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ILLINOIS STATE BAR ASSOCIATION

BENCH & BAR

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

Chair's column

By J.A. Sebastian

Please mark your calendar for three important and approaching ISBA-related events: the March 18 and 19th updated GAL CLE offered in Chicago at the ISBA regional office; the March 26th deadline for submission of nominees for the annual MATTHEW MALONEY TRADITION OF EXCELLENCE AWARD; and the March 31st Lawyers United to Help Haiti Rebuild: A Call to Action fundraiser at the Hyatt Regency Chicago, Crystal Ballroom.

On March 18 and 19th, the Bench & Bar Section Council is pleased to provide an updated GAL training program to help attorneys fulfill Supreme Court Rule 906(c) requirements. The program, Attorney Education in Child Custody and Visitation Matters in 2010 and Beyond, is sponsored by the Bench and Bar, Child Law, and Family Law Sections of the ISBA.

March 26, 2010, is the deadline to submit nominations for the annual MATTHEW MALONEY TRADITION OF EXCELLENCE AWARD, sponsored by the General Practice Section Council. Eligibility requirements include ISBA membership and a minimum of 20 years of practice. If you know a general practitioner who you believe deserves to be recognized, take a moment, please, and complete the online nomination form, found at <http://isba.org/awards/gp>. Also check the ISBA web site for awards sponsored by other section councils and note the applicable deadlines if you wish to nominate someone.

Finally, a fun and very worthwhile fundraising event is scheduled on March 31, at the Hyatt Regency Chicago, Crystal Ballroom, in Chicago, with a reception and silent auction starting at 5:00 p.m., followed by dinner and a program at 6:00 p.m. Individual tickets are $150 per person and proceeds from the event will benefit and be distributed to charitable organizations working in Haiti, including Partners in Health, World Vision, and a consortium of Haitian American organizations. For more information, call 312.952.9254 or e-mail: haitianreliefdinner@gmail.com.

I hope you can make all three events in March. ■

Legislative caps on medical malpractice damages strike out

By Kimberly A. Davis, Momkus McCluskey LLC, Lisle, IL

In a long-awaited and closely watched case, the Illinois Supreme Court has invalidated caps on non-economic damages in medical malpractice cases. The lead lawsuit in a number of cases consolidated by the Cook County Circuit Court was *Lebron v. Gottlieb Memorial Hospital*.[1] The Circuit Court had consolidated the cases to address the constitutionality of a law setting caps on the amount of non-economic damages a plaintiff may recover in a medical malpractice suit.

In 2005, Plaintiff Frances Lebron was pregnant and being cared for by Roberto Levi-D'Ancona, M.D., who later delivered Abigaile Lebron by Cesarean section at Gottlieb Memorial Hospital. Abigaile was born with numerous severe and permanent injuries. In 2006, Frances and Abigaile Lebron filed a medical malpractice lawsuit against Gottlieb, Dr. Levi-D'Ancona, and attending nurse Florence Martinoz, which included a count seeking a declaratory judgment. Specifically, plaintiffs

Continued on page 2

INSIDE

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Legislative caps on medical malpractice damages strike out

Continued from page 1

alleged that Section 330 of Public Act 94-677 ("the Act"), codified as 735 ILCS 5/2-1706.5,[2] was unconstitutional and invalid.

The Act took effect in 2005, prior to Abigaile's birth, and limited plaintiffs' noneconomic damages such as pain and suffering to $1 million against hospitals and their personnel/affiliates, and $500,000 against physicians/entities.[3] Under the Act, if a jury awarded a plaintiff in a medical negligence action a sum in excess of the statutory limitation amounts noted above, the trial judge was required to reduce the jury's verdict to comport with the caps, without considering the facts of the case and without the plaintiff's consent.[4]

The parties filed cross-motions for full or partial judgment on the pleadings on the declaratory action count. The plaintiffs raised several constitutional objections to the Act, most notably that the so-called "legislative remittitur"[5] violated the separation of powers clause of the Illinois Constitution. The defense argued that the Act offended no constitutional mandate.

The Circuit Court agreed with plaintiffs[6] and, with guidance from the majority decision in *Best v. Taylor Machine Works*,[7] held that the statutory caps were unconstitutional facially and as applied to plaintiffs. The court reasoned that the statute legislatively usurped the court's authority to determine whether a remittitur may apply to a case and thus violated the separation of powers clause of the Illinois Constitution.[8] Further, the Circuit Court declared the entire Act unconstitutional due to the Act's inseverability provision.[9] The defendants appealed directly to the Illinois Supreme Court.

The Illinois Supreme Court reviewed de novo the Circuit Court's ruling on the plaintiffs' motion for judgment on the pleadings, but limited its review to whether or not the "legislative remittitur" within Section 2-1706.5 was facially invalid.[10] In *Best v. Taylor Machine Works*, the Illinois Supreme Court evaluated the parties' constitutional objections to Public Act 89-7, which included adoption of a statute capping noneconomic damages for negligence or product liability actions at $500,000 per plaintiff (735 ILCS 5/2115.1(a)).

Defendants in *Lebron* argued that the Circuit Court inappropriately expanded the Best holding, since the general caps statute addressed in *Best* was distinguishable from the "narrowly tailored" Act, which was passed in response to the "health-care crisis." Further, defendants maintained that the Act was an appropriate use of the General Assembly's police power in response to the crisis, and that the principles underlying the separation of powers doctrine remain undisturbed by the legislation. Plaintiffs responded that the *Best* holding controlled, maintained their constitutional objections (e.g., separation of powers) to the legislation, and reasserted that the Act could not be saved in light of these fatal defects.

The Supreme Court began its comprehensive majority opinion authored by Chief Justice Fitzgerald by conceding that the statute in *Best* was broader than the caps legislation at issue in the case before it. The Court provided a detailed analysis of the *Best* case, and noted that its decision there was not essential to its ruling on the instant appeal. The Supreme Court pointedly noted that its discussion in *Best* regarding separation of powers and the remittitur doctrine were *judicial dictum* that essentially amounted to a holding, versus mere *obiter dictum*, since the Court ruled that the statutory caps in Section 2-1115.1(a) violated the separation of powers clause.[11]

The Supreme Court affirmed the Circuit Court in part, and held that the Act, although limited to medical malpractice actions, constituted a facially invalid violation of the separation of powers clause of the Illinois Constitution since the mandated remittitur required the trial court to "override the jury's deliberative process."[12] Further, the Supreme Court held that the statute intruded upon the trial court's power to determine on a case-by-case basis whether or not the jury's verdict is excessive—without the plaintiff's consent.[13]

In so holding, the Illinois Supreme Court considered and denied additional arguments raised by the defendants (e.g., that the Act addressed a specific balance due to the "health care crisis" versus a more global ceiling; that the legislation did not serve as a "legislative remittitur"; that other state courts approved the constitutionality of noneconomic damages caps; and that invalidating the statute would "undermine" the Court's precedents).[14] While the Court recognized the legislature's ability to change the common law, it noted that this power is accompanied by constitutional restraints.[15] In further affirming the Circuit Court, the Illinois Supreme Court ruled that the Act's inseverability clause[16] rendered the entire statute invalid. However, since portions of the Act were deemed invalid due solely to the inseverability provision, the Court conceded that the legislature may reenact those provisions as it sees fit.[17]

A partial dissent in *Lebron*, authored by Justice Karmeier and joined by Justice Garman, includes an insightful discussion of the public policies underlying legislative reforms such as damages caps. The dissent concludes that such public policy considerations appropriately lie with the legislature, and the courts should not second-guess "the wisdom of legislative determinations" under the "guise" of judicial review, which itself amounts to a violation of the separation of powers clause of the Illinois Constitution.[18] ■

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1. No. 105741, 105745, 2010 WL 375190 (Ill. February 4, 2010).

2. 735 ILCS 5/2-1706.5 (a) (West 2008) includes certain caps on damages in medical malpractice cases. Public Act 94-677, Section 330 (effective August 25, 2005) adopts Section 2-1706.5.

3. 735 ILCS 5/2-1706.5 (a) (West 2008).

4. The doctrine of remittitur is an inherent power of the court to, on a case-by-case basis, reduce a verdict that is unduly excessive, with the plaintiff's consent. If the plaintiff objects, the trial court is required to order a new trial. *Lebron* at *11-*14, citing *Best v. Taylor Machine Works*, 179 Ill.2d 367, 411-413, 689 N.E.2d 1057 (Ill. 1997).

5. See *Best* at 413-414.

6. The Circuit Court did not consider all constitutional grounds raised by plaintiffs.

7. 179 Ill.2d 367 (1997) which held 735 ILCS 5/2-1115.1 (broad-based cap of $500,000 on noneconomic damages) unconstitutional.

8. Illinois Constitution 1970, Article II, Section 1.

9. Public Act 94-677, Section 995, effective August 25, 2005.

10. *Lebron* at *3 (the Illinois Supreme Court reversed the trial court's ruling that the statute is invalid "as applied to plaintiffs" and instead considered only the facially invalid challenge).

11. *Lebron* at *8, citing *Best* at pp. 413-414, stating that it held in Best that 735 ILCS 5/2-1115.1 was an unconstitutional remittitur and "unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law." See also *Unzicker v. Kraft Food Ingredients Corp*., 203 Ill.2d 64, 93 (2002).

12. *Lebron* at *10, citing Best at 414.

13. *Lebron* at *18.

14. *Lebron* at *9-18.

15. *Lebron* at *15.

16. Public Act 94-677, Section 995, effective August 25, 2005.

17. *Lebron* at *18.

18. *Lebron* at *39.

Perceptions of justice

By Judge Michael B. Hyman

The following is excerpted from "What the Blindfold Hides," which appears in the fall 2009 issue of The Judges Journal, the quarterly magazine of the ABA Judicial Division. The full article is accessible at the Judicial Division's Web site, <http://new.abanet.org/divisions/Judicial/Pages/JudgesJournal.aspx>.

Regardless of how thoughtful a decision, how observant of due process, how sound the law, or how persuasive the facts, justice remains incomplete unless the public senses that justice has been served. What happens inside the courtroom (reality) is nowhere near as consequential as the reaction to it in the mind of the public (perception). So, it is no surprise that perception carries the day when it comes to whether or not our justice system functions free of racial and ethnic bias.

The legal profession vigorously pursues diversity in its ranks and on the bench, but has mostly stayed away from countering the long-standing perception—held by many African Americans, Hispanics, and other minority groups—that the American justice system treats them worse than it treats whites. The characterization of race, offered Professor Andrew Hacker in his classic study, Two Nations, continues to haunt our society. "America," he says, "is inherently a 'white' country: in character, in structure, in culture."

The perception—that our legal system fails people of color—should neither be underestimated nor ignored. Many African Americans and Hispanics believe that, particularly in criminal cases, they get singled out by the courts. They will tell you that there is such a thing as "white privilege" within the justice system. They will tell you that courts too often appear insulting, insensitive, or indifferent to them because of their skin color. They will tell you that the judicial process is prone to bias, inconsistency, and politicization, all of which foster distrust and negative images of the courts.

Judges have an especially compelling responsibility to eradicate any semblance of bias, hostility, cultural misinterpretation, and stereotyping. This "subtle racism" can intrude into decision making. "I am reminded each day," then-Judge Sonia Sotomayor was quoted as saying, "that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions, and perspectives. . . ." (Sotomayor, Lecture: 'A Latina Judge's Voice,' <http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html?pagewanted=5>).

Most judges, if asked, consider themselves free of bias, even-handed, and open-minded, but something is certainly amiss when large numbers of people of color, decade after decade, perceive the courts to be either biased or inequitable. That people of color have historically endured a full range of injustices does not explain why, following a profound social revolution on race relations, the perception persists that courts throughout the United States perpetuate bias. Courts, and the organized bar, need to deal with this negative perception of the justice system and turn it around, instead of letting the perception boil like an unwatched kettle.

Addressing Perceptions

There are numerous techniques and strategies for facilitating constructive progress to ameliorate the perception. Space permits only brief mention of a few. The judiciary has to find ways to generate greater trust and confidence in the courts by people of color and other minorities. Equal treatment in the justice system, lower cost of accessing the legal system, and enhanced public knowledge of the court process will help. Maintaining an evenhanded, neutral atmosphere in the courtroom will help. Explaining to unrepresented litigants the legal proceedings and their rights in everyday language will help. Sensitivity when dealing with language and cultural barriers will help. But none of this is enough.

Judges should be visible and reach out to the minority communities in their area and provide specific information refuting the myth of a two-tier justice system that supposedly favors the well-off over the poor or whites over minorities. Judges also should regularly review policies and procedures to eliminate anything that smacks of bias. And judges should promote pro bono and court-appointed representation, as well as adequate funding of court operations, indigent criminal defense, and legal services

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People of color will feel aggrieved unless the legal profession—judges and lawyers—confronts with open eyes this multifaceted issue. The profession should initiate dialogues on the fundamental issue of fairness, color, and the courts, and thereby build understanding, expose misunderstandings, defuse conflict, foster credibility, and, ultimately, strengthen respect for the judiciary and the justice system. To be sure, undertaking such a dialogue requires wading into the murky waters of race, an uncomfortable subject that is difficult to approach but too important to ignore.

It is far easier to discuss expanding diversity in the profession than to explore the nature, implications, and effects of color on the quality of justice. We need to sit down together—judges, lawyers, and influential individuals of color, community by community—and talk, listen, share, and learn, openly and honestly, without pretense or reproach. As long as racial and ethnic minorities perceive that the legal system treats them more harshly than whites, judges cannot rest. Nor can the legal profession. ■

Judge Michael B. Hyman, a Bench and Bar Section Council member, sits in the Domestic Relations Division of the Circuit Court of Cook County. As chair of the Lawyers Conference of the ABA Judicial Division during the 2008-9 bar year, he conceived and developed "Perceptions of Justice," a town-hall style dialogue on the issues in this article, which was held during the 2009 ABA annual meeting in Chicago and which will be repeated during the ABA Law Day 2010 in Washington, D.C. and the August 2010 ABA Annual meeting in San Francisco.

Judges' race, gender may have impact on certain cases. Is the "wise Latina" a myth?

By Hon. Edward J. Schoenbaum (ret.)

The race and gender of a judge impacts that judge's decisions according to a study discussed at the ABA mid-year meeting. The study examined a random sample of 40 percent of all reported racial harassment cases (more than 400) from six federal circuits between 1981 and 2003. Recall the 2001 speech at the University of California at Berkeley in which now-U.S. Supreme Court Justice Sonia Sotomayor said: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."

Professor Pat K. Chew of the University of Pittsburgh School of Law, who worked with Robert Kelley of Carnegie Mellon University's Tepper School of Business, shared the results of the study. They found a stark difference between the rulings of Black judges and their White counterparts:

> Our interpretation is that race affects a judge's ability to appreciate the perspective of a plaintiff of another race. Thus, White judges as a group are less able to identify and empathize with African American plaintiffs, making it inherently more difficult to find the plaintiffs' arguments plausible and credible. This interpretation helps explain why White judges deny African American plaintiffs' claims so often.
>
> In contrast, it appears that African American judges are more capable of transcending their own demography and do not let color influence their decision making. They can identify with African American plaintiffs, but also with plaintiffs of other races. At the same time, African American judges still discern between more or less credible claims, holding for plaintiffs only about half of the time.

Plaintiffs in racial harassment cases were ruled against more than half the time if the judge were Black (54 percent). But that percentage rose dramatically if the judge were White (79 percent) or Hispanic (81 percent). Asian American judges ruled against plaintiffs 67 percent of the time. The statistical canyon between the rulings of White and Black judges warranted particular attention by the researchers. Their in-depth findings ought to be required reading in every classroom across the nation that touches on the three branches of government.

Since our study found that the racial make-up of the judiciary affects outcomes, a more diverse judiciary will bring more diverse views on what constitutes racial harassment—ideally reflecting the range of views across all racial groups in society. With 80 percent of all federal judges (and 89 percent of all state judges) being White and our findings that White judges rule less favorably for racial harassment plaintiffs (who are typically African American), it is not surprising that some minorities place little faith in the judicial system.

> If people of all races are to believe in judicial fairness, a more diverse bench is a good place to start. Plaintiffs are less likely to feel marginalized when their experiences are viewed seriously. They are thus more likely to conclude the legal system is not biased. Legal principles prevail but are interpreted with the benefit of varied perspectives that are integral to the just resolution of racial harassment cases. Our study reinforces the need for the judiciary to be representative of the public it serves. Judges do not make decisions in racial harassment cases in a color-blind legal system. As a legal community and as a diverse society, we should not be blind to the color of judges.

This was one of the educational programs during the midyear meeting of the ABA in Orlando in February; it had standing/sitting-on-the-floor room only. The lead sponsor was the National Conference of Federal Trial Judges. Below is the link so that judges and lawyers throughout Illinois will be able to watch the program.

<http://www.abanow.org/2010/02/judges%E2%80%99-race-gender-may-have-impact-on-certain-cases-panel-debates-impact-interpretation-of-studies-on-justice-system/> ■

Save the adverb

By Hon. Robert J. Kressel, United States Bankruptcy Judge, District of Minnesota

This article is one of those unintended consequences that we are always being warned about. Recently, I disseminated my "Order Preparation Guidelines" to members of the local bankruptcy bar. Almost immediately, a local blog picked it up, published a copy, and commented on it. Readers of that blog then contributed their own comments. Once it was on one blog, it spread to others, where it was republished and commented on by both the bloggers and readers of those blogs. Eventually, the editors of the *Bench & Bar* discovered it and asked me to write this article. I accepted with a great deal of trepidation. Some of the commentators on some of the blogs mistook my dissemination of the guidelines as an indication that I consider myself an expert on legal writing and was dictating to others how they should write. This article will simply give my critics another example of my writing, which they can tear apart and let me know about all of the ways that it can be improved. I am willing to accept their criticism, so here goes.

Background

I am sure that our court is not unique in requiring lawyers to submit proposed orders with their motions. This requirement serves many functions. It requires the lawyer to focus on the exact relief that he or she wants. It further gives the lawyer the opportunity to iterate that relief in the way the lawyer prefers. It also relieves the judges from having to prepare an order for every single motion, which would take up an inordinate amount of time. The first 20 years or so of my judicial career, those proposed orders, like the motions they related to, were filed in paper form. After the hearing, I was then in the position of either signing the order as it was proposed, having my secretary retype it, or asking the lawyer to redo it. In virtually all situations, I would sign the order as submitted. I signed them, even though frequently I was not necessarily happy with the language or the grammar. As we got into the electronic age and all motions were filed in electronic form along with the proposed order, it became possible for me to more easily make changes to proposed orders. I started doing so.

It was my hope that, over time, lawyers would see the changes that I made and they

ORDER PREPARATION GUIDELINES FOR JUDGE KRESSEL

My goal in preparing orders, as it is for all of my legal writing, is to use regular grammatical English as much as possible. A secondary goal is to use actual statutory language as much as possible, rather than changing or paraphrasing it, which runs the risk of changing its meaning. When you prepare proposed orders, please keep these principles in mind.

Guideline No. 1 – Electronic Format

All proposed orders must be submitted in electronic form. It should be converted directly from Word or WordPerfect to PDF. It should not be created by scanning it from its original Word or WordPerfect form. If it is scanned, I cannot make additions or changes. As an aside, although scanning documents is acceptable under our local rules and orders, it is highly discouraged since it takes up a much greater amount of space than a document that is created and then converted directly into a PDF document.

Guideline No. 2 – Case Title

In the title of the case or in the body of the order, use "debtor" or "debtors" as appropriate, but never "debtor(s)."

Guideline No. 3 – The Date

Please put a place for the date on the left side below the text. Do not put a month or year, simply put the word "Dated:" I use an electronic stamp to insert the date, so putting any part of the date is simply an inconvenience and an interference. The traditional line used to put the date is also unnecessary.

Guideline No. 4 – Signature

Put a line for a signature below the text on the right side of the page, slightly lower than the date. Do not include anything above the line. For example, do not include the phrase "by the court" or "entered." Putting my name below the signature line is optional, but if you do, do not include anything other than my name. "Honorable," "The Honorable," or "Hon." are forms of address and not part of my name. However, whether you include my name or not, the proper title to be included either directly below the line or directly beneath my name is "United States Bankruptcy Judge."

Guideline No. 5 – Quotation Marks and Parentheses

Do not include quotation marks or parentheses to indicate a shortened version of a name. For example, the common reference in the first sentence to First National Bank of Minneapolis ("Movant") is wordy, somewhat ungrammatical, unnecessary, and certainly clutters up the order. Please don't do it.

Guideline No. 6 – Capitalization

Lawyers apparently love to capitalize words. Pleadings, including proposed orders, are commonly full of words that are capitalized, not quite randomly, but certainly with great abandon. Please limit the use of capitalization to proper names. For example, do not capitalize court, motion, movant, debtor, trustee, order, affidavit, stipulation, mortgage, lease or any of the other numerous words that are commonly capitalized.

Guideline No. 7 – Use of articles

Lawyers apparently disfavor articles, both definite and indefinite. Use the articles "the," "a," and "an" as appropriate. Write the way you would speak. So, "the debtor," not "debtor," "the trustee," not "trustee."

Guideline No. 8 – And/Or

Never use "and/or."

Guideline No. 9 – Superfluous Words and Phrases

Eliminate superfluous words. They serve no purpose other than to make the docu-

would make those same changes in future proposed orders. My hopes were met in only a limited way. While a handful of lawyers did exactly as I had hoped, the majority of lawyers did not and continued to submit their orders using the same language over and over and over again. I am not sure why more lawyers did not make the changes. Perhaps lawyers do not read the signed orders that they receive from the court to see if the order that the judge signed was the same order that they submitted or maybe it was a contest of wills. I am not sure.

I continued to make these changes over the course of about three or four years and eventually started keeping track of the most common things that I changed. Finally, I took my notes and put them into a single document, which eventually became the 19 guidelines. I showed them to my colleagues first, to make sure that I was not asking lawyers to do something in my orders that any of the other judges absolutely did not want. I certainly did not want to put lawyers in the position of having to create different forms of orders for different judges. I even added a few things that were suggested by some of my colleagues.

The Reaction

To say I was surprised at the reaction to the guidelines would be an understatement. The clerk electronically sent copies of the guidelines to members of our bar. The guidelines got picked up by a local legal blog and from there were picked up by quite a few other blogs. Many blogs allow readers to submit their own comments. The first surprise was the wording of the headlines. For example, Law.com Legal Blog Watch wrote: "Judge Cresses Puts An End to Legalese in His Court." Umbricks used the headline: "Too bad Kressel lacks criminal contempt power." The U.S. Law Blog wrote: "Federal judge orders lawyers to stop using legalese." In federalappeals.net, Peter Smythe wrote: "Judge Orders Lawyers to Write Well." LexisNexis in its Lawyers Weekly wrote: "Judge berates lawyers for bad grammar." Lawyerist.com, which I think was the first blog to pick up my guidelines, wrote in its headline: "Judge Orders You to Stop Writing Stupidly." My favorite is the ABA Journal's blog, which started its story with the headline: "Judge Orders Lawyers to Stop Using Capitalization 'With Abandon.'" There are quite a few others, but I think that you get the picture.

ment sound more legal, which is exactly the opposite of the goal that I am trying to accomplish. Examples of such words are: "hereby," "herein," "in and for," "subject," "that certain," "now," "that," "undersigned," "immediately," "heretofore entered in this case," "be, and hereby is"–the list goes on and on. Compare the meaning of "Now, therefore, it may be and is hereby ordered that:" with "It is ordered:"

> A good opening line for an order would read something like: This case came before the court on the motion of First National Bank seeking relief from the automatic stay. Referring to it as "this case" is the most accurate and succinct description. It is unnecessary to refer to it as "matter," "proceeding," "proceedings," "that certain," "subject," or "above titled." If the order is for an adversary proceeding, then refer to it as "this adversary proceeding."

Refer to the automatic stay, simply as the automatic stay, not the automatic stay of actions. Do not refer to an order granting relief from the automatic stay as an order for relief. An order for relief is something entirely different. In addition to superfluous words, watch for superfluous and wordy phrases. Examples include referring to a motion as "filed with the court" or an "order heretofore entered in this case." How about "order?"

Guideline No. 10 – Multiple Page Orders

As a matter of form, if your order runs to more than one page, make sure that the last page contains more than just the court's signature and date.

Guideline No. 11 – Inappropriate Relief

Do not include in the actual order, things that the court is not ordering. Frequently, lawyers will include things that are factual determinations or are things the parties have agreed to. Those things really belong in a separate part before the words "It is ordered:."

Guideline No. 12 – Undersigned.

Never use the word "undersigned."

Guideline No. 13 – Hearing

In a proposed order filed with a motion, do not include any reference to a hearing having been held, since there rarely is. If you are submitting an order after a hearing, then it would obviously be okay to refer to one.

Guideline No. 14 – Attachments

I dislike having attachments to orders. For one thing, attorneys frequently forget to include the attachment. In addition, they can easily be separated from the order or even replaced.

Guideline No. 15 – Waiver of the Stay of the Order

If you want to include a waiver of the stay of your order, include that as a separate and last paragraph. I prefer the language: "Notwithstanding Fed. R. Bankr. P. 4001(a)(3), this order is effective immediately." Substitute Rule 6004(h), 3020(e), or 6006(d) as appropriate.

Guideline No. 16 – Plurals and Possessives

Keep plurals and possessives straight and consistent. Know when to use debtors (plural), debtor's (singular possessive), and debtors' (plural possessive). Make sure the verb matches the subject of the sentence.

Guideline No. 17 – Its and It's

Please use the possessive noun "its" and the contraction "it's" correctly.

Guideline No. 18 – Disposition

Make sure the relief granted is actually stated in the dispositive part of the order. Do not simply say "the motion is granted" or "the trustee's objection is overruled." Say "The debtor's sale of 10,000 widgets is approved" or "The debtor's 1999 Dodge is not exempt." If real property is involved, include the legal description, at least if you ever intend to file the order. Make sure the legal description is correct. (Double and triple check it.) Lastly, do not include as part of your relief anything which you did not request in the motion. ■

In my defense, I would say that I didn't order lawyers to do anything, I did not berate them, and I did not accuse them of writing stupidly. Let me make something else clear; I have never held myself out as an expert on issues of grammar or syntax. While I like to think of myself as a student of the English language, studying it to improve my own writing, I have never lectured other judges or lawyers on proper grammar (my children and grandchildren yes, but lawyers, no). One of the commenters on Lawyerist.com's blogged ". . . the memo comes across as a list of his personal idiosyncrasies." I think the comment was meant as a criticism, but frankly, while I may quibble with the word "idiosyncrasies," the guidelines certainly were intended to reflect my personal preferences and no more.

The Guidelines

Because they were my personal preferences, the guidelines explicitly only apply to proposed orders submitted to me. I was not attempting to mandate any of this usage in briefs or motions or any other document. Just as I would not expect lawyers to agree with everything that I suggest in my guidelines, I would not expect other judges to agree with my preferences either. For example, as a matter of style, I know some judges prefer to always capitalize the word "Court." But it is my preference not to do so, except obviously as part of a proper name like "United States Bankruptcy Court for the District of Minnesota." When I first became a judge, I faced the issue of whether to write opinions in the first or third person. I chose to write all of my opinions in the first person, not because I felt that objectively it was superior in some way to the use of the third person, but because it was comfortable to me and suited my style of writing. It would never occur to me to tell another judge that he or she should write opinions the same way that I do. (Well, to be honest, it might occur to me, but I would never actually do it).

Most of the guidelines are pretty prosaic and deal strictly with the formatting of the proposed order. Others are intended to be simple reminders about spelling and obvious grammar, which lawyers sometimes overlook in their writing. Guidelines 16 and 17, for example, remind lawyers to pay attention to apostrophes when dealing with plurals, possessives, and contractions. I hope no one would quarrel with those guidelines. I feel the same about the use of "and/or." Although one commentator did post an impassioned defense of its use, I think that it is bad grammar in every context.

Guideline 14 expresses my aversion to attachments to orders for the reasons stated in the guidelines. Lawyers frequently forget to include attachments when they submit proposed orders and I always have this nagging concern that it would be too easy to take an actual order and add a different attachment, thereby granting completely different relief. While this is unlikely, it is not entirely unfounded. We actually had a case in our district of a lawyer doing exactly that.

The guidelines that seemed to attract the most comment were guidelines 5, 6, 7, 9, and 12. Guideline 5 deals with a common practice of lawyers: defining terms used in the order by the use of quotation marks, or parentheses or, sometimes, both. It was common practice when I started practicing law to use a phrase like "hereinafter referred to." That has, mercifully, pretty much disappeared. In its place, however, is the practice identified in guideline 5. It is almost always unnecessary and I have noticed that the Supreme Court rarely does it and no one seems to have trouble following their opinions, at least for this reason. It seems to me that if the first sentence of an order is "This case is before the court on the motion of the First National Bank," then I can start the next sentence with "The movant" or "The bank" and not a single person would have any doubt what I was talking about.

Guideline 8 on capitalization also drew a fair amount of attention. It is hard to add anything more to what I have said in the guideline itself. Lawyers like to capitalize words and it is almost always unnecessary.

Guideline 7 addressed itself to another common tendency of lawyers: dropping articles from their written speech, usually the definite article. I am convinced that most lawyers, if they were talking, would refer to "the debtor" or "the trustee" or "the creditor," but for some reason when they write those same phrases they drop the word "the." I simply feel that it sounds better to include the article and I ask lawyers to include it in proposed orders.

Guideline 9 deals with superfluous words and phrases. It is the longest guideline, which is pretty ironic, I guess. During the years that I was making the changes myself, I compiled a list of the various words and phrases that I frequently removed from proposed orders. Most of them appear in guideline 9. I am convinced that the use of any of the words or phrases in guideline 9 adds absolutely nothing to the meaning or the understanding of the order. One of my colleagues accuses me of being a minimalist when it comes to my writing. He is right. I feel that I am more precise and, hopefully, more accurate when I use only those words that are necessary to convey my meaning.

What's Next?

When it comes to grammar, there is one thing I would like to advocate. I hear and see a lot of bad grammar by people who are supposedly professional users of the English language. I am thinking of television news broadcasters and newspaper reporters. There are too many issues to take on, but I would like to use this piece to make one plea: save the adverb. One of the unfortunate things I have observed over the years is the slow death of the use of adverbs. Over and over again, I see an adjective used when the sentence called for an adverb. I blame this on the airlines. Decades ago, they started advertising the fact that their flights flew "direct" to various destinations. From there, more and more people, including professional writers, started substituting the adjective for the adverb. Look no further than the sign on the side of the road that reads: "Drive Slow." So, if you have managed to read this far, please join me in my campaign to save the adverb. ■

Supreme Court amends rules for swifter appeals in child custody cases

By Joseph Tybor, Press Secretary, Illinois Supreme Court

The Illinois Supreme Court has amended its rules to provide a swifter means for achieving permanency and stability in child custody issues relating to divorce and parentage cases. The rules changes, effective February 26, 2010, allow the appeal of custody issues even if other matters in those cases are unresolved. The situation often arises in marriage dissolution cases that can linger over issues of property, spousal support or other matters; or in parentage cases where decisions affecting the rights and persons other than the child may be unresolved.

A primary change amends Supreme Court Rule 304 to allow a trial court's permanent determination of custody to be appealed even if other issues in the underlying matter remain unresolved.

The rules changes have been thoroughly considered by the Special Supreme Court Committee on Child Custody Issues and by the Supreme Court Rules Committee, which held a public hearing on the rules in April 2009. "I think this is a very significant modification," said Circuit Court Judge Moshe Jacobius, presiding judge of the Cook County Domestic Relations Division and co-chair of the Committee on Child Custody Issues. "The Supreme Court wanted to expedite appeals of this type so that a child not remain in limbo after the trial court has ruled on custody but still has other issues remaining before it."

The amended rules are a refinement to strengthen a package of rules studied by both committees and approved by the Supreme Court previously to help ensure that child custody matters be handled expeditiously, competently and with great emphasis on the best interest of the child. Those rules allowed for an interlocutory appeal of custody issues, but required the special permission of the trial court. In addition, some appellate courts had ruled that even a permanent determination of custody may not be appealed until all underlying issues of the divorce case were settled.

The amended rules now make a final determination of custody appealable as a matter of right, regardless of other issues that are remaining. "Now, a child custody judgment, even when it is entered prior to the resolution of other matters involved in the dissolution proceeding such as property distribution and support, shall be treated as a distinct claim and shall be appealable without a special finding," said Circuit Court Judge Robert J. Anderson, presiding judge of the DuPage County Domestic Relations Division and also co-chair of the committee. "The goal of the amendment is to promote stability for affected families by providing a means to obtain swifter resolution of child custody matters."

The amended change is embodied by adding new subsection (b) (6) to Supreme Court Rule 304, which governs appeals from final judgments that do not dispose of an entire proceeding. The Supreme Court also amended Rule 306 to allow for interlocutory appeals of temporary orders of custody by leave of the trial court and the appellate court.

Consistent with an amendment offered by the Supreme Court Rules Committee, the Supreme Court also set out the procedures for disposing of child custody appeals in amended Rule 311, which now contains modified language formerly included in Rule 306A. "The Committee on Child Custody Issues commends the Supreme Court for its continuing interest and concern in this area," said Judge Anderson. "The Court has led the way in making sure that children and children's issues are treated with the utmost speed and competency."

The Special Committee was formed in January, 2002 on the recommendation of Chief Justice Thomas R. Fitzgerald and Justice Rita B. Garman. It was motivated by a desire to provide the children of Illinois the fairest system possible.

Other rules, previously recommended and adopted by the Supreme Court, are encapsulated in Rules 900 to 942. They relate to all child custody proceedings under the Juvenile Court Act, the Illinois Marriage and Dissolution of Marriage Act, the Uniform Child Custody Jurisdiction and Enforcement Act, the Illinois Parentage Act, the Illinois Domestic Violence Act, Article 112 A of the Code of Criminal Procedure and guardianship matters involving a minor under article XI of the Probate Act of 1984.

"A child's life doesn't stop and wait for us," Chief Justice Fitzgerald said at the time the previous rules were adopted. "These are some of the most important issues that ever come before our judicial system, and we have to be conscious that these cases be dealt with in a reasonable period of time."

The Supreme Court amended the rules under its supervisory and administrative authority granted to it by the Illinois Constitution (Art. VI, Section 16), as well as under its constitutional authority to provide by rule for appeals to the Appellate Court from other than final judgments of the Circuit Courts (Article VI, Section 6). ■

Precedent

Painted between 1907-1911, hanging in the Supreme Court Library Mural (North Wall)

Jamie Bas:

Precedent is the examples and legal authority determined in previous cases the courts turn to for guidance when ruling on legal issues to maintain a consistent, fair, and unprejudiced way of implementing our laws.

Hon. Michael Hyman:

Precedent is the lifeblood of the law.

When the law urges a result,
that is precedent.

When yesterday's ruling influences today's reasoning,
that is precedent.

When courts perpetuate predictability and stability in the law,
that is precedent.

When politics or lust for power devalue the rule of law,
that is precedent too.

Precedent is the lifeblood of the lawyer and judge.

When they make choices,
that is precedent.

When their own experiences become their nature,
that is precedent.

When another's experiences shapes their perspective,
that is precedent.

When past mistakes guide present thoughts,
that is precedent, too.

Hon. Mary Minella:

When Ottawa born artist, Edgar Spier Cameron, sometime between 1907-1911, painted the mural in the Illinois Supreme Court Library entitled "Precedent," he chose to depict the concept as a woman whose back is toward the viewer, but whose head, in profile, is turned to look over her right shoulder directly toward the viewer. Of the four female figures representing "Qualities of Law," Precedent is the only figure depicted wearing a sash. The sash forms an "X" on the figure's midback and is belted around her waist. The figure appears to be holding a loose end of her sash in her right hand parallel to her forward gaze, symbolizing precedent's importance and connection with the future. The sash appears to represent the continuum of precedent from the past, through the present, to the future. In Precedent's left hand, she reaches toward ancient ruins, symbolizing precedent's connection with the past.

West's Encyclopedia of American Law defines "precedent" as used in the law as "[a] judicial decision that may be used as a standard in subsequent similar cases." The term precedent is derived from Middle English, from Old French, and from Latin, praeceders, praecedent, praecedere, to go before. The concept of precedent is important in countries that follow common law principles. As early as 1683, in the written decision of *Howard v. Harris,* [1558-1774] All ER Rep. 609; also reported 1 Vern. 190; 8 Cas. in Ch. 147; 1 Eq. Cas. Abr. 312; Freem. Ch. 86; 23 ER 406, the concept of precedent, or rather lack thereof, was argued before the court.

The concept of precedent began in England much earlier under Henry II, who came to the throne in 1154. See Wikipedia, Common Law at p. 9. Henry II would send judges from his central court to hear disputes throughout the country. The judges would return to London to discuss their cases and decisions with other judges. Id. Their decisions would be recorded and filed and would serve as precedent for subsequent matters. Id.

Precedent provides consistency, predictability, stability, and fairness to judicial decisions. Justice Louis D. Brandeis wrote that "stare decisis" (Latin: to stand by that which is decided) "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932).

Precedent relies upon judicial decisions and chiefly upon those with written opinions. See Charles Collier, *Precedent and Legal Authority: A Critical History,* 1988 Wis.L.Rev. 771, 777-78. Prior precedent established by courts of review must be followed by trial courts unless it can be distinguished. However, the United States Supreme Court is not as constrained to follow precedent if convinced its former decisions were decided in error, resulting in reversal of some of its decisions. See *Smith v. Allwright,* 321 U.S. 649, 665 (1944).

Precedent, while mindful of the significance of past decisions, also looks forward to its effect in the future, as reflected so insightfully in Edgar Spier Cameron's mural on the north wall of the Illinois Supreme Court Library depicting "Precedent."

John Sabo:

Legal precedent is the reported accumulation of wisdom and experience applied to the recurring situations of human existence. Its importance to those in the present is that it provides a strong measure of predictability as to whether a particular act or omission is acceptable or unacceptable conduct in society. But legal precedent must yield when changes in society make its further application unjust.

Barbara Slanker:

The use of precedent is fundamental in the practice of law. Decisions and opinions are collected and organized to make them readily and easily available, and the principles thus established are applied to matters pending. By following this procedure, precedent provides a framework that makes consistent and predictable decisions possible. Included in the concept and adding strength to it is the component of flexibility that allows for divergence from past decisions when necessary and appropriate.

Willis Tribler:

The concept of precedent is central to American jurisprudence. It prevents the courts from making arbitrary rulings and requires them to look to previous decisions and follow the law that has been set out in those decisions, where appropriate. It acts as a restraint on potential prejudice or sympathy and creates a consistent body of law. Precedent, however, is not static. It can be overruled, again as necessary, but it cannot be overruled in an arbitrary or capricious way. There must be a good reason to overrule a prior precedent, and that reason must be clearly stated. ■

Audio of Illinois Appellate Court arguments are accessible from Supreme Court Web site

By Joseph Tybor, Press Secretary, Illinois Supreme Court

In keeping with the Illinois Supreme Court's desire to bring greater public access and understanding to the courts, audio recordings of all oral arguments in the Illinois Appellate Court are now available on the Court's Web site.

Under the direction of the Administrative Office of the Illinois Courts and its division of Judicial Management Information Services (JMIS), the appellate courtrooms in all five Judicial Districts have been equipped with digital audio recording systems that will preserve audio quality long-term for archival purposes. The systems also are compatible with standard computer software readily available on most personal computer systems, and will allow the legal community and the general public to listen to and download audio recordings of all appellate arguments and workers' compensation hearings.

The new access began last November and continues a process by the Supreme Court and the Administrative Office to make court information more accessible to a wider public audience. "Use of technology for this purpose offers an additional means by which the Supreme Court and the Administrative Office are able to broaden access to information about the Illinois courts," said Cynthia Y. Cobbs, director of the Administrative Office. "There are approximately 100,000 visitors to the Court's Web site monthly. The Appellate Court opinion section is consistently one of the most popular sections on the site. The availability of audio recordings of Appellate Court arguments to practitioners, law schools and the general public will provide information concerning specific cases and, as an added benefit, will increase the public's knowledge about how our intermediate reviewing courts work."

The Supreme Court has been posting both video and audio recordings of its oral arguments on its Web site since January 2008. It also makes available court-related information by way of Twitter and by 22 list serves which can be subscribed to through an individual's e-mail account. All of the Supreme Court and Appellate Court opinions, as well as orders and announcements, also are available on the Court's Web site (www.state.il.us/court). All the programs have been developed and implemented through the JMIS division.

"Implementation of the Appellate audio-recording project continues to promote the Supreme Court's use of technology to increase access to court information for educational and informational purposes," said Skip Robertson, assistant director of the JMIS division. "With the assistance of Appellate Court personnel, JMIS staff is able to prepare and post audio recordings, linking a filed opinion to its recorded oral argument." ■

Recent appointments and retirements

1. The Illinois Supreme Court, pursuant to its constitutional authority, has appointed the following to be Appellate Judge:
   - Terrence J. Lavin, First District, February 1, 2010

2. The Illinois Supreme Court, pursuant to its constitutional authority, has appointed the following to be Circuit Judge:
   - Anthony C. Kyriakopoulos, Cook County Circuit, 10th Subcircuit, February 2, 2010

3. The following judges have retired:
   - Hon. Diane L. Brunton, Associate Judge, 7th Circuit, February 28, 2010 ■

Upcoming CLE programs

To register, go to www.isba.org/cle or call the ISBA registrar at 800-252-8908 or 217-525-1760.

April

Thursday, 4/1/10 – Webinar—Advanced Research on FastCase. Presented by the Illinois State Bar Association. *An exclusive member benefit provided by ISBA and ISBA Mutual. Register at: <https://www1.gotomeeting.com/register/458393744>. 12-1.

Thursday, 4/8/10- Webcast—Durable Powers of Attorney. Presented by the Illinois State Bar Association. <https://isba.fastcle.com/store/seminar/seminar.php?seminar=3564>. 12-1.

Thursday, 4/8/10- Springfield, INB Building 307 E. Jackson—Key Issues in Local Government Law: A Look at FOIA, OMA, Elections and Attorney Conflicts. Presented by the ISBA Local Government Law Section & the ISBA Standing Committee on Government Lawyers. 12:30-4:45. Cap 55

Thursday, 4/8/10- Chicago, ISBA Regional Office—Resolving Financial Issues in Family Law Cases. Presented by the ISBA Family Law Section. 8:30-4:30.

Friday, 4/9/10- Chicago, ISBA Regional Office—Civil Practice Update- 2010. Presented by the ISBA Civil Practice Section. 9-4.

Monday - Friday, 4/12/10 - 4/16/10 – Chicago, ISBA Regional Office—40 hour Mediation/Arbitration Training. Master Series Presented by the Illinois State Bar Association and the ISBA Alternative Dispute Resolution Section. 8:30-5:45 each day.

Friday, 4/16/10- Chicago, ISBA Regional Office—Legal Trends for Non-Techies: Topics, Trends, and Tips to Help Your Practice. Presented by the ISBA Committee on Legal Technology ; co-sponsored by the ISBA Elder Law Section. 1-4:30pm.

Saturday, 4/17/10 – Lombard, Lindner Learning Center—DUI, Traffic, and Secretary of State Related Issues- 2010. Presented by the ISBA Traffic Law Section. 9-4. Cap 250.

Tuesday, 4/20/10- Bloomington, Double Tree Hotel—Intellectual Property Counsel from Start-up to IPO. Presented by the ISBA Intellectual Property Section. 8:30-3:30. Cap 80.

Wednesday, 4/21/10- Bloomington, Double Tree Hotel—Construction Law- What's New in 2010? Presented by the ISBA Special Committee on Construction Law; co-sponsored by the ISBA Special Committee on Real Estate Law. 9-4. Cap 80

Friday, 4/23/10- Champaign, I- Hotel and Conference Center—Practice Tips & Pointers on Child-Related Issues. Presented by the ISBA Child Law Section; co-sponsored by the ISBA Family Law Section. 8:25-4. Cap 70.

Tuesday, 4/27/10- Chicago, ISBA Regional Office—Construction Law- What's New in 2010? Presented by the ISBA Special Committee on Construction Law. 9-4.

Wednesday, 4/28/10- Chicago, ISBA Regional Office—Intellectual Property Counsel from Start-up to IPO. Presented by the ISBA Intellectual Property Section. 8:30-3:30.

Thursday, 4/29/10- Chicago, ISBA Regional Office—Key Issues in Local Government Law: A Look at FOIA, OMA, Elections and Attorney Conflicts. Presented by the ISBA Local Government Law Section & the ISBA Standing Committee on Government Lawyers. 12:30-4:45.

Friday, 4/30/10- Chicago, ISBA Regional Office—Anatomy of a Trial. Presented by the ISBA Tort Law Section. Time TBD.

May

Tuesday, 5/4/10- Chicago, ISBA Regional Office—Boot Camp- Basic Estate Planning. Presented by the ISBA Trust and Estates Section. 9-4.

Wednesday, 5/5/10- Chicago, ISBA Regional Office—Price Discrimination: Dead or Alive? Robinson Patman after Feesers. Presented by the ISBA Antitrust Section. 12-2pm.

Wednesday, 5/5/10- Chicago, The Standard Club—Tips of the Trade: A Federal Civil Practice Seminar. Presented by the ISBA Federal Civil Practice Section. 9-4:30.

Thursday, 5/6/10 – Chicago, ISBA Regional Office—Law Practice Strategies to Weather a Stormy Economy. Master Series Presented by the Illinois State Bar Association. 8:30-12:45.

Friday, 5/7/10 – Bloomington, Bloomington-Normal Marriott—Law Practice Strategies to Weather a Stormy Economy. Master Series Presented by the Illinois State Bar Association. 8:30- 12:45. Cap 130.

Friday, 5/7/10- Bloomington, Bloomington-Normal Marriott—DUI, Traffic and Secretary of State Related Issues-2010. Presented by the ISBA Traffic Laws/ Courts Section. Time TBD. Cap 125.

Wednesday, 5/12/10- Chicago, ISBA Regional Office—Mental Health Treatment in Illinois: Time for a Change. Presented by the ISBA Committee on Mental Health Law. Time TBD

Thursday, 5/13/10- Friday, 5/14/10- Chicago, ISBA Regional Office—2010 Annual Environmental Law Conference. Presented by the ISBA Environmental Law Section. 8:30-5; 8:30-12:15.

Friday, 5/14/10- Chicago, ISBA Regional Office—Legal Ethics in Corporate Law. Presented by the ISBA Corporate Law Department Section. 1-5:15.

Thursday, 5/20/10- Bloomington, Hawthorn Suites—Resolving Financial Issues in Family Law Cases. Presented by the ISBA Family Law Section. 8:30-4:30.

Friday, 5/21/10- Chicago, ISBA Regional Office—2010 Labor and Employment Litigation Update. Presented by the ISBA Labor and Employment Section. 9-12:30.

Friday, 5/21/10- Chicago, ISBA Regional Office—Roth Conversions in 2010- A Window of Opportunity. Presented by the ISBA Employee Benefits Committee. 2-4pm.

Friday, 5/21/10- Moline, Stoney Creek Inn—Civil Practice Update- 2010. Presented by the ISBA Civil Practice Section. 9-4. Cap 100.

June

Tuesday, 6/1/10- Chicago, ISBA Regional Office—Ethics in Today's Government Agencies: Practice Makes Perfect. Presented by the ISBA State and Local Taxation Section. Time TBD.

Thursday, 6/3/10- Saturday, 6/5/10- Chicago, ISBA Regional Office—CLE Fest Classic Chicago- 2010. Presented by the Illinois State Bar Association. 8:00-5:40; 8:00-5:40; 8:00-12:40

Thursday, 6/10/10– Chicago, ISBA Regional Office—Legal Writing: Improving What You Do Everyday. Presented by the Illinois State Bar Association. Time TBD.

Friday, 6/11/10- Chicago, ISBA Regional Office—Second Annual Animal Law Conference. Presented by the ISBA Animal Law Section. 8-5.

Friday, 6/11/10- Live Webcast—Second Annual Animal Law Conference. Presented by the ISBA Animal Law Section. 8-5.

Thursday, 6/24/10- Friday 6/25/10- St. Louis, Hyatt Regency St. Louis at the Arch—CLE Fest Classic St. Louis- 2010. Presented by the Illinois State Bar Association. 11:00-4:40; 8:30-4:10. ■

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