January 2014 Vol. 59, No. 7

ILLINOIS STATE BAR ASSOCIATION

TRIAL BRIEFS

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

Crafting helpful *amicus* filings in the Supreme Court of Illinois pursuant to Illinois Supreme Court Rule 345

By Matthew R. Carter

This article discusses the role of *amicus curiae* briefs in light of the Illinois Supreme Court's function in the development of Illinois' jurisprudence. It begins with a discussion of the function of the Supreme Court after the adoption of Article VI of Illinois' 1970 Constitution. Thereafter, the article discusses the guidance the Supreme Court has provided by rule and commentary regarding the filing of *amicus* briefs. Finally, suggestions are offered for filing effective *amicus* briefs in ways the Court may accept.

One of the Supreme Court's chief functions is to set legal precedent in the State of Illinois. Every year the Court receives thousands of petitions for leave to appeal complaining of still thousands more errors of every variety. However, granting a petition is a matter within the Court's sound discretion, and the cases that most greatly deserve its attention are not the cases that will have little to no future precedential effect. Those cases have already had the full attention of Illinois' trial and appellate courts.

What the Supreme Court intends to resolve are cases that will affect the state's jurisprudence and Illinois' citizens as a whole. The Supreme Court's role is to rule on the constitutionality of issues great and small, to resolve appellate district

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Civil practice Supreme Court Rule changes: 2013

By Judge Barb Crowder, Third Judicial CIrcuit

If at first you don't succeed, try, try again may be the slogan best applied to some of the Supreme Court Rules in 2013. A tweak here, a tweak there, and eventually lawyers and judges will run out of suggestions to the Rules committee (You think? I don't). In general, the Supreme Court Rules changes can be divided into groupings this year.

The Internet is here to stay: The Court is ready for the future

Rules 2, 12, 13, 104, 110, 131, 132, 137, 181, 187, 191, 216, 277

We are going paperless! "Paper Document" and "Paper(s)" are now "Document(s)." The word paper is gone.

Rule 138

Merry Christmas Eve from the court as the Justices made it clear they were working! The advent of the internet and e-filing leads to identity theft which the court is still addressing. While recognizing the need, implementation is not so easy as first imagined. Therefore the Personal Identity Information rule amendments moved the applicable date for omitting birth dates and minor's names to Jan. 1, 2015. Earlier in the year, right before the July 4th holiday, the court had

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Crafting helpful *amicus* filings in the Supreme Court of Illinois pursuant to Illinois Supreme Court Rule 345

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splits that have confounded litigants and attorneys, to decide the meaning of statutory language, and to help develop the common law in the state.[1] One former Chief Justice, Robert Underwood, commented that the Court's primary function should be to take cases "because of their significance to the state as a whole."[2]

Another former Justice, S. Louis Rathje, echoed the dictates of Rule 315 which governs petitions for leave to appeal, stating that the Court will allow such petitions only under certain circumstances: to resolve conflicts; where its supervisory authority is needed to maintain the integrity or operation of the judicial system; and where the question presented has general importance.[3] Justice Rathje stated that an attorney considering invoking the general importance of the question presented must ask whether anyone other than the parties to the case will care about its outcome.[4] If the answer is "no," the case has little chance of gaining the Court's attention. But, "if the answer is a resounding 'yes,' then the case likely represents the type of case the Illinois Supreme Court will review."[5]

Amicus filings that keep the Court's role in mind and which focus on showing what effect the Court's decision will have on Illinois law as a whole, are useful. In some instances, the direct parties to a case do not have the time, space, or broader perspective necessary to speak to the long-term and wide-ranging impact a decision might have. Done correctly, *amicus* filings can fill that gap and provide helpful insight on the issues.

The remainder of this article will review the mechanics of the Supreme Court's Rule on *amicus* filings, offer suggestions on how best to craft an *amicus* filing in support of a client, and consider whether such a filing is appropriate at the petition for leave to appeal stage.

A. Rule 345 and *Kinkel v. Cingular Wireless*

Illinois Supreme Court Rule 345, titled "Briefs *Amicus Curiae*," provides that "[a] brief *amicus curiae* may be filed only by leave of the court or of a judge thereof, or at the request of the court," and notes that "[a] motion for leave must be accompanied by the proposed brief and shall state the interest of the applicant and explain how an *amicus* brief will assist the court."[6] The Rule sets out several more technical requirements including that an *amicus* brief should conform to the rules for an appellee's brief and any other conditions imposed by the Court, identify the *amicus* on the cover, and be filed on or before the due date of the brief (as well as have a cover that is colored the same) as that of the party whose position it supports.[7] Finally, the Rule states that "[*a*]*micus curiae* will not be allowed to argue orally."[8]

The above requirements are straightforward. The procedural mechanics of filing an *amicus* brief are roughly the same as those for filing a typical brief to the Court found in Rule 343. The key addition is the necessity of a motion for leave to file which explains the *amicus'* interest as well as why its brief will assist the Court. The question, then, is what type of argument by *amici* the Court would find acceptable. Fortunately, the Court has provided some insight on this issue.

In *Kinkel v. Cingular Wireless, L.L.C.,*[9] the Supreme Court—prior to issuing its opinion in that matter—entered an Order denying a motion for leave to file an *amicus* brief, the third such motion from the same proposed *amicus*.[10] Notably, the motion was filed one day after amendments to Rule 345 became effective which made clear that a motion for leave to file an *amicus* brief *must* state the interest of the applicant and explain how its *amicus* brief will assist the Court.[11] While the Court ultimately denied the *amicus* leave to file its brief, in doing so, it provided guidance for future *amici* to follow.[12]

The Court noted that "[b]y definition, an *amicus curiae* is a friend of the Court, not of the parties."[13] The Court indicated that allowing an *amicus* filing is discretionary and a matter of "judicial grace," thereby requiring leave before such a brief may be filed.[14] Citing the Seventh Circuit, the Court stated that in deciding whether to accept an *amicus* filing, it "must consider whether the brief will provide it with ideas, arguments, or insights helpful to resolution of the case that were not addressed by the litigants themselves."[15]

The Court noted that *amicus* briefs which

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Published at least four times per year.

Annual subscription rate for ISBA members: $25.

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merely restate the arguments of the principal parties are of no benefit to the adversarial process and only add an unnecessary burden to the time and resources of both the Court and the parties.[16] The Court explained that such briefs may represent an "improper attempt" to inject interest group politics in the appellate process or to circumvent the Court's rules on page limitations.[17]

With these concerns in mind, the Court described several instances when an *amicus* brief would be appropriate including: "(1) when a party is not competently represented or not represented at all; or (2) when the would-be *amicus* has a direct interest in another case, and the case in which he seeks permission to file an *amicus curiae* brief may, by operation of *stare decisis* or *res judicata,* materially affect that interest; or (3) when the *amicus* has a unique perspective, or information, that can assist the court beyond the help that the lawyers for parties are able to provide."[18] The Court stated that while these criteria were non-binding, "we consider them a useful guide in assessing the propriety of *amicus* briefs submitted to us under Rule 345, as amended."[19]

Putting these principles into practice, the *Kinkel* Court denied the proposed *amicus* leave to file its brief. While it had no doubt of the sincerity of the *amicus*' concerns regarding the case or its description of the potential ramifications for its members, the Court determined that the *amicus* brief "provide[d] no significant insights into the merits of the case beyond those offered by able counsel" for the party it sought to support.[20] The Court stated that the proposed brief filled "no analytical gaps" and provided no "tangible examples of how the appellate court's decision" actually affected the interests the *amicus* represented.[21] In the Court's view, the proposed brief offered "nothing more about the case except how the [*amicus]* believes it should be resolved," an insufficient basis to warrant participation.[22]

One important aspect of the *Kinkel* Order is its discussion of the propriety of filing an *amicus* brief in support of a petition for leave to appeal. The Court noted that the *amicus* in *Kinkel* originally filed its motion for leave to file its brief in connection with a petition for leave to appeal.[23] The Court stated that this original motion was denied because "our rules do not authorize *amicus* filings in support of petitions for leave to appeal."[24] It also pointed out that "in accordance with [ ] established policy," its denial was without prejudice to the *amicus'* ability to file a renewed motion for leave to file should the petition for leave to appeal be granted.

B. Crafting a helpful amicus filing.

As noted in the *Kinkel* Order, at least three situations are appropriate for *amicus* filings: where competent counsel is not already involved in an appeal; where *stare decisis* or *res judicata* is at play; or where the *amicus* has a unique ability to assist the Court in a way that the parties cannot. The first two situations are relatively clear. That said, they provide only a limited avenue for potential involvement. It is rare, for example, for a case to reach the Illinois Supreme Court involving incompetent counsel, let alone an unrepresented party. Likewise, it is relatively rare for a party to have a direct interest in a case which would be affected by *stare decisis* or *res judicata*. If those situations arise, any potential *amici* will have a strong case for involvement. The majority of filers, though, will have to look to the third category in order to make their case—they must provide a unique perspective or information that can assist the Court in ways the parties may not.

As an initial step, a potential *amicus* should consider how its brief can assist the Court rather than simply support a particular party. Because *amicus* opportunities tend to arise in situations where a party actively seeks additional helpful involvement or a particular interest group is carefully watching for cases that might affect its interests, potential *amici* are almost always heavily invested and interested in supporting one outcome or another. When these *amici* hire counsel to craft an *amicus* brief, they rightly expect their brief to reflect their interests. The goal, then, is to accomplish this task in a way that avoids partisanship.

A successful *amicus* brief will not simply explain and reiterate that a particular outcome is warranted for all the reasons already described in the brief filed by the party it seeks to support *and* because the *amicus* agrees with that position as well. Instead, it has to provide something more to aid the Court in its analysis. While there is no one way to provide this additional help, several approaches are possible.

In a case causing a detrimental effect on a particular business or type of business, potential *amici* may be able to show that a similar detrimental effect will ultimately be felt in other types of businesses or by the Illinois business community as a whole. In such situations, as *Kinkel* suggested, the potential *amicus* should carefully set out tangible examples of how a particular decision will affect its interests. Potential *amicus* might accomplish this through citations to past examples, scholarly articles and studies, decisions in other jurisdictions, or even newspaper articles.

Oftentimes, potential *amicus* can assist the Court through a detailed and in-depth knowledge of how particular outcomes or decisions have played out in the past. *Amicus* briefs are commonly filed by state or nationwide associations or organizations representing relatively well-defined interests. By virtue of their long-term involvement in support of their interests and memberships, these groups often have the historical or broader based knowledge to file a brief that can explain historical or extra-jurisdictional examples. The parties to a case, by contrast, simply may not have the background or broad knowledge and historical perspective necessary to make such points.

A third more general path to helpful *amicus* involvement is to attempt to show how the outcome of a case may affect Illinois, its citizens, or its jurisprudence. If an *amicus* is able to show how the Court's decision has the potential to affect the law in Illinois in ways that have not previously been anticipated or described by the parties to a case in filings before the trial or appellate courts, such a situation calls out for *amicus* involvement. As described above, the Supreme Court specifically intends, among other things, to decide and resolve cases that will have an impact in the future and on parties other than those directly involved. The parties to a case, and the Court itself, cannot anticipate all of the potential ramifications of a particular decision. If a potential *amicus* can help in that regard, the Court is likely to look favorably on its involvement.

Importantly, *amicus* should also remain mindful that "an *amicus* takes the case as he finds it, with the issues framed by the parties."[25] In other words, while a helpful *amicus* brief needs to add something to aid the court rather than merely reiterate the position of the party which it supports, such a brief also must carefully avoid raising new issues. In situations where the Supreme Court feels that an *amicus* has gone too far by attempting to add new issues to a case, it will

decline to address the issue or strike it from the *amicus* brief altogether.[26]

C. Should an *amicus* file at the petition for leave to appeal stage?

In some cases, a potential *amicus* is interested in filing a brief at the petition for leave to appeal stage, before the Supreme Court has decided to take the case in the first place. While this is commonly done before the United States Supreme Court, the Illinois Supreme Court has taken a different approach. Here again, *Kinkel* provides insight and guidance.

The Supreme Court Rules do not provide specific procedures for an *amicus* brief in support of a petition for leave to appeal. Nothing in the rules explicitly permits or prohibits such a filing. Rule 345 represents the only discussion of *amicus* briefs in the rules and it is focused, by its language, on briefs in support of pending appeals. For example, the Rule provides that an *amicus* brief should follow the format of an appellee's brief.[27] Likewise, the Rule states that *amicus* briefs shall be filed "on or before the due date of the initial brief of the party whose position it supports."[28] A petition for leave to appeal, though, is not a "brief" and the Court's Order in *Kinkel* makes clear that its omission of any guidelines for *amicus* participation in the petition for leave to appeal process is no accident. As noted, *Kinkel* specifically states that the Supreme Court Rules "do *not* authorize *amicus* filings in support of petitions for leave to appeal."[29]

Kinkel's pronouncement on this issue suggests that filing an *amicus* brief in support of a petition for leave to appeal will have no affect on the petition's potential for success. The Rules simply do not allow for such a filing. *Kinkel* also provides, however, that while a motion for leave to file an *amicus* brief in support of a petition for leave to appeal will be denied, the Court's current practice is to deny such motions without prejudice to a renewed request should the petition for leave to appeal be granted. This caveat is important and might have strategic import.

In some instances, a potential *amicus* may want to file for leave to submit a brief in support of a petition for leave to appeal as a means to focus the attention of its constituents or members on a particular case of great importance, better prepare itself for a potential *amicus* filing if the petition for leave to appeal is granted, and have a draft of such filing written and prepared should it become necessary. It could be, for example, that the filing and publication of a motion for leave to file an *amicus* brief in support of a petition for leave to appeal, even if certain to be denied, may allow a proposed *amicus* to better marshal its arguments and resources on the chance that the petition for leave to appeal is later granted.

Further, even the very publication of a proposed *amicus* brief itself may have a benefit the potential *amicus* is interested in, regardless of whether the Court ever even reads the brief. Indeed, Justice Antonin Scalia and Professor Bryan Garner, after noting that most judges rarely read all the *amicus* briefs that come across their desks, noted that:

> [p]erhaps the most common purpose [of *amicus* briefs], is to enable the officers of trade associations to show their members that they are on the ball. To achieve this end, it really does not matter what the *amicus* brief says. It can track the party's brief; the filing of it is what counts. The same can be said of the *amicus* brief filed by 35 states, or by the chief law-enforcement officers of 50 metropolitan jurisdictions. The very cover of the brief makes its principal point—a very telling point in support of a petition for discretionary review: this case involves an issue of grave national importance.[30]

The lesson from *Kinkel* is that amicus filings in support of a petition for leave to appeal to the Supreme Court of Illinois *will* be denied because they are not "authorized." As such, any motion for leave to make such a filing should keep this point in mind, make clear that it has not been ignored, and explain why the attempt to file an *amicus* brief at the petition for leave to appeal stage could result in a greater ability to assist the Court should leave to appeal be granted. In other words, the motion for leave to file should make clear that the proposed *amicus* does not intend to violate the Supreme Court Rules, believes that moving for leave to file is not a violation of any rule, recognizes that its motion will likely be denied and its brief not accepted, but still believes there is value in filing the motion for leave to file.

Any client intent on attempting to involve itself as an *amicus* at the petition for leave to appeal stage should be advised and apprised of *Kinkel* and especially the fact that it will be denied leave to file its proposed *amicus* brief. Most clients—in an effort to avoid an unnecessary expense—will likely decide not to file when informed of that reality. For the reasons discussed above, however, some may decide to file for leave anyway. That decision is only appropriate, however, when made in a fully informed way.

D. Conclusion

Briefs *amicus curiae* can play an important role in cases before the Illinois Supreme Court. To do so, such filings should carefully follow the guidelines the Court has provided in its rules and decisions and keep in mind that the Court's function, as former Chief Justice Underwood stated, is to take and decide cases that affect Illinois as a whole. Apart from this, as *Kinkel* states, potential *amici* and their attorneys must remember that an *amicus* brief needs to focus on assisting the Court, not just a particular party. There are several ways to accomplish that task and, as long as it remains at the forefront of any *amicus* filing, there is a chance to capture the Court's attention while at the same time advancing the interests an *amicus* represents.

Furthermore, potential *amici* should understand that, according to *Kinkel*, amicus briefs in support of petitions for leave to appeal are not "authorized" by the Supreme Court Rules. As such, their value at that stage, if any, lies not in the their ability to increase the odds of convincing the Supreme Court to allow a petition for leave to appeal but instead, through a motion for leave to file, as a strategic means to develop a better *amicus* brief if the appeal is accepted on its own merits. Potential *amici* and their attorneys should also be careful to follow any new developments surrounding this practice. ■

Matthew R. Carter is an associate at Winston & Strawn LLP and, as a new lawyer, had the privilege of starting his career as a law clerk for then Justice, now Chief Justice, Rita B. Garman of the Supreme Court of Illinois.

1. *See* Article XI, §§ 4, 16; Ill. S. Ct. R. 315(a); *see also, Petitions for Leave to Appeal: A Primer*, Hon. S. Louis Rathje, 11 DCBA Brief 12 (1999).

2. *See The Illinois Supreme Court: What Role Does it Play?*, Illinois Issues, Daniels, Stephen, Melton, Ada, and Wilkin, Rebecca (April 1984) (reprinted at http://www.lib.niu.edu/1984/ii840411.html) ("Today, the ISC [Illinois Supreme Court] is what an ISC justice called a 'discretionary court.' The 1970 Constitution gives the ISC almost complete discretion in choosing the cases it will hear with only a few specifically mandated exceptions (perhaps the most important being death penalty cases). As a result, the ISC can virtually control the size and nature of its caseload. In a 1974 address

to the Illinois State Bar Association, then Chief Justice Robert Underwood remarked that, in his estimation, the ISC '. . . was for the first time in the history of the state, performing the function ... a state court of last resort should perform.' It was, he thought, taking cases '... because of their significance to the state as a whole. ...' And this is precisely what reformers since the turn of the century have wanted."); *See also Price v. Philip Morris, Inc.*, 2011 IL 112067 (Garman, J. dissenting on denial of a petition for leave to appeal in a long-pending case and noting that while the issue presented "appear[ed] to involve only a routine question of the timeliness of a motion" it was important and worth taking "because the people of the State of Illinois and other litigants, whose access to the courts is affected by litigation that endures for a decade or more, also deserve to have us address" it); *People v. Edwards*, 96 Ill. 2d 543 (1983) (Simon, J. dissenting on denial of a petition for leave to appeal in a question which implicated prison overcrowding which Justice Simon described as a potential concern of the judiciary but "certainly . . . the concern of society.").

3. *Petitions for Leave to Appeal: A Primer*, Hon. S. Louis Rathje, 11 DCBA Brief 12 (1999).

4. *Id*.

5. *Id*.

6. Illinois S. Ct. Rule 345.

7. *Id*.

8. *Id*.

9. No. 100925, 2006 Ill. Lexis 1 (January 11, 2006). The author would like to acknowledge that his friend, attorney Michael T. Reagan, pointed him in the direction of this Order which was entered in *Kinkel*.

10. *Id* at *1.

11. *Id*. at *2.

12. *Id*. at *6.

13. *Id*. at *2; *Burger v. Lutheran General Hosp.*, 198 Ill. 2d 21, 62 (2001) ("It is well settled that an *amicus curiae* is not a party to the action but is, instead, a 'friend' of the court. As such, the sole function of an *amicus* is to advise or to make suggestions to the court." (internal quotations omitted)).

14. *Id*.

15. *Id*. citing *Voices for Choices v. Illinois Bell Telephone Co*., 339 F.3d 542. 545 (7th Cir. 2003) (chambers opinion by Posner, J.).

16. *Id*. at *3.

17. *Id*.

18. *Id*. at *4 citing *National Organization for Women v. Scheidler*, 223 F. 3d 615, 617 (7th Cir. 2000).

19. *Id*. at *4 (emphasis in original).

20. *Id*. at *5-6.

21. *Id*. at *6.

22. *Id*.

23. *Id*. at *1.

24. *Id*.

25. *Burger*, 198 Ill. 2d at 62

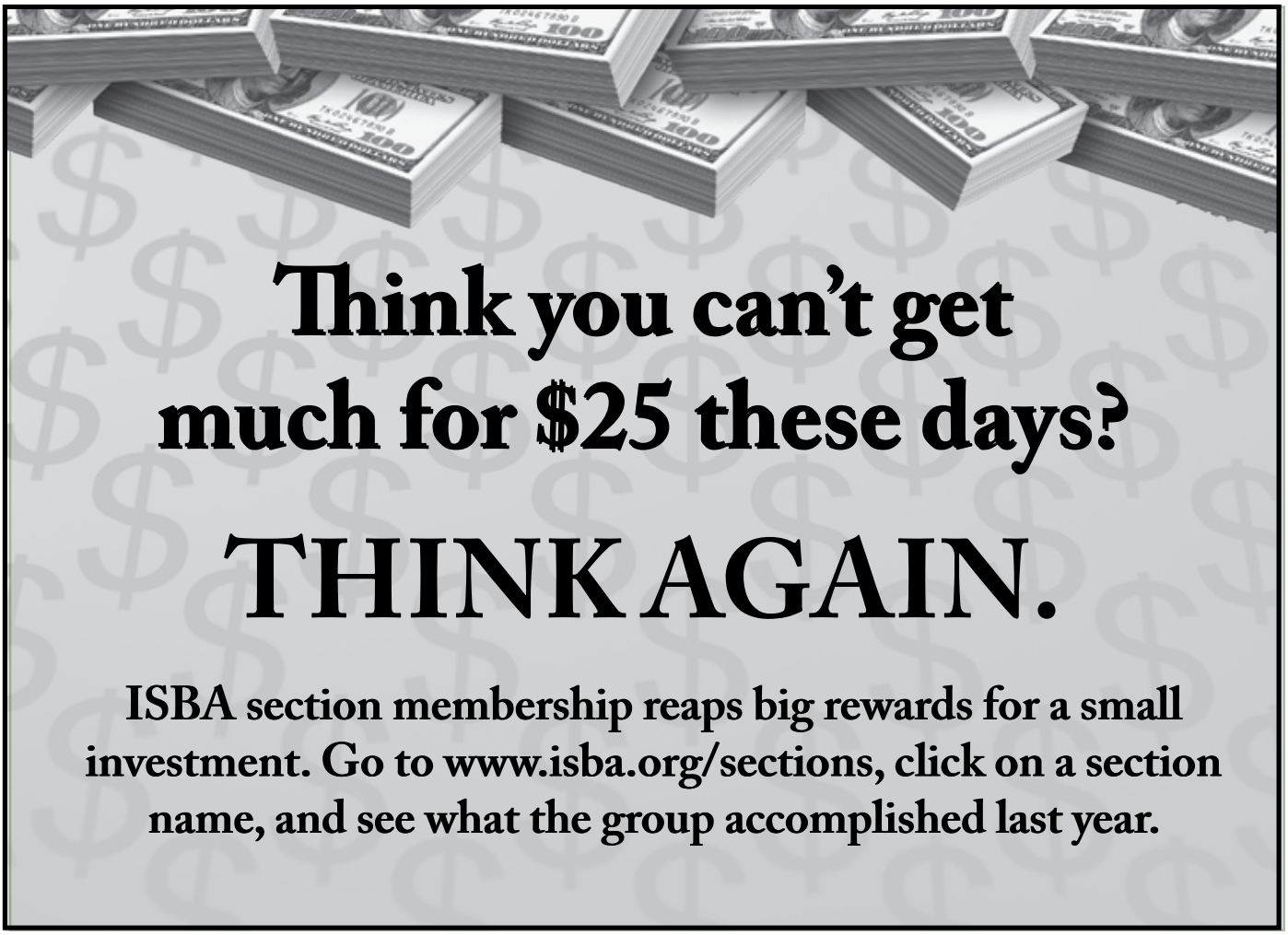
26. *Id*. (expressly declining to address an issue that was not raised by the parties); *see also Karas v. Strevell*, 227 Ill. 2d 440, 450-51 (2008) (striking portion of *amicus* brief which raised an issue not raised by the parties to the action).

27. Illinois S. Ct. Rule 345.

28. *Id*.

29. *Kinkel*, 2006 Ill. Lexis at *1 (emphasis added).

30. "Making Your Case: The Art of Persuading Judges," Scalia, Antonin and Garner, Bryan A. (2008).



Civil practice Supreme Court Rule changes: 2013

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pushed the effective date of the rule to January 1, 2014. Before that, the rule was slightly changed June 3rd.

In the most recent version, the court clarified that when January 2015 arrives, only birth years, initials for minors, and the last four digits of informational numbers (driver's license, bank accounts, credit cards, etc.) are to be used in public filings. The party will need to file the actual data along with a "Notice of Confidential Information Within Court Filing" that the Clerk will impound. This impounded information must be updated as account numbers change (presumably birth years will remain constant). The rule allows attorneys to use un-redacted sets on institutions that need the entire name or numbers, recognizing that an employer or bank may want a birth date, social security number, and other identifying information before following a court order.

Clerk responsibilities: the amended rule sets out that the clerk may tattle to the court if a clerk notices non-compliance, but it is not the clerk's job to check the filings and point out errors in compliance to anyone. When someone does notice failure to comply and files a motion asking the court to order redaction, the clerk must impound the motion and put the potentially offensive document in purgatory (i.e. away from public access) until the court rules. If granted, the old document is impounded and the new redacted one is placed for public viewing. So redact them in the first place and avoid the second round of filings!

Rule 216

The only change to Rule 216 is one of those that makes me happy, but granted I may be among the few who care. "He" has been changed to "the party." Thank you.

Rule 239

Paperless applies to jury instructions, too. The court is serious that its website is the place to go for the most current information so that attorneys will stop saying: "I didn't know there was a new IPI. It is not in my book." The rule now reminds you that the most current version of IPI Civil instructions is on the website and that the IPI instruction "shall be used, unless the court determines that it does not accurately state the law."

Who let you in here? The Court allows for attorneys to come and go

Rule 707: You can join the whole case even if you are not from Illinois

The impact on practice of the change in Rule 707 actually took the requirement of reviewing petitions from out-of-state attorneys to practice law in Illinois on a case-by-case basis out of the court and sensibly placed it with the ARDC. Once an out-of-state attorney files a statement with the ARDC and has an active status Illinois attorney also enter an appearance, then the out-of-state practitioner may appear in court, in an arbitration proceeding, or before an administrative tribunal. The forms and fees are on the ARDC Web site.

Limited Scope Representation: Multiple rules allow counsel to assist litigants within a case

Rule 13: Attorneys can now file limited scope appearances in civil proceedings when the attorney has a written agreement to provide limited representation. Attorneys must withdraw as required by the rule, too. In point of fact, attorneys may dive in and out of the same case based upon their written agreements with the client so long as a new Notice of Limited Scope Appearance is filed so that other parties can keep track of whether the attorney is in the case or out, or for what subjects or hearings. A withdrawal should specify the "out" times. And the court promises not to say: "Either go out or come in, but make up your mind," as your mother used to do when you were a child going in and out of the house slamming the back door! The forms are in the rule.

Rule 11: When an attorney enters an appearance for limited scope representation, that attorney is added to the service list; the original party litigant continues to get a copy too. When the limited scope attorney is done, then that person can be removed from the service list. Basically, the original litigant gets everything.

Mortgage Foreclosure Rules: Enough already, the court is setting the rules

Rule 113

Mortgage foreclosure actions filed after May 1, 2013 (originally March 1, but a later amendment pushed the date back to May), require an Affidavit of Amounts Due and Owing. Further, notice must be sent when an Order of Default and Judgment of Foreclosure is entered. And when a surprise occurs and the judicial sale nets more than is owed, notices and petitions dealing with those surplus funds must be filed. The forms are in the rule.

Rule 114

Loss mitigation forms must also be filed prior to moving for a foreclosure judgment where the plaintiff identifies the efforts taken to assist the mortgagor. The forms are in the rule.

Conclusion

Fortunately for practitioners, the changes in Civil Supreme Court Rules issued in 2013 were not major. Remember the internet is changing the practice of law. Remember that attorneys are encouraged to consider limited scope representation and can find the forms in the rules. And remember that the housing crisis is not over yet. Most importantly, remember to check the court's Web site regularly! ■

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Closing argument: Some topics to consider ©

By John M. Stalmack, RUBERRY STALMACK & GARVEY, Chicago

Substantive evidence

Substantive evidence is evidence that is offered for the purpose of proving a fact in issue, as opposed to evidence offered for the purpose of either discrediting a witness or corroborating the testimony of that witness.[1] In *Rios v. City of Chicago*,[2] the defendant's meteorology expert relied, in part, upon the deposition of an eye-witness who died prior to the trial of the case. In closing argument, defense counsel argued substantively the facts stated in the deposition upon which the expert relied as a basis for that expert's opinion. The Illinois Appellate Court held that it was reversible error for the defense counsel to have argued as substantive that evidence which was merely the basis for the expert's opinion.

Similarly, in *Piano v. Davison*,[3] the Illinois Appellate Court upheld the trial court for properly restricting the plaintiff's closing argument. Plaintiff's counsel had attempted to argue substantively medical literature that was used to impeach the defense expert witness.

Finally, in *McDonnell v. City of Chicago*,[4] one of the defendants argued that it was error for the plaintiff's counsel to read during closing argument parts of a co-defendant's prior statement that was used during the trial for impeachment of that co-defedant. In rejecting the defendant's argument, the Illinois Appellate Court acknowledged that impeachment evidence must not be argued substantively, but that what the plaintiff's counsel said during his closing argument did not represent that the impeaching evidence was substantive.[5]

Judicial admission

A judicial admission is a statement made by a party about a concrete fact within that party's particular knowledge that is deliberate, clear and unequivocal.[6] An attorney in either a civil[7] or a criminal case[8] is capable in court of making an admission that may be binding upon his or her client. An admission of a party may concern fault.[9] A judicial admission is binding upon the party who makes it, thereby prohibiting that party from either controverting or explaining the judicial admission.[10]

In *Lowe v. Kang*,[11] a pedestrian, who was hit by an automobile, brought suit against the driver of the automobile. During closing argument, the defendant driver's attorney made repeated statements that both parties were at fault. After defense counsel's closing argument, the plaintiff moved for a directed verdict as to the defendant's liability. The trial court granted the plaintiff's Motion for a Directed Verdict and instructed the jury that the issue of the defendant's liability was no longer before them for their consideration. The plaintiff's counsel then presented his rebuttal argument regarding the issues of comparative negligence and damages. On appeal, the Illinois Appellate Court upheld the trial court's granting of the direct verdict of liability against the defendant on the basis of the repeated judicial admissions of fault that the counsel for the defendant made during closing argument.[12]

The appellate court in *Lowe* examined the circumstance of the case and the context in which the defendant's counsel's statements were made. With respect to the circumstances of the case, the appellate court noted that that testimony of the witnesses, as well as the physical evidence presented at trial, indicated that neither party saw the other until an instant before the accident.

With respect to the context in which the defense counsel's statements were made, the appellate court reasoned that it was fatal for the defense counsel not to argue in the alternative. Rather than admitting fault, in the appellate court's opinion, the defense counsel should have argued that the defendant was not negligent, but if the jury found otherwise, then the plaintiff's negligence must be offset against the defendant's negligence so as to reduce the plaintiff's damages. Consequently, the appellate court held that the trial court properly found that the defense counsel's statements made during closing argument were judicial admissions that allowed the trial court to grant the plaintiff a directed verdict.[13]

Conversely, in *Stamp v. Sylvan*,[14] the plaintiff's attorney during closing argument in an automobile accident case asked the jury to award the plaintiff $2.3 million based, in part, upon the non-economic damages of pain and suffering and loss of a normal life. Counsel for the defendants suggested to the jury that the present action was a "whiplash case" that was worth about $10,000. On appeal, the Illinois Appellate Court held that defense counsel's statements regarding the plaintiff's damages during closing argument did not constitute judicial admissions because those statements were not clear, unequivocal statements about concrete facts within the defense counsel's particular knowledge. Instead, the defense counsel's statements, in the opinion of the appellate court, were merely opinions or suggestions that the jury was free to either accept or reject.[15]

Likewise, in *Dobyns v. Chung*,[16] a medical negligence case, the defendant's attorney made the statement in closing argument that if the jury found liability against his clients, "then a fair verdict on damages would be a million dollars." The jury returned a verdict against the physician and hospital in the amount of $100,000, which was reduced by 50% because the jury found that patient was contributorily negligent. On appeal, the plaintiff argued that the defense counsel's statement that a "fair verdict on damages would be a million dollars" was a judicial admission that bound the defendants. The Illinois Appellate Court rejected the plaintiff's argument. The appellate court reasoned that defense counsel's statement regarding the amount of damages was an opinion and, therefore, was not a binding judicial admission.[17]

Hired gun

In the case of *Regan v. Vizza*,[18] the defense counsel compared the plaintiff's treating physician to Paladin, a television character who was a hired gun in the Old West. The treating physician was on staff at the hospital where plaintiff sought medical attention because of the motor vehicle accident from which the case arose. The treating physician was an orthopedic surgeon who had been recommended to treat the plaintiff by the hospital's emergency care physician. On appeal, the Illinois Appellate Court found that defense counsel's remarks were sufficiently prejudicial and inflammatory so as to constitute reversible error.[19]

However, if a closing argument made by counsel is supported by the evidence in the case, counsel is allowed to use the "hired gun" argument. In *Moore v. Centerville Township Hospital*,[20] plaintiff's counsel during

closing argument referred to the defendant's two medical experts as "high-priced experts" and "hired gun doctors." The verdict was for the plaintiff, and the defendant appealed. The Illinois Appellate Court noted that earlier Illinois Appellate decisions held that comments during closing argument such as a "hired gun" to be improper.[21] Nevertheless, the appellate court in *Moore* held that the "hired gun" type argument was permissible so long as the evidence in the case justified the argument. In *Moore*, the evidence showed that both experts for the defense charged significant rates for their time and that both experts testified predominantly for defendants in other cases.[22]

Missing witness

Generally, a party's failure to call a witness who is within its control is a proper argument during closing.[23] I.P.I. Civil No. Section 5.01 states as follows:

5.01 Failure To Produce Evidence or A Witness

> If a party to this case has failed [to offer evidence] [to produce a witness] within his power to produce, you may infer that the [evidence] [testimony of the witness] would be adverse to that party if you believe each of the following elements:
>
> 1. The [evidence] [witness] was under the control of the party and could have been produced by the exercise of reasonable diligence.
> 2. The [evidence] [witness] was not equally available to an adverse party.
> 3. A reasonably prudent person under the same or similar circumstances would have [offered the evidence] [produced the witness] if he believed [it to be] [the testimony would be] favorable to him.
> 4. No reasonable excuse for the failure has been shown.[24]

The decision to instruct the jury as to the adverse inference of a missing witness is within the sound discretion of the trial court.[25]

In *Wetherell v. Matson*,[26] a five-year-old boy was awarded $9,000 by a jury for injuries to his foot that were caused when a 13-year-old boy riding a lawn mower ran over the five-year-old's foot. At trial, an orthopedic surgeon, who saw the injured boy two months before trial was not called by the plaintiff to testify about the boy's foot injuries. During closing argument, the defense attorney commented about the plaintiff's failure to call the orthopedic surgeon as a witness. During the plaintiff's attorney's rebuttal argument, the plaintiff's attorney attempted to explain the reason for not calling the orthopedic surgeon as a witness. The defense attorney objected and a colloquy then ensued among the trial court and the attorneys for both the plaintiff and defendant. Although the I.P.I. Section 5.01 missing witness instruction was discussed, the trial court did not give the instruction and allowed the plaintiff to resume explaining why the orthopedic surgeon was not called.

On appeal, the defendant argued that the failure to call a witness is always a proper comment because the requirements for giving I.P.I. Section 5.01 are greater than the permissible scope of closing argument regarding a missing witness. The Illinois Appellate Court disagreed, reasoning that the crucial element was the party's control over the missing witness. Otherwise, without the element of control, as in *Wetherell*, the plaintiff would have had to produce every physician who treated him or be faced with the argument of the defendant that those physicians were not produced because they would have testified adversely. Consequently, the appellate court held that the orthopedic surgeon was not under the control of the plaintiff, and it was error for the defendant's attorney to insinuate that the orthopedic surgeon would have testified adversely toward the plaintiff. As a result, the appellate court ordered a new trial on damages.[27]

Similarly, in *O'Connell v. City of Chicago*,[28] the plaintiff's attorney made no request for the I.P.I. Section 5.01 missing witness instruction. In rebuttal argument, the attorney for the plaintiff, over four sustained objections by the defense attorney, talked about the city's failure to produce a police officer in its effort to prove that the plaintiff was intoxicated. The Illinois Appellate Court held that the plaintiff's attorney's argument was improper because no evidence existed that the missing police officer was still on the police force or had anything relevant to say. The appellate court further expounded that even if the absent witness were an officer at the time of trial, he or she would have been considered to have been a public employee and, therefore, equally available to both parties.[29]

Conversely, in *Simmons v. University of Chicago Hospital*,[30] a medical negligence action, after a lengthy debate, the trial court gave the missing witness instruction because the defendant failed to produce a physician who was instrumental in treating the plaintiff. Both the Illinois Appellate Court and the Illinois Supreme Court held that giving the missing witness instruction was proper because the physician in question was an employee of the defendant hospital who was potentially liable to the plaintiff and, therefore, was not equally available to the plaintiff.

A distinction can be made, however, between commenting about a party's failure to call a witness and commenting upon the disparities and gaps in the testimony presented. In *Gilman v. Kessler*,[31] the allegedly intoxicated person in a Dram Shop action was a party to the case, but did not appear at trial. The Illinois Appellate Court held that the defense counsel's closing argument was proper because the defense counsel was careful not to comment upon the plaintiff's failure to call the allegedly intoxicated person because that person was not under the plaintiff's control and was equally available to the defendant. Rather, the defense counsel artfully argued about the lack of testimony of the allegedly intoxicated person causing disparities and gaps in the testimony presented.[32]

A retained expert who is hired by a party to support that party's position at trial is under that party's control and, therefore, unavailable to the opposing party.[33] However, if the proffered testimony of a retained expert is cumulative of other expert testimony of the party controlling that expert, that cumulative expert may be withdrawn without the trial court giving the missing witness instruction.[34]

For example, the Illinois Appellate Court in *Montgomery v. Blas*[35] held that the trial court properly used its discretion by allowing defendant to withdraw one of the three experts whom he had retained. At issue was whether epidural steroidal injections given by the defendant were the cause of the plaintiff's avascular necrosis. The appellate court found that the withdrawn expert was not contradictory to the other two experts and if that withdrawn expert were called to testify, the trial would have been unnecessarily prolonged. Therefore, the appellate court held that the trial court properly used its discretion in allowing the defendant to withdraw the cumulative expert without having to suffer a missing witness instruction.[36]

However, if the testimony of the with-

drawn expert is not entirely cumulative, it is reversible error not to give the missing witness instruction.[37] In *Kersey v. Rush Trucking, Inc.*,[38] the defendant withdrew its accident reconstruction expert on the premise that the expert's testimony would be cumulative to information that defense counsel obtained during the cross-examination of the plaintiff's accident reconstruction expert. One of the key issues at trial was whether the defendant's truck was speeding at the time of the accident. The Illinois Appellate Court found that the withdrawn expert's testimony regarding the speed of the truck was most likely favorable to the plaintiff's position, and, therefore, it was reversible error by the trial court not to have given the missing witness instruction against the defendant.[39]

Finally, a party may avoid the missing witness instruction if that party gives reasonable notice to the opposing party before trial of the abandonment of an expert witness.[40] In *Taylor v. Kohli*,[41] the trial court gave the missing witness instruction because the plaintiff failed to call an expert witness. The Illinois Appellate Court remanded the case for a new trial on the issue of whether reasonable notice of abandonment was given.[42] The Illinois Supreme Court upheld the ruling of the appellate court.[43]

Rebuttal

In closing argument, the plaintiff, in rebuttal, must reply to the argument of the defense and must not introduce any new line of argument.[44] In *Clarke v. Medly Moving and Storage, Inc.*,[45] the plaintiff's decedent was an 83-year-old man who was struck and killed by one of the defendant's trucks while crossing the street. At trial, the defense counsel argued that the man's survivors somehow pieced together photographs and testimony to falsely portray a close relationship with the decedent. In rebuttal, the plaintiff's counsel argued that the defense was "kicking the decedent in the grave."

The Illinois Appellate Court held that the plaintiff's counsel did not engage in improper argument because the plaintiff's counsel properly responded to the defense counsel's argument that plaintiff was exaggerating his damages and disingenuously fabricating his claim.

Likewise, in *Caponi v. Larry's 66*,[46] the Illinois Appellate court held that the plaintiff's rebuttal argument that the value of the pain and suffering of older persons such as the plaintiff was no less than that of younger persons was a proper response to the defense counsel's argument. The plaintiff was properly responding to the argument of defense counsel that the plaintiff was not a wage earner in the flush of his career.

Conversely, in *Malanowski v. Jabamoni, M.D.*,[47] the Illinois Appellate Court held that the trial court properly barred the plaintiff's counsel from discussing damages in rebuttal. Because the plaintiff's counsel did not discuss damages in closing argument, defense counsel did not discuss damages in closing argument. Consequently, in discussing damages for the first time in rebuttal, the plaintiff's counsel was not replying to the argument of the defense, but was introducing a new line of argument.

Similarly, in *Prendergast v. Cox*,[48] the counsel for the plaintiff urged the jury to take inflation into account in measuring damages. The defense counsel objected on the basis that no evidence was presented by anyone as to inflation. The trial court sustained the objection, and the Illinois Appellate Court held that the trial court's ruling was correct.[49] ■

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1. *People v. Suastegui*, 374 Ill. App. 3d 635, 871 N. E. 2d 145 (1st Dist. 2007).
2. 331 Ill.App.3d 763, 771 N. E. 2d 1030 (1st Dist. 2002).
3. 157 Ill.App.3d 649, 510 N. E. 2d 1066 (1st Dist. 1987).
4. 102 Ill.App.3d 578, 430 N. E. 2d 169 (1st Dist. 1981).
5. It is difficult to comprehend why the Illinois Appellate Court did not rule in this case that when the witness whose credibility is under attached is also a party to the action then the prior inconsistent statement of that party witness constitutes an admission and is, therefore, independently and substantively admissible. See, *e.g.*, *Security Savings and Loan Association v. Commissioner of Savings and Loan Associations,* 77 Ill.App,3d 606, 396 N.E. 2d 320 (3rd Dist. 1979).
6. *In re Estate of Rennick*, 181 Ill.2d 395, 692 N. E. 2d 1150 (1998).
7. *Standard Management Realty Company v. Johnson*, 157 Ill.App.3d 919, 510 N.E.2d 986 (1st Dist. 1987).
8. *People v. Howery*, 178 Ill.2d 1, 687 N.E.2d 836 (1997).
9. *Wright v. Stokes*, 167 Ill.App.3d 887, 522 N.E.2d 308 (5th Dist. 1988).
10. *Keeven v. City of Highland*, 294 Ill. App. 345, 689 N.E.2d 658 (5th Dist. 1998); *Williams Nationalease, Ltd. v. Motter*, 271 Ill.App.3d 594, 648 N.E.2d 614 (4th Dist. 1995); *Pandya v. Hoerchler*, 256 Ill. App. 3d 669, 628 N.E.2d 1040 (1st Dist. 1993).
11. 167 Ill.App.3d 772, 521 N. E. 2d 1245 (2nd Dist. 1988).
12. *Id*., 521 N. E. 2d 1247 - 1250.
13. *Id*.
14. 391 Ill.App.3d 117, 906 N.E.2d 1222 (1st Dist. 2009).
15. *Id*., 906 N.E.2d 1230.
16. 399 Ill.App.3d 272, 926 N.E.2d 847 (5th Dist. 2010).
17. *Id*., 926 N. E. 2d at 860.
18. 65 Ill.App.3d 50, 382 N.E.2d 409 (1st Dist. 1978).
19. *Id*., 382 N.E.2d 412.
20. 246 Ill.App.3d 579, 616 N.E.2d 1321 (5th Dist. 1993).
21. *Id*., 616 N.E.2d 1330 - 1331.
22. *Id*. at 1332. See also, *Klingelhoets v. Stacia Charlton-Perrin*, 2013 IL App. (1st) 112412, 983 N. E. 2d 1095 (1st Dist. 2013); *Thornhill v. Midwest Physician Center of Orland Park*, 337 Ill.App.3d 1034, 787 N.E.2d 247 (1st Dist. 2003).
23. *Hunter v. Chicago and Northwestern Transportation Company*, 200 Ill.App.3d 458, 558 N.E.2d 216 (1st Dist. 1990).
24. Please note that I.P.I. Civil No. §5.01 also applies to missing evidence. *Roeseke v. Pryor*, 152 Ill. App.3d 771, 504 N. E. 2d 927 (1st Dist. 1987) (defendant hotel failed to produce night manager's report summarizing events in question).
25. *Schaffner v. Chicago and Northwestern Transportation Company*, 129 Ill.2d 1, 541 N.E.2d 643 (1989).
26. 52 Ill.App.3d 314, 367 N.E.2d 472 (4th Dist. 1977).
27. *Id*., 367 N.E.2d 475 - 476.
28. 285 Ill.App.3d 459, 674 N.E.2d 105 (1st Dist. 1996).
29. *Id.,* 674 N.E.2d 112.
30. 162 Ill.2d 1, 642 N.E.2d 107 (1994).
31. 192 Ill.App.3d 630, 548 N.E.2d 1371 (2nd Dist. 1989).
32. *Id*., 548 N. E. 2d at 1381-1382. See also, *Lewis v. Cottonbelt Route – St. Louis Southwestern Railway Company*, 217 Ill.App.3d 94, 576 N.E.2d 918 (5th Dist. 1991).
33. *Montgomery v. Blas*, 359 Ill.App.3d 83, 833 N.E.2d 931 (1st Dist. 2005).
34. Id.
35. Id.
36. *Id*., 833 N.E.2d 935. See also, *Adami v. Belmonte*, 302 Ill.App.3d 17, 704 N.E.2d (1st Dist. 1998); *Glassman v. St. Joseph Hospital*, 259 Ill. App. 3d 730, 631 N. E. 2d 1186 (1st Dist. 1994).
37. *Kersey v. Rush Trucking, Inc.*, 344 Ill.App.3d 690, 800 N.E.2d 847 (2nd Dist. 2003).
38. *Id*.
39. *Id*., 800 at 856-857. See also, *Natalino v. JMB Realty Corp.*, 277 Ill.App.3d 270, 660 N.E.2d 138 (1st Dist. 1995).
40. *Taylor v. Kohli*, 162 Ill.App.2d 91, 642 N.E.2d 467 (1994).
41. *Id*.
42. 252 Ill.App.3d 852, 625 N.E.2d 64 (1st Dist. 1993).
43. 642 N. E. 2d 469-470.
44. *People v. Bundy*, 295 Ill. 322, 129 N.E. 189 (1920).
45. 381 Ill.App.3d 82, 885 N.E.2d 396 (1st Dist. 2008).
46. 236 Ill.App.3d 660, 601 N.E.2d 1347 (2nd Dist. 1992).
47. 332 Ill.App.3d 8, 772 N.E.2d 967(1st Dist. 2002).
48. 128 Ill.App,3d 84, 470 N.E.2d 34 (1st Dist. 1984).
49. *Id*., 470 N.E.2d 39.

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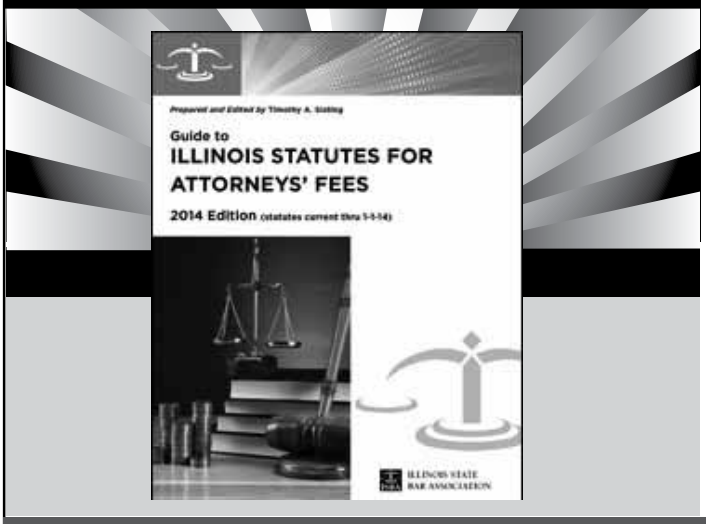

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