

# Trial Briefs

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

## Jury instruction update: "Do you hear what I hear?"

BY JUDGE BARB CROWDER, EDWARDSVILLE

Whether we are talking about a **universal desire for peace** as the 1962 song did,<sup>1</sup> or a universal desire for the ability of all litigants to have meaningful access to justice, the importance of meaningful communication cannot be overlooked. Interpreting court proceedings for litigants and jurors should be one of the areas that the legal system stresses. Fortunately for all of us, the Supreme Court and its Access to Justice Commission have been addressing the needs of self-represented litigants,

jurors and witnesses through policies, forms, articles, and new jury instructions.<sup>2</sup> This article will discuss the 2017 changes made thus far to Illinois Pattern Jury Instruction for Civil Cases since the revisions focus on language access.

The first change is in IPI – Civil 1.07. Gone are the days when attorneys and judges may have excused a hearing-impaired juror. A truly representative jury panel should be able to accommodate

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## Respondents in discovery: A procedure for streamlining litigation when used properly

BY JAMES J. AYRES

The **Illinois Code of Civil Procedure recognizes three categories** of participants in a lawsuit, Plaintiff, Defendant, and Respondents in Discovery ("RID"). 735 ILCS 5/2-401. This article will focus on the third category.

"The plaintiff in any civil

action may designate as respondents in discovery in his or her pleading those individuals or other entities, other than the named defendants, believed by the

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## Jury instruction update

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adults with many disabilities. This instruction addresses the presence of an interpreter for a hearing-impaired juror and how an interpreter is an exception to the Jury Secrecy Act. (705 ILCS 315/1). The new instruction provides:

### “1.07 Interpreter for a Hearing-Impaired Juror

One of the jurors in this case is hearing impaired and has the right to be accompanied by a court-appointed interpreter during the trial and deliberations. When addressing the hearing-impaired juror, you should speak directly to the juror, and not to the interpreter. Although the interpreter is not a juror, and you may not discuss the case with the interpreter, [he] [she] will keep strictly confidential all matters discussed during deliberations. If you have reason to believe that the interpreter is doing more than interpreting, let me know immediately by writing a note and giving it to the [clerk] [bailiff] [deputy].”

This instruction should be read to the courtroom at the start of the trial so that all present are clear that the interpreter is there to help the juror and will remain through deliberations but is NOT the juror. Plus, trial judges appreciate this instruction so that we can point it out to counsel as further support for the importance of including more individuals in juries so that the juries are truly representative of the community.

In making the above instruction number 1.07 in March of 2017, the prior 1.07 was moved to number 2.05. That newly-numbered instruction is worthy of review here as it deals with witnesses who have interpreters either because the witness is using sign language or a language other than English. It provides:

### “2.05 Testimony through Interpreter

You are about to hear testimony from \_\_\_\_\_ who will be testifying in [language to be used] through the interpreter. You should give this testimony the same consideration you would give it had the witness testified in English.

Although some of you may know [language to be used], it is important that all jurors consider the same evidence. Therefore, you must accept the English translation of [his] [her] testimony.

If, however, you believe the interpreter translated incorrectly, let me know immediately by writing a note and giving it to the [clerk] [bailiff] [deputy]. You should not ask your question or make any comment about the translation in front of the other jurors, or otherwise share your question or concern with any of them. I will take steps to see if your question can be answered and any discrepancy can be addressed. If, however, after such efforts a discrepancy remains, you must rely only on the official English translation as provided by the interpreter.”

Obviously the court reads this instruction to the jury and others present before the witness testifies. And if a juror knows the language the witness is using, it is important that the juror understands he or she cannot translate for the other jurors. If the juror thinks the interpreter failed to interpret correctly, the juror needs to raise it at the time so that any problem can be resolved. As the court has adopted rules for certifying interpreters, the hope is erroneous translations will be less frequent or eliminated.

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Communication is a two-way street. The Supreme Court is addressing the myriad ways that persons using court may fail to understand what is expected and what is happening. Plain language forms, assistance in courthouses and greater responsibilities placed on lawyers and judges are helping. The use of interpreters to bridge the communication gap aids everyone when language is a barrier to meaningful communication. Interpreters

may be needed because of an individual with a hearing impairment or because of a witness who uses a language other than English. Whatever the reason, standardized jury instructions guarantee that the law and rules governing the use of interpreters are explained and all “hear” the same thing. ■

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1. Song Released in November 1962. Composer Gloria Shayne Baker, Lyrics by Noel Regney. Written in response to the Cuban missile

crisis, this song became a holiday hit urging “pray for peace people everywhere.”

2. Hopefully, everyone is aware that the court system has a monthly newsletter, *Illinois Courts Connect*. It started in April, 2017. The April issue outlined four programs dealing with access to justice. The June issue includes an article, “The Silent Injustice of Ineffective Interpreting and How Courts Can Prevent It” by Sophia Akbar. Go to [www.illinoiscourts.gov](http://www.illinoiscourts.gov) under the Media tab to read the issues and sign up to receive them.

## Respondents in discovery

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plaintiff to have information essential to the determination of who should properly be named as additional defendants in the action.

Persons or entities so named as respondents in discovery shall be required to respond to discovery by the plaintiff in the same manner as are defendants and may, on motion of the plaintiff, be added as defendants if the evidence discloses the existence of probable cause for such action.

A person or entity named a respondent in discovery may upon his or her own motion be made a defendant in the action, in which case the provisions of this Section are no longer applicable to that person.

\*\*\*

A person or entity named as a respondent in discovery in any civil action may be made a defendant in the same action at any time within 6 months after being named as a respondent in discovery, even though the time during which an action may otherwise be initiated against him or her may have expired during such 6 month period.”

735 ILCS 5/2-402 (West 2012).

On September 27, 2016, the First Direct Appellate Court addressed an increasing use (or abuse) of the RID. *Westwood Constr. Group, Inc. v. IRUS Prop., LLC*, 2016 IL App (1st) 142490.

The Plaintiff in that case named several parties as RIDs. The trial court dismissed the complaint without prejudice. The Plaintiff filed an amended complaint and named some former defendants as RIDs. The Defendants now designated as RID moved to be dismissed with prejudice and for sanctions.

The trial court dismissed the RID with prejudice and included 304(a) language in the dismissal. They appealed.

The majority opinion found that:

“We find that a plain reading of section 2-402 and a review of the relevant case law makes clear that section 2-402 may be employed against a former defendant, dismissed without prejudice, as a respondent in discovery. Section 2-402 contains no limitation as to when or in what sequence a plaintiff may designate a person or entity as a respondent in discovery. The only limitation is that the designated persons or entities be “believed by the plaintiff to have information essential to the determination of who should

properly be named as additional defendants in the case.” 735 ILCS 5/2-402 (West 2012). If the legislature intended to restrict a plaintiff in the designation of a respondent in discovery to the initial filing, for example, it would have done so.” *Westwood Constr. Grp., Inc. v. IRUS Prop., LLC*, 2016 IL App (1st) 142490, ¶ 17, 407 Ill. Dec. 972, 978, 64 N.E.3d 771, 777.

The dissenting opinion by Justice Hyman noted that:

“It is too late for plaintiffs to claim that they do not know whether they should have ever named R&C, Martin, and Continuum as defendants in the initial complaint. (Had plaintiffs named them as respondents-in-discovery in the first complaint, they would be better able to claim ignorance now.) But at this point, it seems preposterous for the plaintiffs to claim that they need to name R&C, Martin, and Continuum as respondents-in-discovery because, after having been named defendants, these entities have essential information, unknown to plaintiffs, as to whether they should have been sued in the first place. Indeed, we

presume that the legislature did not intend to produce absurd, inconvenient, or unjust results. *Deprizio v. MacNeal Memorial Hospital Ass'n*, 2014 IL App (1st) 123206, ¶ 28, 382 Ill. Dec. 503, 12 N.E.3d 782.” *Westwood Constr. Grp., Inc. v. IRUS Prop., LLC*, 2016 IL App (1st) 142490, ¶ 37, 407 Ill. Dec. 972, 981, 64 N.E.3d 771, 780.

Justice Hyman went on to note that, “The Legislature intended section 2-402 as a mechanism to spare potential defendants the inconvenience and expense of responding to frivolous civil complaints. See *Bogseth*, 261 Ill. App. 3d 690 - 91. Instead, the majority’s interpretation increases inconvenience and expense by letting a plaintiff keep a defendant “on the hook,” so to speak, for limited discovery and possible reappearance as a defendant.

The decision may lead to all sorts of unintended mischief.”

As of this article, other cases are working their way through other Districts of the Appellate seeking clarification. Although a valuable tool to streamline litigation, perhaps the time has come for the Illinois General Assembly to revisit the use of the RID as a method of streamlining litigation. ■

## Stipulation versus guilty plea: Are both admissions?

BY EUGENE G. DOHERTY, CIRCUIT JUDGE, 17TH JUDICIAL CIRCUIT, ROCKFORD, ILLINOIS

The scene has played out many times in many courtrooms. In a civil suit arising out of an auto accident, the plaintiff’s attorney seeks to introduce evidence of the defendant’s conviction of a traffic offense related to the same event. The conviction was entered on a plea, she argues, and it therefore constitutes an admission on the part of the defendant. Confidently, the defense attorney notes that the conviction was not entered on a plea *per se*; instead, it was entered on a “stipulation” to the facts which supported the conviction. This makes all the difference, the defense attorney argues, and there is no admission made by his client.

It is my experience that a lot of attorneys and judges would accept the defendant’s argument in this hypothetical case; indeed, for a long time I was one of them. But a closer look at the law may lead to a different conclusion. In *Batterton v. Thurman*, 105 Ill.App.3d 798, 434 N.E.2d 1174 (3d Dist. 1982), the plaintiff brought a claim for assault and battery against the defendant, and he successfully introduced evidence that the defendant had stipulated to the facts underlying a related criminal charge arising out of the same incident. The Appellate Court held that the defendant’s stipulation constituted a “binding admission that he struck plaintiff and

injured him.” The Court stated that such an admission “is recognized by the majority of jurisdictions as being admissible in a subsequent civil trial,” and that “such a rule of evidence manifests logic and common sense.” *Batterton*, 105 Ill.App.3d 802, 434 N.E.2d 1176 - 77.

*Batterton’s* conclusion may well be supported by sound “logic and common sense.” What is the practical difference between a defendant pleading guilty to an offense (which is clearly an admission) as opposed to stipulating to the factual basis for a conviction of that offense? If I agree that I ate a sandwich containing bacon, lettuce and tomato, do I have wiggle room to deny that I had a BLT? It is likely that most defendants who stipulate to the underlying facts rather than pleading guilty do so on the advice of counsel, and specifically with the intention of avoiding an admission which might be used against them in a civil case. But really ... can it be that easy? Does form so easily triumph over function?

Curiously, *Batterton* did not discuss the significance of an Illinois Supreme Court case issued only a year before which touched on the same question. In *Thornton v. Illinois Founders Ins. Co.*, 84 Ill. 2d 365, 418 N.E.2d 744 (1981), the Supreme Court suggested that not all stipulations are

the same. So, if the criminal defendant’s trial is a sham, or if he stipulates that the evidence is sufficient to convict, then the stipulation will be treated as an admission in a subsequent civil case. However, where the stipulation is only as to facts, and the defendant’s guilt is ultimately left to the trier of fact, the stipulation is not admissible in a subsequent civil case. *Thornton*, 84 Ill. 2d 372, 418 N.E.2d 748 (1981).

*Thornton’s* rule aside, appellate decisions since *Batterton* have continued to follow the rule laid down in that case: a stipulation to the facts supporting a criminal conviction may be introduced in a subsequent civil trial as an admission against interest. See *In re Marriage of Engelbach*, 181 Ill. App. 3d 563, 575, 537 N.E.2d 372, 380 (2d Dist. 1989); *W. States Ins. Co. v. Kelley-Williamson Co.*, 211 Ill. App. 3d 7, 12, 569 N.E.2d 1289, 1292 (2d Dist. 1991); *Young v. Forgas*, 308 Ill. App. 3d 553, 565, 720 N.E.2d 360, 368 (4th Dist. 1999).

If there is a lesson here for lawyers and judges, it is that no one should abide by the simple rule that a stipulation to the facts supporting a guilty plea is necessarily inadmissible in a subsequent civil proceeding. The stipulation-versus-guilty-plea argument is not a magic bullet. ■



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### Thursday, 09-07-17 - Webinar—

Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

### Thursday and Friday 09-7 & 8, 2017

– Chicago, ISBA Regional Office—Guardian Ad Litem, Child Representative, and Attorney for Minor Child Training – 2017. Presented by Family Law.

### Friday, 09-08-17 – Lincoln Heritage

Museum, Lincoln, IL—First Annual: Abraham Lincoln's Legacy - Lessons for Today's Lawyer. 9 a.m.-4:30 p.m.

### Tuesday, 09-12-17 – Webinar—Using

Mac in a Window's World. Practice Toolbox Series. 12:00 -1:00 p.m.

### Wednesday, 09-13-17 – LIVE

Webcast—Title VII Now Covers Sexual Orientation – The Law That Made History. Presented by Labor and Employment. 12-2 pm.

### Thursday, 09-14-17 – LIVE Webcast—

Environmental Due Diligence in the Era of President Trump. Presented by Real Estate. 12-1 p.m.

### Thursday, 09-14-17 - Webinar—

Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

### Friday, 09-15-17 – Fairview Heights,

Four Points by Sheraton—Solo and Small Firm Practice Institute. All Day.

### Wednesday, 09-20-17 – LIVE

Webcast— Construction Escrow, Lien Waivers and Sworn Statements: Best Practices. Presented by Construction Law.

12-1 p.m.

### Thursday, 09-21-17 - Webinar—

Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm

### Tuesday, 09-26-17 – Webinar—End of

Year Preparations – Best Practices for Your Law Firm. Practice Toolbox Series. 12:00 -1:00 p.m.

### Tuesday, 09-26-17 – Oak Brook—

Executive Power Hour: Managing Company Relations in a Union Environment. Joint ISBA/MCA Seminar Lunch. 11:30 Lunch; 12:00 – 1:30 p.m. program.

### Wednesday, 09-27-17 – LIVE Webcast

Webinar— HIPAA For Employer-Sponsored Health Plans. Presented by Employee Benefits. 12-1 p.m.

### Thursday, 09-28-17 – LIVE Webcast—

How Secure Are you? Cyber for the Illinois Practitioner. Presented by Insurance Law. 12-2:15 p.m.

## October

### Wednesday, 10-04-17 LIVE Webcast—

Issues to Recognize and Resolve When Dealing With Clients of Diminished Capacity. Presented by Business Advice and Financial Planning. 12-2 pm.

### Thursday, 10-05-17 - Webinar—

Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

### Thursday, 10-05-17 – Chicago, ISBA

Regional Office—The New Bankruptcy Rules and Advanced Topics in Consumer Bankruptcy. Presented by Commercial Banking, Collections & Bankruptcy. 9am

– 4pm.

### Thursday, 10-05-17 – LIVE Webcast—

The New Bankruptcy Rules and Advanced Topics in Consumer Bankruptcy. Presented by Commercial Banking, Collections & Bankruptcy. 9am – 4pm.

### Friday, 10-06-17 – Holiday Inn and

Suites, East Peoria—Fall 2017 Beginner DUI and Traffic Program. Presented by Traffic Law. Time: 8:55 am – 4:30 pm.

### Friday, 10-06-17 – Holiday Inn and

Suites, East Peoria—Fall 2017 Advanced DUI and Traffic Program. Presented by Traffic Law. Time: 8:55 am – 4:30 pm.

### Friday, 10-06-17 – Chicago, ISBA

Regional Office—Pathways to Becoming Corporate General Counsel and the Issues You Will Face. Presented by Corporate Law. Time: 9:00 am – 12:30 pm

### Monday, 10-09-17 – Chicago, ISBA

Regional Office—Workers' Compensation Update – Fall 2017. Presented by Workers' Compensation. Time: 9:00 am – 4:00 pm.

### Monday, 10-09-17 –Fairview

Heights—Workers' Compensation Update – Fall 2017. Presented by Workers' Compensation. Time: 9:00 am – 4:00 pm.

### Tuesday, 10-10-17 – Webinar—

Outlook for Mac. Practice Toolbox Series. 12:00 -1:00 p.m.

### Wednesday, 10-11-17 – LIVE

Webcast—Enforcing Illinois' Eviction Laws: A Basic Guide to Landlord Remedies and Tenant Rights. Presented by Real Estate Law. 12-1 pm.

### Wednesday, 10-11-17 – LIVE

Webcast—Working Effectively with Interpreters. Presented by Delivery of Legal Services. 2-3:30 pm.

**Thursday, 10-12-17 - Webinar—**  
Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

**Monday-Friday, 10-16 to 20, 2017 – Chicago, ISBA Regional Office—**40 Hour Mediation/Arbitration Training Master Series. Master Series

**Thursday, 10-19-17 - Webinar—**  
Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

**Thursday, 10-19-17 – Bloomington—**  
Real Estate Law Update – Fall 2017. Presented by Real Estate.

**Tuesday, 10-24-17 – Webinar—**Law Firm Accounting 101. Practice Toolbox Series. 12:00 -1:00 p.m.

**Wednesday, 10-25-17 – Webinar—**  
Working with Low Income Clients. Presented by Delivery of Legal Services. 12-1:30 pm.

**Friday, 10-27-17 – Chicago, ISBA Regional Office—**Solo and Small Firm Practice Institute. All Day.

**Friday, 10-27-17 – LIVE Webcast—**  
Solo and Small Firm Practice Institute. All Day.

## November

**Wednesday, 11-01-17 – ISBA Chicago Regional Office—**Anatomy of a Medical Negligence Trial. Presented by Tort Law. All Day.

**Thursday, 11-02-17 - Webinar—**  
Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

**Friday, 11-03-17 – NIU Naperville—**  
Real Estate Law Update – Fall 2017.

Presented by Real Estate.

**Thursday, 11-09-17 - Webinar—**  
Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

**Friday, 11-10-17 – Chicago, ISBA Regional Office—**Profession Under Pressure; Stress in the Legal Profession and Ways to Cope. Presented by Civil Practice and Procedure. 8:15 am-4:45 pm.

**Tuesday, 11-14-17 – Webinar—**Speech Recognition. Practice Toolbox Series. 12:00 -1:00 p.m.

**Wednesday, 11-15-17 – Chicago, ISBA Regional Office—**Microsoft Word in the Law Office: ISBA's Tech Competency Series. Master Series with Barron Henley. All Day.

**Thursday, 11-16, 2017 – Chicago, ISBA Regional Office—**Microsoft Excel In the Law Office: ISBA's Technology Competency Series. Master Series with Barron Henley. Half Day.

**Thursday, 11-16, 2017 – Chicago, ISBA Regional Office—**Adobe Acrobat and PDF Files in the Law Office: ISBA's Technology Competency Series. Master Series with Barron Henley. Half Day.

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Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

**Friday, 11-17-17 – Webcast—**Obtaining and Using Social Media Evidence at Trial. Presented by Young Lawyers Division. 12:00-1:30 pm.

**Tuesday, 11-28-17 - Webcast—**Ethics Questions: Multi-Party Representation – Conflicts of Interest, Joint Representation and Privilege. Presented by Labor and Employment. 2:00-4:00 pm.

**Tuesday, 11-28-17 – Webinar—**  
Understanding Process Mapping. Practice Toolbox Series. 12:00 -1:00 p.m.

## December

**Wednesday, 12-06-17 - Webcast—**  
Defense Strategies for Health Care Fraud Cases. Presented by Health Care. 12:00-1:30 pm.

**Tuesday, 12-12-17 – Webinar—**Driving Profitability in your Firm. Practice Toolbox Series. 12:00 -1:00 p.m.

**Thursday, 12-14-17 – Chicago, ISBA Regional Office—**Vulnerable Students: A Review of Student Rights. Presented by Education Law. 9:00 am – 12:30 pm. ■

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