Editors**
John T. Phipps
44 Main St.
P.O. Box 1220
Champaign 61824-1220

Edna Turkington-Viktora
P.O. Box 641727
Chicago 60664-1727

**Managing Editor/Production**
Katie Underwood
kunderwood@isba.org



POSTMASTER: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

appealable before or after final dissolution.

## II. Parents agreements modifying support prohibited because of need for judicial protection of children's interest

***In re Marriage of Case*, 815 N.E.2d 67 (4th Dist. 2004)**

As it stated above in the Second Appellate District in *In re Marriage of Smith*, 806 N.E. 2d 727 (2nd Dist. 2004), it is well-recognized that courts have the exclusive authority to modify child support and are not bound by parties' agreement that is not approved by the Court. The Illinois Supreme Court clearly expressed this in *Blisset v. Blisset*, 526 N.E.2d 125 (1988). In deciding child support obligations, a court must protect the interests of children. If a court allowed parents to create new child support agreement without court approval, this would circumvent the judicial protection of the children's interest.

## III. Civil procedure—Compensation damages not available in civil contempt proceedings

***In re Marriage of Blankshain*, 805 N.E.2d 739 (2nd Dist. 2004)**

In December of 1999, Wife filed a petition for dissolution of marriage. The trial court entered a temporary order enjoining the parties from removing money from certain accounts, including husband's account with Wachovia Securities, Inc. In February, 2002, wife filed a petition for rule to show cause against husband and Wachovia Securities, Inc. for violating the injunction. She alleged that Wachovia Securities, Inc. received a copy of the injunction order in January of 2000 and in October of 2000, husband transferred the funds from his IRA with Wachovia Securities Inc. to a new account at a different financial institution before dissipating most of the money. Wife alleged that Wachovia Securities, Inc. had acted "in active concert and/or participation" with husband to violate the injunction. Wife sought the following relief:

1. The return of the value of the transferred account
2. Incarceration of husband
3. Incarceration of the employee of Wachovia Securities, Inc. responsible for the transfer.

In April of 2002, the trial court entered a judgment of dissolution of marriage between the parties and wife received the funds in all the accounts she held with Wachovia Securities Inc., as well as the funds remaining in husband's GunnAllen account (the account into which husband transferred the Wachovia Securities Inc. IRA). The Judgment of Dissolution of Marriage provided that the rule to show cause against husband was discharged, but wife reserved the right to pursue repayment of the funds from Wachovia Securities, Inc.

Wachovia Securities Inc. moved to dismiss the petition under 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615. The trial court granted Wachovia Securities Inc.'s motion to dismiss wife's petition for a rule to show cause. The Appellate Court affirmed the trial court's ruling and held as follows:

> In Illinois, it is well established that civil contempt is an affront to the authority of the court and not a private remedy, that any fine imposed pursuant to the contempt is payable to the public treasury and not a plaintiff, and that a plaintiff may not recover compensatory damages in a civil contempt proceeding. [Citation omitted]. Because a sanction in a civil contempt proceeding is strictly coercive, the court is without the authority to compensate an aggrieved party for its damages. "(Citations omitted). *Blankshain* at 805 N.E.2d 754.

Wife argued that she sought redress and remedy rather than compensatory damages by requesting Wachovia Securities, Inc. to put back the money. However, the funds were transferred from husband's account at Wachovia Securities Inc. to a different account at a different financial institution. As a result, Wachovia Securities, Inc. was not capable of returning the funds as it did not have possession or control of those funds. The Appellate Court concluded that if it were to order Wachovia Securities, Inc. to use its own money to fund the IRA account at its previous level, Wife would receive compensatory relief which is not available in a civil contempt proceeding.

## Contempt: Different acts, different methods to punish

***In re Marriage of Slingerland*, 807 N.E.2d 731 (2nd Dist. 2004)**

This case is a good illustration of the differences between criminal and civil contempt and direct and indirect contempt.

During a hearing on February 26, 2003, while Husband was testifying, an exchange between the court and wife took place wherein wife refused to sit down, refused to approach the bench, repeatedly stated that the proceeding was unfair and that she did not trust the judge. The Court told wife that the trial would be finished that day, recommended that she sit in court and that there would be no continuance. The court allowed wife to have a few minutes to compose herself. When court resumed, Wife was not present in the courtroom and was not in the parking lot. On April 23, 2003, the trial court entered an order finding wife in direct criminal contempt of the court for her conduct at the February 26, 2003 hearing. Prior to sentencing wife, the trial court asked wife why she had left the hearing when it had indicated it would not grant a continuance and expected her to return. She indicated that she was upset because she felt the proceedings were unfair and that her presence was meaningless. The trial court sentenced her to seven days imprisonment. Wife appealed.

The Appellate Court held as follows:

> A civil contempt sanction is coercive and seeks to compel future compliance with a court order whereas a criminal contempt sanction punishes a party for past conduct. (Citations omitted). Criminal contempt is conduct that is calculated to embarrass or obstruct the court in the administration of justice or lessen the court's authority or dignity. (Citation omitted). Before citing an individual with criminal contempt, the judge must find that the contemptuous conduct was willful (Citation omitted). A contemptuous state of mind may be inferred from

the conduct itself and the surrounding circumstances (Citation omitted). *Slingerland* at 807 N.E.2d 734.

Wife did not dispute that only criminal contempt was at issue in this case, but argued that her conduct constituted indirect criminal contempt. In response to wife's arguments, the Appellate Court stated as follows:

> Indirect contempt arises from conduct that occurred outside the judge's presence (Citation omitted) whereas direct contempt arises from conduct that occurred in the judge's presence, making all the elements of the offense within the judge's personal knowledge. (Citation omitted). While a trial court can punish direct contempt summarily, indirect contempt requires due process rights of notice, opportunity to answer, and a hearing. (Citations omitted). However, if the acts constituting indirect contempt are admitted to in open court, the conduct is punishable as direct contempt. (Citation omitted). *Slingerland* at 807 N.E.2d 734.

The Appellate Court further stated that it would not reverse the trial court's finding of direct criminal contempt unless the judge considered facts outside of his personal knowledge. The trial court held wife in contempt for her conduct at the hearing rather than only for her failure to return to the hearing after the recess. The Appellate Court held that wife's conduct at the hearing was an affront to the court's dignity and authority; therefore, there was sufficient evidence to support a finding of direct criminal contempt. However, the Appellate Court stated that even if the contempt finding had been based only on wife's failure to return to the hearing after the recess, it would have reached the same conclusion because she admitted in open court she wanted to leave because she thought the trial court was treating her unfairly and that her presence was meaningless. The Appellate Court found that the trial judge had sufficient knowledge as to why she did not return to the hearing after the recess, which was adequate to support a direct contempt finding.

## Void judgments may still be enforced where party accepts benefits under the judgment

***In re Marriage of Chrobak*, 811 N.E.2d 1248 (2nd Dist. 2004)**

On March 2, 1997, the parties' marriage was dissolved in Canada. The Canadian divorce decree did not address maintenance or the division of marital property. On July 24, 1997, husband petitioned for legal separation in Illinois, but did acknowledge the Canadian divorce decree. Wife was personally served with the petition for legal separation, but failed to attend any proceedings. Husband testified as to the terms of parties' settlement agreement. The trial court found that wife was in default by consent and granted the petition for legal separation and incorporated into the judgment the terms of the settlement agreement. On November 6, 2002, wife moved to vacate the judgment for legal separation and the incorporated settlement agreement. The basis for her motion was that the judgment was void because the parties were divorced when the judgment for legal separation was entered and the trial court lacked subject matter jurisdiction to grant a legal separation. Husband argued that wife should be estopped from challenging the judgment of legal separation and incorporated marital settlement agreement because she profited from the judgment when she accepted maintenance and other benefits. The trial court granted husband's motion to strike and dismiss. Wife appealed.

The Appellate Court affirmed the trial court's judgment and specifically held as follows:

> Before considering the petitioner's estoppel argument, we note that the special concurrence recites the test for collaterally attacking a void judgment that was delineated in the Restatement (Second) of Judgments Section 12 (1982). Our supreme court mentioned this test in *In re Marriage of Mitchell,* 181 Ill.2d 169, 176, 229 Ill.Dec. 508, 692 N.E.2d 281 (1998), but specifically stated that it was not adopting that test in lieu of the traditional view, which provides that void judgments may be attacked at any time, either directly or collaterally. (Citation omitted). Because the Restatement has not been adopted by our supreme court, it is not the law, and merely provides guidance. (Citation omitted). As such, we believe that the traditional view is the current law and that void judgments may be collaterally attacked. *Chrobak* at 811 N.E.2d 1252.

The Appellate Court held that wife was estopped from claiming that the trial court's judgment of legal separation, which incorporated the parties' settlement agreement, was void for lack of subject matter jurisdiction. The court recognized that estoppel does not generally apply to a void order. It stated that in dissolution proceedings a party who accepts the benefit of a judgment may be estopped from later attacking the order on the basis that the order is void because of lack of subject matter jurisdiction. The Appellate Court held that as wife had benefitted from the judgment and agreement by receiving maintenance and property, she was estopped from attacking the judgment.

## Property—*In Re the Marriage of Hunt* formula for allocating marital vs. non-marital portions of pensions reaffirmed

***In re Marriage of Sawicki*, 806 N.E.2d 701(3rd Dist. 2004)**

At the time of trial, husband and wife were married for 17 years. During the course of the marriage, they had one child. At the time of trial, the parties' child was 12 years old. The parties were awarded joint legal custody of the child with wife having primary physical custody. At time of trial, wife was 47 years old and had a ninth grade education. Before she married husband she had worked several minimum-wage jobs and held a minimum-wage job during the early years of the marriage to husband. When she became pregnant with their child, she quit her job to stay home and remained a homemaker for the remainder of the marriage. At time of trial, husband was 52 years old and had worked as a construction laborer for 27 years prior to his diagnosis of rheumatoid arthritis. His condition left

him physically disabled and unable to perform his job as a construction laborer. In 1999, he retired from his job as a construction laborer and began receiving disability benefits. In addition thereto, he performed odd jobs.

Husband's pension was a defined benefit plan. Based upon the pension credits earned by husband prior to and during the marriage, he would have received $3,702.35 per month. Prior to wife filing a petition for dissolution of marriage, husband elected a 50 percent joint and survivor annuity for wife which reduced his monthly amount to $2,795.27 per month. The annuity would provide wife with the sum of $1,397.64 per month if husband predeceased her. In addition to the above income, husband received $300 per month as a temporary supplemental benefit, which terminated once he obtained the age of 65 or earlier under certain circumstances and $103 per month as a veterans pension.

Husband began contributing to his pension fund 13 years before the parties were married. He was a participant in the pension plan for approximately 27 years prior to when he began receiving disability benefits. At the time he became disabled, he had earned 39.65 pension credits with 15.25 of those credits earned prior to his marriage to wife. Wife presented testimony from a certified public accountant that 87.6 percent of the disability pension should be considered marital property. The accountant's rationale for his opinion was that "as earnings go up, the amount of contributions to the fund and contributions to the union-negotiated plan normally increase, so that there would have been more benefit accrued after the date of the marriage than prior." *Sawicki* at 806 N.E.2d 709. Husband did not have an expert testify as to the value of the marital portion of his pension. The trial court found that the marital portion of husband's central laborer's pension was 87.5 percent of the total value of the pension and awarded wife one-half the marital portion of the pension, which at the time was $1,298.06 per month.

One of the issues husband appealed was the method of calculation of the marital portion of his disability pension. He argued that the trial court erred in finding that the marital portion of the disability pension was 87.5 percent and the remainder as non-marital property. He further argued that the trial court should have applied the widely-accepted formula as articulated in *In re Marriage of Hunt,* 78 Ill.App.3d 653, 34 Ill.Dec.55, 397 N.E.2d 511 (1979). In *Hunt,* the court set out the method of determining the marital portion of a parties pension as follows: the marital share is determined by the present value of the interest multiplied by a fraction whose numerator is the number of years (or months) of the marriage during which benefits were accumulated, and whose denominator is the total number of years (or months) during which the benefits were accumulated prior to divorce. The Appellate Court found that the trial court had abused its discretion in valuing the marital portion of husband's disability pension at 87.5 percent when he had contributed to the pension a full 13 years prior to his marriage to Wife.

The Appellate Court indicated that husband had accrued a total of 39.65 pension credits of which 15.25 of the credits accumulated prior to the marriage; almost 40 percent of his pension was accumulated prior to the marriage. The Appellate Court reasoned that the trial court, by its finding of the marital portion of husband's disability pension was 87.5 percent, had adopted a "freezing approach" as to the determination of the marital share as opposed to the "proportionality rule," which is more widely accepted in Illinois. The Appellate Court responded that the "freezing approach" had been rejected. In the case of *In re Marriage of Wisniewski,* 286 Ill.App.3d 236, 221 Ill.Dec. 632, 675 N.E.2d 1362 (4th Dist, 1997). In *Wisniewski*, the court relied upon the reasoning in *Hunt,* which provided that regardless of how pension benefits are calculated under language of the particular plan, contributions in the earlier years were more valuable than payments in later years because the value of money in the early years are worth more than in later years. The Appellate Court was persuaded by the reasoning of *Wiesniewski* and reversed the trial court's finding that the marital portion of husband's disability pension was valued at 87.65 percent and remanded the issue to trial courts to review, re-calculate the marital portion of husband's pension in accordance with the *Hunt* formula.

## Social security benefits not dividable in dissolution case

***In re Marriage of Crook*, 813 N.E.2d 198 (4th Dist. 2004)**

During the marriage wife worked as a secretary at Parkland College. In July of 2000, after accepting an early retirement incentive plan, wife began receiving $1,676 per month through her participation in the State University Retirement System and Illinois Municipal Retirement Fund. Wife is not eligible to receive social security benefits. The parties agreed that husband's current social security benefit entitlement was $850 per month and would increase as he continued to work. Wife may receive a nominal social security benefit as his former spouse if she does not remarry. The trial court ordered an equal division of wife's retirement benefit through the State University Retirement System and Illinois Municipal Retirement Fund, with each party receiving approximately $838 per month until July 2004. After July 2004, each party would receive only $460 per month when wife's early retirement incentive payments from Parkland College terminate. The trial court did not consider the $850 per month in anticipated social security benefits husband would receive upon his retirement. Based on the trial court's ruling, at retirement, husband would receive approximately $850 per month from social security and $460 per month from his marital portion of wife's State University Retirement System and Municipal Retirement Fund benefits for a total of approximately $1,110 per month. Wife would receive $460 per month from her marital share of her retirement benefits through the State University Retirement System and Illinois Municipal Retirement Fund. The trial court held that it could not consider husband's social security benefits in the division of the marital property in a dissolution of marriage proceeding. The Appellate Court reversed the trial court's order. Husband appealed the Supreme Court.

The Supreme Court held as follows, relying on *Hisquierdo v. Hisquierdo,*


# Need a Little Help?
# Want to Share Your Expertise?

***Sign up now to become a mentor…***
***or go there to find one.***

**ISBA MentorCenter**
**@www.isba.org**

**It's the Place for Questions and Answers**

ILLINOIS STATE
BAR ASSOCIATION

439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979):

> In this court's view, *Hisquierdo* establishes two important points: Social Security benefits may not be divided directly or used as a basis for an offset during state dissolution proceedings. Although the courts in a number of other states have permitted a trial judge to consider a spouse's anticipated social security benefits as one factor, among others, in making an equitable distribution of the distributable assets, we reject that analysis." (Citations omitted).
>
> Instructing a trial court to "consider" Social Security benefits, as the appellate court did in this case, either causes an actual difference in the asset distribution or it does not. If it does not, then the "consideration" is essentially without meaning. If it does, then the monetary value of the Social Security benefits the spouse would have received is taken away from that spouse and given to the other spouse to compensate for the anticipated difference. This works as an offset not to equalize the property distribution. That this type of "consideration" amounts to an offset is recognized in the well-reasoned decisions from other state jurisdictions holding that under *Hiaquierdo,* it is improper for a circuit court to consider social security benefits in equalizing a property distribution upon dissolution. (Citations omitted) *Crook at* 813 N.E.2d 204 and 205.

Section 402 of the Social Security Act specifically provides for the division of social security benefits where husband and wife are divorcing; therefore, Congress created a statutory scheme that strictly regulates and limits the payment of social security benefits to a divorced spouse. Further, the Supreme Court held that if it were to find that social security benefits could be divided or considered in the distribution of marital property upon a divorce, it would violate the Supremacy Clause. "Before a state law governing domestic relations will be overridden it must do "major damage" to "clear and substantial federal interests." (Citation omitted). *Crook at* 813 N.E.2d 202.

The Supreme Court stated that the *Hisquierdo* court held that allowing a state court to alter the comprehensive federal scheme could do great damage when it held as follows:

> An offsetting award, however, would upset the statutory balance and impair [the ex-husband's] economic security just as surely as would a regular deduction from his benefit check. The harm might be greater." [The Railroad Retirement Act] provides that payments are not to be "anticipated" * * * [A] prohibition against anticipation is commonly understood to mean that "the interest of a sole beneficiary shall not be paid to him before a certain date. * * * If that definition is applied here, then the offsetting award respondent seeks would improperly anticipate payment by allowing her to receive her interest before the date Congress has set for any interest to accrue." *Crook at* 813 N.E.2d 203.

The Supreme Court did leave open a possibility of how to address the inequities such as were present in this case when it stated as follows:

> Other state courts facing the issue of inequity have held that a spouse who participates in a pension system in lieu of Social Security must be placed in a position similar to that of the other spouse whose Social Security benefits will be statutorily exempt from equitable distribution. (Citation omitted). In this case, however, the parties have not argued the applicability of these cases or cited their rationale. Thus, we leave the resolution of that issue for another day. *Crook* 813 N.E.2d 207.

**About the Author: Anne M. Martinkus practices with the law firm of Erwin, Martinkus & Cole, Ltd. in Champaign, Illinois. She concentrates her practice in Family Law, Real Estate and Estate Planning. She is a member of the ISBA General Practice, Solo and Small Firm Section Council.**

# Law clerks

***By Walter Kilgus***

What do you do when a law student sends you a resume or merely stops into your office seeking summer employment? Usually this is a student who has completed his or her first year of law school and is filled with energy and enthusiasm and seeks to put all the knowledge he or she has acquired during that first year into practice. The common reaction might be to assume that this student can be of no significant benefit and will merely take up a lot of your time and be an unwanted addition to your payroll.

Let me suggest that hiring that summer clerk may be of great benefit, not only to the clerk, but to your law firm as well. Most large law firms have an established program for hiring summer clerks and they have found that there are advantages in doing so. I would submit that those same advantages also apply to the small firm or sole practitioner.

Probably the foremost reason for hiring a summer clerk is the altruistic mission of "the good of the Bar." Helping an aspiring law student to learn to practice law in the right way redounds to the benefit of the whole profession.

Of course, many law students, like students everywhere, need summer jobs in order to survive. Giving the law student a summer job in his or her chosen profession is a good thing. A note here: pay them a reasonable wage; just because they are eager does not mean they should work for nothing, although in our experience, many of them would do so.

Some other tips that we have found useful include giving the clerk an office if at all possible; it makes them feel pro-

fessional. Make sure that the clerk has access to secretarial staff for drafting documents, memos and research projects. Take the clerk with you when you go to Court; they need to see how law is actually practiced, including the interchange between lawyers, judges and court personnel. Let the law clerk sit in on depositions, witness interviews, and client interviews whenever possible. It is of great value to the student to see how the projects they are working on actually come together.

Our law clerk this summer was Julie, who completed her first year at the Northern Illinois University Law School. Julie has proven to be bright, energetic, hard-working, and fits in well with the rest of our staff.

Much of Julie's work has been in the area of traffic and criminal defense, as well as divorce and post-decree matters. However, she has also done research in a variety of areas from estate claims to collection issues. She also completed research on insurance defense matters and prepared settlement proposals for personal injury actions. Although Julie's law school experience had not covered many of these areas, she quickly understood the issues.

One of the unexpected benefits that I found with law clerks is that in order to explain a research project to them, it is necessary to articulate the problem and the issues clearly and succinctly, which helps to refine my own thinking on the matter.

Finally, employing law clerks becomes a good source for hiring new associates. The summer clerkship gives the law firm an opportunity to observe the clerk for strengths and weaknesses and also gives the clerk an opportunity to determine what type of law he or she might wish to practice and the type of firm environment that might be appropriate.

If you have the opportunity to hire a law clerk next summer, do so; it is a good experience for everyone.

**About the author: Walter C. Kilgus is a partner in the Morrison, Illinois law firm Nelson, Kilgus, Richey & Huffman. He is a graduate of Carthege College and the University of Illinois College of Law. He is engaged in the general practice of law.**

# Red flags

***By Bernard Wysocki***

This past fall, I attended my 30th law school reunion. I hadn't planned to attend but my 10 closest friends from law school were all returning. With these "crazy" friends, I played sports, studied and socialized until all hours. After graduation all of us went our separate ways and except for occasional holiday cards, I haven't seen my friends in 30 years.

Some of my friends were in large firms, others in solo and small firms. They were trial lawyers, and those that specialized in transactional accounts. However, as we discussed the past 30 years over a refreshing beverage, we realized that we had so many experiences in common. The biggest commonality we had were our experiences with our clients. We all had great clients and cases in the past, but we also had clients whose cases we wished we had never agreed to handle.

After that marvelous weekend I made a list of clients that if you see them coming, you better "run for the hills." Here are my "red flag clients":

1. **Go With Gut:** If your reaction to the case and/or the persons is unfavorable, then pass on the case.
2. **Prior Legal Representation:** If the potential client has been represented by other attorneys on the same case, question why it didn't work out with the former attorney. Now there may be reasons that would confirm your reasons for taking the case, but before you pick up someone else's problems, investigate the case with the prior attorney and/or court file.
3. **Attitudes Towards Other Professionals:** If the potential client has no respect for professionals such as doctors, accountants, or other attorneys, he or she probably has little respect for you.
4. **Attitude Toward the Case:** If a potential client wants to sue on the basis of "principle," then you probably know that you will not be paid on the basis of "principle."
5. **Potential Client's Belief of the Skill, Expertise, and Time Needed to Pursue Their Case:** If the potential client has formed an opinion that his case will require little or no time to acquire the results he desires, then the client will probably attempt to control you and your fee.
6. **Beware of Friends, Friends of Relatives, or Knows Someone Who Went to High School With You:** Always ask yourself, would you have accepted the case if the person was just a stranger?
7. **Fee Disputes:** If you are having difficulty coming to terms on a fee agreement at the initial conference, refuse the case.
8. **Emergency Matters:** Beware of clients that only appear with an "immediate emergency" or the statute of limitations that is about to run.
9. **Consider Their Ability to Pay:** If the potential client does not appear to have the ability to pay your fee, then decide either to handle the matter as a pro bono matter or avoid the case.

You may have your own list of red flag clients that you may add to my list. One more admonition: even after 30 years of practice, I still find myself taking a client here or there that I wish I had avoided. So don't beat yourself up too much. Just have fun with it. It will definitely be a great story at some future reunion party.

**About the Author: Bernard Wysocki is an attorney at Wysocki, Smith & Curtis located in Waukegan, Illinois. He is a past Chair of the General Practice, Solo and Small Firm Section. He is the author of numerous articles in various ISBA publications and has spoken at numerous ISBA programs.**

# SAVE THE DATE!

OCTOBER 7-9, 2005

PHEASANT RUN RESORT • ST. CHARLES, IL

## Don't Just Survive —


1ST ANNUAL

## SOLO & SMALL FIRM CONFERENCE

ILLINOIS STATE BAR ASSOCIATION

Featuring nationally-known speakers **Jay Foonberg** and **Dustin Cole**. Foonberg is the author of the ABA's best-selling book, *How to Start and Build a Law Practice*. Cole is the founder of the "Attorneys Master Class," which helps lawyer enhance their practice-management skills.

For more information as programs are developed, go to <www.isba.org> and click on the conference icon on the right-hand side of the Web page.

# Illinois Real Estate Lawyers Association

***THE ONLY BAR ASSOCIATION REPRESENTING THE INTERESTS SOLELY OF REAL ESTATE ATTORNEYS IN ILLINOIS***

**ILLINOIS REAL ESTATE LAWYERS ASSOCIATION**
2340 S. Arlington Heights Road
Suite 400
Arlington Heights, Illinois 60005
(847) 593-5750 $ Fax (847) 593-5171
www.reallaw.org

**General Practice, Solo & Small Firm**
Illinois Bar Center
Springfield, Illinois 62701-1779
**April 2005**
Vol. 33, No. 6

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