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How lawyers can temper judicial temperament

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See page 12 for details

By Hon. Michael B. Hyman

A steady, fair-minded temperament is one of the most defining attributes of a judge. Yet, as a young lawyer I learned early that stumbling onto a judge's pet peeves could short circuit his or her otherwise cordial disposition. To avoid unnecessarily stressing the judge, let alone, myself, I made it a habit to inquire into the idiosyncrasies of judges hearing my cases. In this way I greatly reduced my anxiety and accepted the sense of an Old Russian saying, "The thing to fear is not the law, but the judge."

Now a judge myself, I assume lawyers are trying to find out my pet peeves to ease their fears! Well, they should have nothing to be afraid of. A display of anger, frustration, disgust or other emotions has no place in any judicial repertoire. A judge on the bench is like an actor on the stage and the litigants are closely watching and listening to what the judge does and says. I believe that whatever a judge might be feeling inside about what is happening in front of the bench, it should stay inside, lest the judge do or say something which is interpreted as forecasting bias or favoritism.

I do my best to keep my pet peeves under wraps, incomprehensible to anyone appearing before me. My essential duty as a judge is to maintain not just the reality of impartiality but its appearance and perception. Once a judge's words, actions or attitude undermine his or her temperament, the aura of justice recedes. The best antidote is for the judge to let pet peeves escape detention and handle them with stoicism and common sense.

When I joined the bench I asked a few experienced judges to tell me which courtroom shenanigans most aggravated them. I then knew what to look for and made sure I could handle each situation in a non-threatening, even-handed way without appearing judgmental.

Here are nine general irritants that judges frequently mentioned. Lawyers should steer clear of them. No lawyer or litigant helps his or her cause by provoking the judge. Avoid the irritants, and you can rest easy, knowing that the thing to fear is no longer the judge, but the law!

Ignorance of Court Rules

To paraphrase Justice Holmes' father, young lawyers know the rules, but old lawyers know the exceptions. Unfortunately, some young and old lawyers don't know either. Judges have been known to bristle at lawyers who only minimally master court rules. Imagine playing "Monopoly" against someone who says they know how to play but who turns out to be clueless about the basics. Lawyers are expected to firmly grasp, among others, the procedural rules, the Illinois Supreme Court Rules, the Illinois Rules of Professional Conduct, local rules, and evidence rules. They also should be familiar with any standing orders of the judge. Besides raising a judge's eyebrows, lawyers who don't know or understand the rules applicable to their case risk appearing incompetent or, worse, giving their opponent a big advantage.

Tardiness

Arriving late to a party might be fashionable, but not arriving late to a courtroom. As my son's high school football coach liked to remind his players, "If you're early, you're on time. If you're on time, you're late. If you're late, you are forgotten." Judges, like clients, don't appreciate being made to wait. Judges also disdain wasting valuable time –there is always another case in queue. Allow yourself at least an extra 15 minutes before heading off to court. And, once in the courtroom, don't go wandering off without informing the clerk. Most judges will hold a case if the attorney clears it first with the clerk. Consistent tardiness is irresponsible, and may even earn you the appellation "the late attorney (your name here)."

Personal Attacks

Lawyers should heed the advice of an African proverb, "If your mouth turns into a knife, it will cut off your

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lips." Judges loathe seeing lawyers cross swords as if in a duel. Although lawyers usually treat one another with respect, particularly when before the bench, they occasionally lapse and haul off on one another. Not a judge in this country appreciates such antics or is swayed by them. It is another time waster and can sap a judge's patience faster than you can say, "Touché." Should you feel like sniping or snapping at opponents (or the court), think twice. Besides degrading yourself, you put at risk your integrity, your professionalism, and above all else, your reputation. Why would you want to do all that in front of a judge?

Courtroom Noise

Remember to turn off all "noise makers" before entering a courtroom. And remain quiet. Commotion and disruptions can give a judge a headache. Not only do good manners and decorum dictate silence in the courtroom, but lawyers should use the time until their case is called to pick up clues about the judge's habits, quirks and methods of dealing with legal issues.

Blabber-mouths

Long-winded lawyers weaken their message with stale air, and are prone to antagonize the judge. A German Proverb suggests, "The wise person has long ears and a short tongue." Judges appreciate lawyers who get to the point and stay on point. Lawyers who listen too little and talk too much invariably become their own worst enemy. When someone is speaking, carefully pay attention and don't interrupt. It is a truism that people learn more from listening than from talking. Judges also don't like it when lawyers continue to argue after the judge has already ruled or talk directly to one another rather than address the court. In each of these situations the lawyers have forgotten their professional manners. In sum, watch your tongue.

Lack of Communication

Another all too frequent annoyance occurs when lawyers don't try to resolve differences among themselves, particularly discovery disputes. "What we've got here is failure to communicate," as Paul Newman's character says in "Cool Hand Luke." The matter ends up in the judge's lap, when a simple phone call, quick e-mail, or face-to-face meeting should have taken place before using up the judge's time. Judges expect lawyers to work together to address, minimize and prevent misunderstandings and confrontations. Before jumping into a paper war, consider trying in good faith to resolve your differences. Lawyers who can work together not only save their clients' money and themselves time, but make for happier judges.

Lack of Candor

Judges expect lawyers to tell it straight—no embellishments, no exaggerations, and no fabrications. The Illinois Rules of Professional Conduct require nothing less. Occasionally, however, lawyers in oral argument and in pleadings take unwarranted liberties with the facts and the law. Nine times out of ten a judge or an opponent will catch the doublespeak. A want of candor is an affront to the search for truth, appalling to a court and, once revealed, a credibility disaster for the lawyer. If a misstatement or omission is made, correct it at the earliest opportunity. Few missteps are worse in the eyes of a judge than distorting the facts and mischaracterizing the law.

Lack of Preparation

A Portuguese proverb goes, "Prepare a nest for the hen, and she will lay eggs for you." Unless you crave egg on your face, be conversant about your case's facts and legal issues when appearing before a judge. Ignorance, as well as lack of preparation, irritates judges no end, and undermines your credibility and effectiveness. Judges sense an unprepared lawyer's vulnerability. Most judges prepare every day for their call and expect the lawyers coming before them to do the same.

Rudeness to Staff

The court clerk, courtroom deputy, judge's secretary, court reporter, and law clerk are all extensions of the judge. Lawyers should never consider those around the judge to be inferior or regard them with indifference. Judges are protective of their staff, and more often than not take it personally if a staff member is badgered or bullied. In fact, lawyers should be kinder and gentler with the judge's staff than with the judge. To avert problems, treat everyone with respect.

Judge Michael B. Hyman, of the Circuit Court of Cook County, sits in Courtroom 1401 at the Daley Center hearing Supplementary Proceedings. He is a member of the ISBA Bench and Bar Council. Portions of this article were adapted from Judge Hyman's Editor's Briefcase column in the April 2007 CBA Record, published by the Chicago Bar Association.

Recent amendments to the Illinois Supreme Court rules

By Michele M. Jochner

Since the beginning of this calendar year, the Supreme Court of Illinois has made several amendments to its Rules. Outlined below are highlights of some of the most significant amendments.

Rule 39: Appointment of Associate Judges

The Court amended this Rule to clarify that any attorney who seeks appointment to the office of associate judge: 1) must be a United States citizen; 2) must be licensed to practice law in this State; and 3) must be a resident of the unit from which he/she seeks appointment.

Amended January 25, 2007, corrected January 26, 2007, effective February 1, 2007.

Rule 63: Canon 3 of the Code of Judicial Conduct - A Judge Should Perform the Duties of Judicial Office Impartially and Diligently

The Court made amendments to subsection A(7) of Rule 63 in order to clarify that the general proscription against the taking of photographs in the courtroom during sessions of the court or recesses between proceedings and the broadcasting or televising of court proceedings unless such photos or broadcasts are permitted by order of the Illinois Supreme Court is not intended to

prohibit local circuit courts from using security cameras to monitor courtrooms, provided that the cameras are controlled by "designated court personnel."

In conjunction with the amendment to Rule 63, the Illinois Supreme Court also entered an order, M.R. 2634, which provides an implementation procedure for the use of such security cameras. The order states:

> Any security cameras installed in the courtroom in the various circuits shall be in accordance with the following standards: (1) security cameras are to be placed in areas of the courtroom such that there is no video recording of the jury or witnesses; (2) audio recordings of the proceedings are prohibited in connection with security cameras; (3) use of such cameras is limited to security purposes and any video tape produced therefrom shall remain the property of the court and may not be used for evidentiary purposes by the parties or included in the record on appeal; (4) security cameras shall be monitored by designated court personnel only; and (5) signs shall be posted in and outside of the courtroom notifying those present of the existence of the court surveillance.

Amended April 16, 2007, effective immediately.

Rule 87: Appointment, Qualification and Compensation of Arbitrators

The Court amended subsection (e) to increase the compensation for arbitrators from $75 to $100 per hearing.

Amended January 25, 2007, corrected January 26, 2007, effective February 1, 2007.

Rule 213: Written Interrogatories to Parties

The Court amended subsection (g) of Rule 213, which limits trial testimony and the freedom to cross-examine witnesses at trial, by drawing a new distinction between a discovery deposition and an evidence deposition. The amended Rule provides that information disclosed in either an answer to a Rule 213(f) interrogatory or in a discovery deposition limits the testimony that can be given by a witness on direct examination at trial. The amendment also clarifies that information disclosed in a discovery deposition need not be later specifically identified in a Rule 213(f) interrogatory answer; however, upon objection at trial, the burden is on the proponent of the witness to prove the information was provided in a Rule 213(f) answer or in a discovery deposition. Finally, the amended Rule now also states that, "[e]xcept upon a showing of good cause, information in an evidence deposition not previously disclosed in a Rule 213(f) interrogatory answer or in a discovery deposition shall not be admissible upon objection at trial."

Amended December 6, 2006, effective January 1, 2007.

Rule 289: Service of Process in Proceedings to Confirm a Judgment by Confession or to Collect a Judgment for $10,000 or Less

The Court amended this Rule to reflect the increased jurisdictional limit from $5,000 to $10,000 for small-claims actions under Rule 281.

Amended March 9, 2007, effective April 1, 2007.

Rule 303: Appeals From Final Judgments of the Circuit Court in Civil Cases

The Court amended subsection (a)(2) of Rule 303 to provide that when a timely post judgment motion has been filed by any party - either in a jury or a nonjury case - a notice of appeal filed either before the entry of the order disposing of the last pending post judgment motion, or before the final disposition of any claim, becomes effective when the order disposing of said motion or claim is entered. In addition, the Court also amended the Rule to provide that a party intending to challenge an order disposing of any post judgment motion or separate claim, or a judgment amended upon such motion, must file a notice of appeal, or an amended notice of appeal, within 30 days of the entry of said order or amended judgment. The new provisions of the Rule also clarify that where a post judgment motion is denied, an appeal from the judgment is deemed to include an appeal from the denial of the post judgment motion.

According to the Committee Comments, the amendments to subsection (a)(2) are modeled on the Federal Rules of Appellate Procedure, and are intended to "protect[] the rights of an appellant who has filed a 'premature' notice of appeal by making the notice of appeal effective when the order denying a post judgment motion or resolving a still-pending separate claim is entered." In addition, the Committee Comments recognize that "[t]he question of whether a particular 'claim' is a separate claim for purposes of Rule 304(a) is often a difficult one," and, accordingly, the amendments to Rule 303(a)(2) "protect[] the appellant who files a notice of appeal prior to the resolution of a still-pending claim that is determined to be a separate claim under Rule 304(a)." The amendment clarifies that "there is no need to file a second notice of appeal where the post judgment order simply denies the appellant's post judgment motion," but also provides that "where the post judgment order grants new or different relief than the judgment itself, or resolves a separate claim, a second notice of appeal is necessary to preserve an appeal from such order."

In addition, the Court also amended subsection (b)(3) of Rule 303 by adding a new provision stating that a notice of appeal filed pursuant to Rule 302(a)(1) from a judgment of a circuit court holding a statute of the United States or of Illinois unconstitutional shall have appended thereto a copy of the court's findings made in compliance with Supreme Court Rule 18.

Amended March 16, 2007, effective May 1, 2007.

Rule 431: Voir Dire Examination in Criminal Proceedings

The Court amended subsection (b) by deleting permissive language allowing a defendant to "request" that the court ask each potential juror a series of questions assuring that the juror understands and accepts basic principles of criminal procedure (i.e., that a defendant is presumed innocent and must be proven guilty beyond a reasonable doubt), and now requires the court to ask all potential jurors these questions.

Amended March 21, 2007, effective May 1, 2007.

Rule 701: General Qualifications for Admission to the Bar

The Court amended subsection (a) to provide that a person may be "conditionally admitted" to the practice of law in Illinois.

Amended October 2, 2006, effective July 1, 2007.

Rule 704: Qualification on Examination

With respect to applicants who must first receive certification of good moral character and general fitness to practice law by the Committee on Character and Fitness before they are permitted to write the bar examination, the Court amended subsection (b) by removing from this classification those individuals

who are convicted of, or charged with, "misdemeanors involving moral turpitude."

The Court also amended subsection (e) of Rule 704 to provide that once an applicant has achieved a passing score on the bar exam and received certification from the Committee on Character and Fitness, the Board of Admissions to the Bar shall certify to the Court that these requirements have been met and "may also transmit to the Court any additional information or recommendation it deems appropriate."

In addition, the Court also added a new subsection (f) to Rule 704, which provides that for all persons taking the bar examination after the effective date of these amendments, a passing score on that examination is valid for four years from the last date of the examination. An applicant for admission on examination who is not admitted to practice within four years must repeat and pass the examination after filing the requisite character and fitness registration and bar examination applications and paying the corresponding fees.

Amended October 2, 2006, effective July 1, 2007.

Rule 707: Foreign Attorneys in Isolated Cases

The Court amended the caption of this Rule by deleting the phrase "Foreign Attorneys in Isolated Cases" and renaming this provision "Pro Hac Vice."

Amended October 2, 2006, effective July 1, 2007.

Rule 708: Committee on Character and Fitness

The Court amended subsection (a) of this Rule by increasing from 10 to 15 the minimum number of individuals who shall serve on each Committee on Character and Fitness from the Second, Third, Fourth and Fifth Judicial Districts.

The Court completely rewrote subsection (b) of Rule 708 to provide that the Committee on Character and Fitness shall determine "whether each law school registrant and applicant presently possesses good moral character and general fitness for admission to the practice of law." This test is satisfied if the Committee determines that the person's "record of conduct demonstrates that he or she meets the essential eligibility requirements for the practice of law and justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to them." This new provision further states that "[a] record manifesting a failure to meet the essential eligibility requirements, including a deficiency in the honesty, trustworthiness, diligence, or reliability of a registrant or applicant, may constitute a basis for denial of admission."

The Court also completely revised subsection (c) of Rule 708. This provision now sets forth a series of "eligibility requirements for the practice of law," which include the following:

> (1) the ability to learn, to recall what has been learned, to reason, and to analyze; (2) the ability to communicate clearly and logically with clients, attorneys, courts and others; (3) the ability to exercise good judgment in conducting one's professional business; (4) the ability to conduct oneself with a high degree of honesty, integrity and trustworthiness in all professional relationships and with respect to all legal obligations; (5) the ability to conduct oneself with respect for and in accordance with the law and the Illinois Rules of Professional Conduct; (6) the ability to avoid acts that exhibit disregard for the health, safety and welfare of others; (7) the ability to conduct oneself diligently and reliably in fulfilling all obligations to clients, attorneys, courts, creditors and others; (8) the ability to use honesty and good judgment in financial dealings on behalf of oneself, clients and others; (9) the ability to comply with deadlines and time constraints; and (10) the ability to conduct oneself properly and in a manner that engenders respect for the law and the profession.

In addition, the Court added a new subsection (d), which provides that, if required by the Committee or its Rules of Procedure, a law student registrant or applicant "shall appear before the committee of his or her district or some member thereof and furnish the committee such evidence of his or her good moral character and general fitness to practice law as in the opinion of the committee would justify his or her admission to the bar."

The Court also added a new subsection (e), which provides that each law student registrant or applicant - prior to being admitted to the bar - is under a "continuing duty to supplement and continue to report fully and completely to the Board of Admissions to the Bar and to the Committee on Character and Fitness all information to be required to be disclosed pursuant to any and all application documents and such further inquiries prescribed by the Board and the Committee."

Amended October 2, 2006, effective July 1, 2007.

Rule 1.15 of the Illinois Rules of Professional Conduct - Safekeeping Property

The Court completely rewrote substantial portions of Rule 1.15, which set forth the requirements for depositing nominal or short-term funds of clients or third-persons held by a lawyer or law firm. Accordingly, Rule 1.15 is set forth below in its entirety. Deleted portions are indicated with strikeouts and new language is denoted by an underscore.

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account or accounts maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.
>
> (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
>
> (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate

by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

~~(d) All nominal or short-term funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more pooled interest-bearing trust accounts established with a bank or savings and loan association, with the Lawyers Trust Fund of Illinois designated as income beneficiary. Each pooled, interest-bearing trust account shall comply with the following provisions:~~

~~(1) Each lawyer or law firm shall establish one or more interest-bearing trust accounts with any bank(s), savings bank(s) or savings and loan association(s) authorized by federal or state law to do business in Illinois. Each interest-bearing trust account shall be insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation and such funds shall be subject to withdrawal promptly upon request. At the direction of the lawyer or law firm, such funds may be used to purchase securities pursuant to fully collateralized overnight repurchase agreements with such financial institution(s), provided such securities: (a) are guaranteed as to principal and interest by the full faith and credit of the United States or are AAA-rated United States agency obligations, and (b) are held by a third-party custodian who shall be either the Federal Reserve Bank of Chicago or St. Louis or a correspondent bank who is a member of the Federal Reserve System.~~

~~(2) The rate of interest payable on any interest-bearing trust account shall not be less than the rate paid by the depository institution to depositors other than lawyers or law firms.~~

~~(3) Each lawyer or law firm shall direct the depository institution to remit net interest or dividends, after deduction of reasonable charges and fees, as the case may be, on the average monthly balance in the account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, directly to the Lawyers Trust Fund of Illinois. A statement shall be transmitted with each remittance showing the name of the lawyer or law firm directing that the remittance be sent, the account number, the gross interest, the service fee/handling charge, if any, the net interest remitted, the amount of such remittance, the remittance period, and the rate of interest applied.~~

~~(4) Each lawyer or law firm shall deposit into such interest-bearing trust accounts all clients' funds which are nominal in amount or are expected to be held for a short period of time.~~

~~(5) The decision as to whether funds are nominal in amount or are expected to be held for a short period of time rests exclusively in the sound judgment of the lawyer or law firm, and no charge of ethical impropriety or other breach of professional conduct shall attend a lawyer's or law firm's judgment on what is nominal or short term.~~

(d) All nominal or short-term funds of clients or third persons held by a lawyer or law firm, including advances for costs and expenses, and funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm, shall be deposited in one or more pooled interest- or dividend-bearing trust accounts,

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hereinafter "IOLTA accounts," established with an eligible financial institution selected by a lawyer or law firm in the exercise of ordinary prudence, and with the Lawyers Trust Fund of Illinois designated as income beneficiary. Each IOLTA account shall comply with the following provisions:

(1) Each lawyer or law firm in receipt of nominal or short-term client funds shall establish one or more IOLTA accounts with an eligible financial institution authorized by federal or state law to do business in the state of Illinois. An eligible financial institution is a bank or a savings bank insured by the Federal Deposit Insurance Corporation or an open-end investment company registered with the Security and Exchange Commission, which offers IOLTA accounts within the requirements of this rule as administered by the Lawyers Trust Fund of Illinois.

(2) Eligible institutions shall maintain IOLTA accounts that pay the highest interest rate or dividend available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility guidelines, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers, and that these factors do not include that the account is an IOLTA account.

(3) An IOLTA account that meets the highest comparable rate - or dividend - standard set forth in (d)(2) must use one of the identified account options as an IOLTA account, or pay the equivalent yield on an existing IOLTA account in lieu of using the highest-yield bank product:

(a) a checking account paying preferred interest rates, such as money market or indexed rates, or any other suitable interest-bearing deposit account offered by the eligible institution to its non-IOLTA customers.

(b) for accounts with balances of $100,000 or more, a business checking account with automated investment feature, such as an overnight sweep and investment in repurchase agreements fully collateralized by U.S. Government securities as defined in (f).

(c) for accounts with balances of $100,000 or more, an open-end money market fund with, or tied to, check-writing capacity solely invested in or fully collateralized by U.S. Government securities.

(4) As an alternative to the account options in (3), the financial institution may pay a "safe harbor" yield equal to 70% of the Federal Funds Target Rate.

(5) A lawyer or law firm may maintain funds belonging to the lawyer or law firm in the IOLTA account to meet minimum balance requirements and to pay bank charges.

(6) Each lawyer or law firm shall direct the eligible financial institution to remit monthly earnings on the IOLTA account directly to the Lawyers Trust Fund of Illinois. For each individual IOLTA account, the eligible financial institution shall provide: a statement transmitted with each remittance showing the name of the lawyer or law firm directing that the remittance be sent; the account number; the remittance period; the rate of interest applied; the account balance on which the interest was calculated, the reasonable service fee(s) if any; the gross earnings for the remittance period; and the net amount of earnings remitted. Remittances shall be sent to the Lawyers Trust Fund electronically unless otherwise agreed. Fees in excess of the earnings accrued on an individual IOLTA account for any month shall not be taken from earnings accrued on other IOLTA accounts or from the principal of the account.

(7) Each lawyer or law firm shall deposit into such interest-bearing trust accounts all clients' funds which are nominal in amount or are expected to be held for a short period of time.

(8) The decision as to whether funds are nominal in amount or are expected to be held for a short period of time rests exclusively in the sound judgment of the lawyer or law firm, and no charge of ethical impropriety or other breach of professional conduct shall attend a lawyer's or law firm's judgment on what is nominal or short term.

(e) Ordinarily, in determining the type of account into which to deposit particular funds for a client or third person, a lawyer or a law firm shall take into consideration the following factors:

(1) the amount of interest which the funds would earn during the period they are expected to be ~~deposited~~ held and the likelihood of delay in the relevant transaction or proceeding;

(2) the cost of establishing and administering the account, including the cost of the

lawyer's services;

(3) the capability of the financial institution, through subaccounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client.

~~(f) Any lawyer or law firm that can establish that compliance with subparagraph (d) of this rule has resulted in any banking expense whatsoever shall be entitled to reimbursement of such expense from the Lawyers Trust Fund of Illinois by filing an appropriate claim with supporting documentation.~~

(f) Definitions

(1) "IOLTA account" means an interest- or dividend-bearing trust account benefiting the Lawyers Trust Fund of Illinois, established in an eligible institution for the deposit of nominal or short-term funds of clients or third persons as defined in (d) and from which funds may be withdrawn upon request as soon as permitted by law.

(2) "Open-end money market fund" is a fund of an open-end investment company that must hold itself out as a money market fund as defined by applicable federal statutes and regulations under the Investment Act of 1940, and, at the time of the investment, have total assets of at least $250 million.

(3) "U.S. Government securities" refers to U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest or any AAA-rated United States agency or instrumentality thereof. A daily overnight financial repurchase agreement ("repo") may be established only with an institution that is deemed to be "well capitalized" or "adequately capitalized" as defined by applicable federal statutes and regulations.

(4) "Safe harbor" is a yield that if paid by the financial institution on IOLTA accounts shall be deemed as a comparable return in compliance with this rule. Such yield shall be calculated as 70% of the Federal Funds Target Rate as reported in the Wall Street Journal on the first business day of the calendar month.

(5) "Allowable reasonable fees" for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, automated investment ("sweep") fees, and a reasonable maintenance fee, if those fees are charged on comparable bank accounts maintained by non-IOLTA depositors. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account.

(g) In the closing of a real estate transaction, a lawyer's disbursement of funds deposited but not collected shall not violate his or her duty pursuant to this Rule 1.15 if, prior to the closing, the lawyer has established a segregated Real Estate Funds Account (REFA) maintained solely for the receipt and disbursement of such funds, has deposited such funds into a REFA, and:

(1) is acting as a closing agent pursuant to an insured closing letter for a title insurance company licensed in the State of Illinois and uses for such funds a segregated REFA maintained solely for such title insurance business; or

(2) has met the "good-funds" requirements. The good-funds requirements shall be met if the bank in which the REFA was established has agreed in a writing directed to the lawyer to honor all disbursement orders drawn on that REFA for all transactions up to a specified dollar amount not less than the total amount being deposited in good funds. Good funds shall include only the following forms of deposits: (a) a certified check, (b) a check issued by the State of Illinois, the United States, or a political subdivision of the State of Illinois or the United States, (c) a cashier's check, teller's check, bank money order, or official bank check drawn on or issued by a financial institution insured by the Federal Deposit Insurance Corporation or a comparable agency of the federal or state government, (d) a check drawn on the trust account of any lawyer or real estate broker licensed under the laws of any state, (e) a personal check or checks in an aggregate amount not exceeding $5,000 per closing if the lawyer making the deposit has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the REFA, (f) a check drawn on the account of or issued by a lender approved by the United States Department of Housing and Urban Development as either a supervised or a nonsupervised mortgagee as defined in 24 C.F.R. §202.2, (g) a check from a title insurance company licensed in the State of Illinois, or from a title insurance agent of the title insurance company, provided that the title insurance company has guaranteed the funds of that title insurance agent. Without limiting the rights of the lawyer against any person, it shall be the responsibility of the disbursing lawyer to reimburse the trust account for such funds that are not collected and for any fees, charges and interest assessed by the paying bank on account of such funds being uncollected.

Amended January 25, 2007, effective June 1, 2007.

Crawford v. Washington—Confrontation clause

By Thomas Bruno

The Illinois Supreme Court has decided a case on the Confrontation Clause that takes us back to the days of Sir Walter Raleigh. On April 19th of this year the Illinois Supreme Court decided the matter of *People v. Robert Stetchley*. The Illinois Supreme Court relied on two U.S. Supreme Court cases as authority for the decision in *Stetchley*, those being *Crawford v. Washington*, 541 U.S. 36, (2004), and *Davis v. Washington*, 547 U.S. _____, 126 S. Ct. 2266, 165 L.Ed2d 224 (2006).

Justice Scalia wrote the opinion in *Crawford.* Justice Scalia notoriously eschews foreign precedent, but in *Crawford* he traces the origins of the Sixth Amendment Confrontation Clause back to the treason trial of Sir Walter Raleigh in 1603. The most damning evidence introduced against Sir Walter came by way of hearsay documents and statements of one Lord Cobham. Cobham was attempting to get a downward departure in his own treason case and was therefore currying the King's favor by providing information on alleged co-conspirators. (There is something familiar about all this.) Raleigh demanded that Cobham come to the trial to face cross examination, but the court refused this request and Sir Walter lost the trial and later his life. One of the judges in Sir Walter's trial later lamented: "The justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh."

Scalia writes in *Crawford* that as a result of Raleigh's trial, English Parliament and courts reformed the law as to confrontation, making unavailability of a witness and prior opportunity to cross-examine as requirements for the introduction of hearsay. The tradition of those reforms was the basis of the Sixth Amendment Confrontation Clause. The Illinois Supreme Court in *Stetchley*, relying on *Crawford* as authority, gives a nod to the hapless Sir Walter in its opinion.

The *Stetchley* case began when young MM, a five-year-old girl, reported to Brenda Galete that "Bob" had misbehaved with her while he babysat for her a few months earlier. Brenda immediately told MM's mother, Joan, and Brenda and Joan took MM to the hospital while MM related the story to her mother. At the hospital, Ann Grote, a nurse in charge of the hospital's child abuse team, interviewed Joan who told Grote that the "Bob" in question was Robert Stetchley, Joan's boyfriend. Stetchley had babysat for MM sometime before the previous Christmas. Grote then interviewed MM in a playroom setting, and interviewed MM the next day with police outside of the playroom watching through a two-way mirror.

MM also made a statement to Perry Yates, a social worker at MM's kindergarten. Joan had provided Yates with some information about the incident, and Yates interviewed MM with Joan's permission.

The State requested a hearing to determine whether MM's hearsay statements were sufficiently reliable for admission pursuant to section 115-10. At the hearing Joan, Grote, and Yates all testified. The trial judge found the statements to be reliable and admissible pending either MM testifying at trial or a judicial determination of unavailability. The State filed a motion in limine, alleging that MM was too traumatized to testify at a trial. After hearing from a treating child psychologist, the trial court concluded that MM would be traumatized if required to testify and therefore she was unavailable for trial.

At Stetchley's jury trial Joan, Grote, and Yates again testified regarding MM's hearsay statements. Brenda actually testified as a defense witness. The jury became deadlocked. The parties agreed to a stipulated bench trial, with the stipulation that all of the jury trial evidence could be considered by the trial judge as if the evidence was presented again at the bench trial. The trial judge found Stetchley guilty and sentenced him to six years in prison.

Though there are many issues raised in Stetchley's appeal, the confrontation issues are the subject of interest here. One other issue, however, seems to be a classic case of begging the question. Though the Supreme Court decided that some of the MM's hearsay statements were inadmissible, the Court remanded the case to the trial court on the issue of whether Stetchley had waived the issue of unavailability by causing MM's trauma in the first place. In other words, the trial court has to decide whether Stetchley is guilty in order to determine whether evidence of his guilt is admissible.

The confrontation issues are not so paradoxical. The Illinois Supreme Court makes a clear statement in the analysis of the Confrontation Clause:

> After *Crawford*, a testimonial statement of a witness who does not testify at trial is never admissible unless (1) the witness is unavailable to testify, and (2) the defendant had a prior opportunity for cross-examination.... Moreover, *Davis* made clear that the confrontation clause has no application to non-testimonial statements.

This is clear enough, and the Court goes further:

> Thus, the threshold question in confrontation clause analysis is, Are the statements at issue "testimonial"? If not, the confrontation clause places no restriction on their introduction… If the statements are testimonial, the next question is, Will the declarant testify? If so, the confrontation clause again places no restriction on the introduction of the declarant's prior hearsay statements, as the defendant will have the opportunity to cross-examine–confront–the declarant… Finally, if the statements are testimonial and the declarant will not testify, then the statements are inadmissible unless both (a) the declarant is unavailable to testify, and (b) the defendant had a prior opportunity to cross-examine the declarant.

The next step in this logical progression for the Court is to define the meaning of "testimonial." The Court declines to give the term a specific definition. The Illinois Court quoted *Crawford*:

> We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing,

before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."

The Court identifies two components of a "testimonial' statement. First, the declarant must make the statement in a solemn fashion. Statements to the court easily meet this standard, as do most statements to investigating police officers. Statements to DCFS abuse investigators and mandated abuse reporters also meet this requirement. The second component is that the statement is intended to establish a particular fact. The Court then dealt with the question of whose 'intent' to establish the fact is critical in the analysis - the intent of the investigator or of the witness.

Since statements made to investigating officers are clearly testimonial in nature, the question of intent arises mostly when a statement is made in some other context. The Court concluded that it is the intent of the person making the statement that the courts should consider in determining whether the statement is testimonial. Said the Court: "it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." The Illinois Court further uses a reasonable person standard in the analysis of the declarant's actual intent in making the statement. The Court wrote: "…the question is whether the objective circumstances indicate that a reasonable person in the declarant's position would have anticipated that his statement likely would be used in prosecution."

This is all very well and large, but what about the intent of a child in making statements of possible sexual abuse? Should the court admit hearsay statements of children below a certain age because they are too young to understand the impact and meaning of their statements? On this issue the Illinois Supreme Court cited the authority of Professor R. Friedman in *The Conundrum of Children, Confrontation, and Hearsay*, 65 Law & Contemp. Prob. 243. The Court concluded that the age of the child is a factor to be considered by a trial court in determining whether objective considerations indicate that the child understood the nature of his or her statements and whether they would be used at a trial. Neither the Court nor Professor Freidman drew a bright line at any particular age, but said that a trial court must evaluate the statements of children on a case by case basis.

Using this analysis the Illinois Court concluded that in *Stetchley* the statement by MM to her mother was not testimonial and therefore admissible. The statements by MM to the other witnesses were testimonial and therefore inadmissible because Stetchley had no opportunity to cross-examine MM prior to trial. The Illinois Supreme Court remanded the matter to the trial court on the issue of waiver by wrongdoing, but provided the Confrontation Clause analysis in the event that the trial court concluded that Stetchley had not waived the issue.

If Sir Walter had the benefit of the decisions in *Crawford* and *Stetchley*, Lord Cobham's hearsay testimony would have been excluded and Raleigh might have avoided years of incarceration. On the other hand, Raleigh's trial was political in nature, and there is no indication from the U.S. Supreme Court that the standards set forth in *Crawford* apply to enemy combatants.

Recent judicial appointments and retirements

1. The Illinois Supreme Court, pursuant to its constitutional authority, has appointed the following to be Circuit Judge:
   - Hon. Dennis J. Burke, Cook County Circuit, June 5, 2007
   - Laura Bertucci Smith, Cook County Circuit, 6th Subcircuit, June 8, 2007
   - Eugene G. Doherty, 17th Circuit, June 11, 2007
   - Hon. Victor V. Sprengelmeyer, 15th Circuit, July 3, 2007
   - Hon. Robert C. Lorz, 12th Circuit, 2nd subcircuit, July 5, 2007
   - Anita Rivkin-Carothers, Cook County Circuit, 7th subcircuit, July 5, 2007
   - William E. Gomolinski, Cook County Circuit, 4th subcircuit, July 23, 2007
2. Pursuant to its constitutional authority, the Supreme Court has recalled the following to be Circuit Judge:
   - Paul Noland, Associate Judge, 18th Circuit, June 25, 2007
3. Pursuant to its constitutional authority, the Supreme Court has recalled the following to be Associate Judges:
   - Hon. J.B. Grogan, Associate Judge, Cook County Circuit, July 1, 2007
   - Hon. Jordan Kaplan, Cook County Circuit, July 1, 2007
   - Hon. Angus Sinclair More, Jr. 17th Circuit, July 3, 2007
4. The Circuit Judges have appointed the following to be Associate Judges:
   - Thomas M. Harris, Jr. 11th Circuit, July 16, 2007
5. The Illinois Supreme Court has accepted the resignations of the following judges:
   - Nicholas J. Galasso, Associate Judge, 18th Circuit, June 30, 2007
   - A. Scott Madson, Associate Judge, 13th Circuit, June 30, 2007
   - Lewes E. Mallott, Associate Judge, 3rd Circuit, June 30, 2007
   - Steven M. Nash, Associate Judge, 17th Circuit, June 30, 2007
   - James W. Jerz, 17th Circuit, July 2, 2007
   - Jude I. Mitchell-Davis, Cook County Circuit, July 2, 2007
   - John E. Payne, 15th Circuit, July 2, 2007
   - William G. McMenamin, 12th Circuit, 2nd subcircuit, July 5, 2007
   - Lon W. Schultz, Cook County Circuit, 4th subcircuit, July 3, 2007
   - Bernetta D. Bush, Cook County Circuit, 5th subcircuit, July 6, 2007
   - Michael T. Healy, Cook County Circuit, July 6, 2007
   - Rodney A. Clutts, First Subcircuit, July 31, 2007
   - Gerald F. Grubb, 17th Circuit, July 31, 2007

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