ILLINOIS STATE BAR ASSOCIATION

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Bench & Bar

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

What traits make for a good lawyer? What about a good judge?

BY JUSTICE MICHAEL B. HYMAN, CHAIR

To find out the answers to these questions, at the May meeting of the Bench & Bar Section Council, I invited members to identify a trait of each—a good lawyer and a good judge. Although most members suggested a distinct trait that set lawyers and judges apart, some offered a single trait for both.

I expected variety, and there was that,

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The ideal standing order: What should be included?

BY DEANE B. BROWN

At its meeting May 4, 2017, ISBA Bench & Bar Section Council chair, Justice Michael Hyman, tasked Council members with developing a list of rules and procedures which should be included in a standing order in every Illinois trial courtroom. The Section Council arrived at these suggestions, which should apply to both lawyers and *pro se* litigants appearing before the Court.

Efficient Communications Between the Court and Attorneys

At the outset of each case, the judge should provide all counsel with an email address and phone number for his or her court clerk and advise the parties whether the judge also has a law clerk. Likewise, all attorneys should provide their email addresses, office phone numbers and cell phone numbers to the judge's court clerk and to one another. That way, if the judge is running late or will be absent for a scheduled court call, the court clerk can notify the attorneys accordingly. And if an attorney is running late or is stuck in another courtroom, he or she can notify

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What traits make for a good lawyer? What about a good judge?

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of course. But I noticed something else, something interesting. Before reading on, look at the lists, and see if you notice it too.

Traits of a good lawyer

Appropriately Dressed
Civil
Courteous
Dedicated
Deliberate
Dogged
Empathic
Ethical
Even-keeled
Honest
Knowledgeable
Like Atticus Finch
People Skill
Polite
Precise & Concise
Prepared
Professional
Sense of Humor
Thorough
Timely

Traits of a good judge

Able Writer
Appropriately Dressed
Calm
Decisive
Deliberate
Empathy
Engaged
Ethical
Even-keeled
Independent
Like Judge Weaver (*Anatomy of a Murder*)
Listens
Patient
People Skills
Practical
Precise & Concise
Professional
Prepare
Sense of Humor
Sensitive to People
Studious
Timely

The lists are by no means all-inclusive or intended to be. There may be some traits that you do not agree with and others that you would have included.

Now read over the lists again. But this time imagine the first list contains traits of a good judge and the second list contains traits of a good lawyer.

It turns out that good lawyers and good judges share what it takes to distinguish themselves and stand out among their peers. Their "good" traits are not so different from one another and are interchangeable, reciprocal, and mutual. That is, traits befitting a good lawyer apply with equal force to a good judge.

This makes sense. When we think of a good judge we would expect (or at least want) the individual to have been a good lawyer, otherwise, why would we want him or her on the bench in the first place?

As this is my final chair's column, I want to express my sincere thank you for the privilege to serve in this role, and the opportunity to work with so many talented lawyers and judges. Special thanks go to my successors, the incoming chair, Deane Brown, and the incoming vice-chair, David Inlander. Also, I want to acknowledge the fine work of all the committee chairs –Newsletter (Ret. Judges Al Swanson, Jr., and Edward Schoenbaum, Judge E. Kenneth Wright, Jr., and Michele Jochner), Legislation (Judge Patrice Ball-Reed); Civility Ombudspersons (Ret. Judge Michael Jordan and Jayne Reardon); Professional Ethics (Kenya Jenkins-Wright); and CLE (William Allison; Ret. Judge Stephen Pacey, and Marc Wolfe). In addition, a shout-out to our board co-liaisons, Judge E. Kenneth Wright, Jr. and Al Durkin.

I will close with one of my favorite quotations, which, for me, sums up what the ISBA Bench & Bar Section Council is about: "For as you know, it is not in books that the law can live, but in the consciousness of the profession as a whole." —Judge Learned Hand. ■

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The ideal standing order: What should be included?

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the court clerk and the other counsel of such.

Page Limits and Courtesy Copies

No later than one week prior to hearing on a contested motion (barring any emergency), the moving party shall provide courtesy copies of all briefs to the judge, preferably via email. There should be a 15-page limit on all briefs, absent leave of court.

Uniform Case Management Order and Effective Use of Pretrial Orders

A uniform Case Management Order should be adopted statewide, rather than the various types of Case Management Orders currently used in different courtrooms throughout Illinois.

Judges should actively use Pretrial Orders to make trials more efficient for both the Court and counsel. This includes narrowing the issues to be tried, exchanging witness lists and exhibits, and handling issues such as the authentication of documents well in advance of trial.

Efficient Use of Time by the Court and Attorneys

A rule should be implemented allowing attorneys to submit an Agreed Order to the judge three days before a case management or status hearing. If the judge concurs with the Agreed Order, he or she will enter the Agreed Order and either email it to counsel or instruct counsel to pick it up from his or her courtroom at counsel's convenience. This way, attorneys will not have to appear in court for an Agreed Order and the judge can focus his or her time on contested matters. If the judge does not concur, his or her clerk should notify counsel that they must appear in court for the scheduled hearing. In the alternative, the judge should schedule all agreed matters at the start of his or her call, or on a separate call, followed by contested motions on which the Court will hear argument.

Hearings and Rulings on Motions

When scheduling a hearing, the judge should inform the parties whether he or she will rule orally or in writing so that the parties can determine whether they should bring a court reporter. Judges should provide counsel with reasons for their rulings, whether verbally or in writing. In addition, judges should be proactive in managing hearings by: (a) imposing and enforcing a time limit on oral arguments for contested motions; (b) instructing counsel that they may not make objections during oral argument; and (c) advising counsel that they may not interrupt opposing counsel during his or her argument.

Courtesy and Civility

Judges shall instruct lawyers appearing before him or her that they should direct their comments to the judge, not to one another. In addition, lawyers should be prohibited from handing each other pleadings or cases when they appear in court, as this should be done in advance of a court appearance, according to applicable rules. ■

To arbitrate or to not arbitrate—That is the question

BY HON. FRED FOREMAN (RET.) AND KATHLEEN A. EHRHART

Arbitration continues to be an increasingly popular method of resolving legal disputes between parties. For example, the American Arbitration Association announced in 2016 that the total international case filings for 2015 had risen to over 1000 cases with the aggregate amount of claims and counterclaims exceeding $8.2 billion.[1] The industries in which it reported the greatest growth included construction, franchise, hospitality/travel, insurance, technology, and energy.[2] Similarly, the International Court of Arbitration of the International Chamber of Commerce announced a record number of new arbitration cases filed in 2016 – 996 new cases in total involving 3,099 parties from 137 countries.[3]

In order to decide if arbitration is the best course of action for parties to choose to determine any legal disputes that might arise between them, it is important for an individual or entity to fully understand how arbitration works, the advantages and disadvantages of using arbitration, and how courts view arbitration awards. If a party decides arbitration is its preferred method of dispute resolution there are also a number of things it should consider in terms of how it drafts and negotiates an arbitration provision in any contract it enters into.

Arbitration is a form of alternative dispute resolution whereby parties to a dispute agree to submit their respective positions and evidence to a neutral third-party arbitrator (or panel of arbitrators) who then considers the evidence and makes a binding decision resolving the parties' dispute. Arbitral decisions are considered final and binding on the parties. Arbitration provisions can be found in many commercial and professional agreements, including attorney-retainer agreements and employment agreements. Arbitration provisions are also quite common in consumer contracts including cellular-phone agreements, residential-mortgage loans, and sales agreements that individual consumers agree to all the time in everyday ordinary sales transactions. Parties can also later agree to arbitrate an existing dispute through a separate contract. The agreement between the parties to submit their dispute to arbitration is a legally binding contract.

In Illinois there are two primary statutory guides that govern arbitrations, the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and the Illinois Uniform Arbitration Act, 710 ILCS 5/1, *et seq.* The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements and was intended to put arbitration agreements on the same footing as other contracts.[4] Section 2 of the FAA, the primary substantive provision of the Act, provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[5] The Supreme Court has described this provision as reflecting both a "liberal federal policy favoring arbitration," and the "fundamental principle that arbitration is a matter of contract."[6] The FAA applies to all arbitration agreements involving interstate commerce, including employment agreements not involving transportation workers.[7]

Similarly, Illinois adopted the Uniform Arbitration Act in 1961 to forward a policy favoring enforcement of arbitration agreements.[8] The Act contains the same basic language as the FAA setting forth that an arbitration agreement is valid and enforceable except if there exists any grounds at law or in equity to revoke any contract.[9] The Illinois Act applies to those arbitration clauses that do not affect interstate commerce or specifically state that Illinois law will apply.[10]

Under both statutes, arbitral awards are subject to only the most "limited judicial review."[11] Under the FAA, confirmation of arbitration awards is mandatory. Section 9 of the FAA provides that:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.[12]

As the Supreme Court has held, "[t]here is nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases, except where one of the 'prescribed' exceptions applies."[13] Section 9 of the FAA "carries no hint of flexibility."[14]

Under Section 10 of the FAA, an arbitration award may be vacated only: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[15] Errors of fact or law – even "serious" errors – are insufficient to vacate an award.[16]

Illinois courts similarly review arbitration awards so as to uphold their validity "wherever possible."[17] They will

"not vacate an arbitration award for 'mere errors in judgment or mistakes of law;'" but rather, the errors must be significant and plainly apparent on the face of the award.[18] The Illinois Arbitration Award sets forth the same limited four grounds as the FAA for vacating an arbitrator's decision, but in addition includes a provision that a court may vacate an award where "there was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection, but the fact that it could not or would not be granted by the circuit court is not ground for vacating or refusing to confirm the award."[19] It is precisely because the parties bargained to not have a judicial determination in the first instance, which courts are reluctant to interfere with an arbitration award outside the limited grounds set forth in the Act.[20]

Where the FAA and Illinois UAA statutes do diverge is whether a court or arbitrator(s) must decide whether an issue is arbitral under the parties' arbitration agreement. Under the FAA, the court, not the arbitrator, determines whether individual claims fall within the arbitration agreement.[21] Under the Illinois act, however, whether a court or arbitrator decides if an issue belongs in arbitration depends on the arbitration agreement. Where the language of the arbitration agreement is clear, and it is apparent that the dispute between the parties falls within the scope of the arbitration clause, a court should decide the arbitrability issue and compel arbitration.[22] Similarly, if it is clear that that the issue does not fall within the arbitration clause, the court should also decide the arbitrability issue and deny any motion to compel arbitration because there is no agreement to arbitrate between the parties.[23] But when the language of an arbitration clause is unclear as to whether the subject matter of the dispute between the parties falls within the scope of the arbitration agreement, the court should decline to make a decision and instead the question of whether the issues are to be arbitrated should be decided by the arbitrator.[24]

Given the deference shown by the courts to arbitration awards, it is important to consider the benefits and potential detriments in agreeing to arbitration. Some advantages to arbitration include the following:

- It is faster and less expensive than litigation because there are less battles over pleadings, discovery can be more limited, and the hearing of evidence can be streamlined;
- The parties can select arbitrators with specialized knowledge about the industry that is at issue in the arbitration;
- The parties can select the arbitration forum and procedure;
- The arbitrators need not follow the strict structure of the law;
- Arbitration is typically confidential;
- There is more flexibility with arbitration regarding scheduling of hearings and discovery, the scope of discovery and the presentation of evidence.

There are also perceived disadvantages to arbitration. Some of those include:

- Arbitrators may be more likely to provide an award that is a compromise between two parties' position rather than a full victory to one party or the other;
- Arbitrations are not always less expensive in particular if the arbitrator(s) allow pretrial motions and do not limit discovery;
- Parties to an arbitration do not have the right to a jury trial and there is a limited right to appeal the award;
- Depending on the parties' arbitration agreement, arbitrators may not follow the rule of law;
- Arbitrators do not have to follow the rules of evidence and so evidence may be allowed that would not otherwise be admitted by a court.

Parties should consider both the advantages and disadvantages to arbitration when deciding whether to agree to arbitrate their claims. In addition, if parties agree to an arbitration clause, they should consider whether some of the potential disadvantages to arbitration might be handled by including certain provisions in an arbitration clause. For example, the parties can decide what law will apply to the arbitration clause. Absent selecting a specific law, the arbitration clause will likely be governed the law which applies to the entire contract. But by identifying what law the parties agree applies to the arbitration clause, the parties obtain certainty and agreement on the applicable law.

Similarly, the parties can potentially avoid the uncertainty of what type of pleadings, discovery, and evidence arbitrators will allow by agreeing the rules of evidence do or do not apply, and selecting a set of rules to govern procedure. The International Chamber of Commerce and American Arbitration Association are just two examples of dispute resolution organizations that have set forth sets of rules to govern arbitrations that parties can select to include in their arbitration agreement. By selecting a governing set of rules, everyone knows at the outset what the ground rules will be if there is a dispute to be arbitrated. What procedures are agreed upon can also impact the expense of arbitration. More discovery and motion practice will increase the cost of arbitration as well as the length of time to resolve the parties' issues. Selecting the location of an arbitration and including it in the arbitration agreement also impacts cost as the parties can take into account the location of the parties, witnesses, and counsel (although that might not be completely known to the parties at the time of drafting the arbitration provision.)

One of the most important items to include in an arbitration agreement is to be clear what matters will be subject to arbitration. This is particularly true given the deference and limited review by the courts over arbitration awards. The parties better be sure they intend to have a dispute decided through arbitration because once an award is issued it will be difficult to get the award vacated.

The parties can decide to submit all disputes relating to the contract to arbitration. The parties can also decide to split matters and have certain disputes decided through arbitration while other disputes will be submitted to the courts. For example, matters involving highly technical issues may be better suited for arbitration where the arbitrator has specialized industry experience and knowledge to assist in deciding those issues. What is most

important, however, is that whatever the parties decide they use clear and explicit language to set forth what they agree is the scope of the arbitration agreement. As explained above, the clarity of the language may impact whether a court or arbitrator(s) determine whether a dispute is to be arbitrated.

At the end of the day, an agreement to arbitrate is a contractual agreement between two-private parties, and courts have made clear an intent to uphold the principles of the freedom to contract and to hold parties to their agreement. Parties should carefully weigh the potential upsides and downsides of agreeing to arbitrate disputes in lieu of the civil-court systems. And if the parties decide that they wish to agree to arbitrate their disputes, they should think through and draft carefully the arbitration provision to capture the parties' agreement. ■

1. <https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTAGE2041081&revision=latestreleased>
2. *Id.*
3. <https://iccwbo.org/media-wall/news-speeches/icc-reveals-record-number-new-arbitration-cases-filed-2016/>
4. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)
5. 9 U.S.C. § 2
6. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)
7. 9 U.S.C. §1; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123-24 (2001)
8. 710 ILCS 5/1, *et seq.*
9. *Id.*
10. *Tortoriello v. General Nissan of North America, Inc.*, 379 Ill. App. 3d 214, 225 (2nd Dist. 2008)
11. *Oxford Health Plans, Inc. v. Sutter*, 569 U.S. ---, 133 S.Ct. 2064, 2068 (2013); *Shakman v. Democratic Organization of Cook County*, No. 69 C 2145, 2017 WL 962762, *3 (N.D. Ill. March 9, 2017)
12. 9 U.S.C. § 9
13. *Hall Street Assoc., LLC v. Mattel, Inc.*, 552 U.S. 576, 587 (2008)
14. *Id.*
15. 9 U.S.C. § 10
16. *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010)
17. *Salsitz v. Kreiss*, 198 Ill.2d 1, 13 (2001)
18. *Bankers Life & Casualty Ins. Co. v. CBRE, Inc.*, 830 F.3d 729, 732 (7th Cir. 2016)
19. 710 ILCS 5/12(a)(1)-(5)
20. *Perik v. JP Morgan Chase Bank*, 2017 IL App. (1st) 151593-U ¶ 5 (1st Div. March 31, 2017)
21. *Price v. NCR Corp.*, 908 F.Supp.2d 935, 940 (N.D. Ill. 2012)
22. *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill.2d 435, 444 (1998)
23. *Id.*
24. *Id.* at 445

Madison County Domestic Violence Accountability Court

BY KERRI DAVIS, ASSISTANT STATE'S ATTORNEY, MADISON COUNTY

June 1, 2017 marked one year since Madison County launched the Domestic Violence Accountability Court (DVAC). DVAC is a specialty court, which aims to address the challenging issues domestic violence presents in the justice system. DVAC is committed to improving the consistency and response to domestic violence. Nearly all cases involving intimate partner violence in Madison County are filed under DVAC. Key elements of the court include a dedicated group of judges, prosecutors and probation officers who are specially trained on the dynamics of abuse.

The Madison County DVAC is modeled after Winnebago County's Domestic Violence Coordinated Courts (DVCC), which was established in 2012 and was one of the first of its kind in the nation. In late 2014, the Winnebago County DVCC was designated by the Office on Violence Against Women to serve as one of six national Domestic Violence Mentor Courts. Specialized courts addressing domestic violence are becoming increasingly popular, as the justice system seeks to stimulate a more effective response to domestic violence.

Among the goals of DVAC, offender accountability and victim safety are top priorities. Every defendant charged under the court must complete a risk assessment with a Department of Human Services approved Partner Abuse Intervention Program (PAIP) provider. They are then required to follow up with a minimum of 26 weeks of treatment, where offenders learn to take personal responsibility for their actions and how to break the violence cycle to prevent further abuse. Offenders are required to attend regular court appearances in which they appear in front of a designated DVAC Judge. Having one judge handle intimate partner violence related cases ensures consistency and helps to increase compliance. If offenders are not abiding by the rules of DVAC, the judge may impose sanctions, which range from community service to additional jail sentences.

Another important aim of DVAC is to improve victim safety. Domestic violence victims have unique needs and concerns. By contacting victims immediately after an offender is arrested, the court intends to provide them with links to available services and programs in the community, including crisis assistance, emergency shelter information, counseling and safety planning. Additionally, advocates are present for all hearings and court dates to ensure victims are informed. Victim safety is also manifested by the coordination of information and services in both criminal and civil cases so that the judge, attorneys and advocates are all aware of a case history.

With DVAC, Madison County is changing the way the system approaches domestic violence cases. In the upcoming year, DVAC intends to intensively its focus on victim safety and pursue additional sources of funding. ■

The Ninth Circuit's ruling in *Rizo* suggests employers can pay women less than men for the same job based on prior salary

BY AVA GEORGE STEWART AND KENYA JENKINS-WRIGHT

In April, the Ninth Circuit held in *Rizo v. Yovino*[1] that prior salary could be used to justify differences in compensation as a "factor other than sex" if the use of prior salary is reasonable and supports a business policy without running afoul of the Equal Pay Act. Aileen Rizo moved from Arizona to California as a math consultant. She was one of four math consultants in the public schools in Fresno County. After some time working there, she discovered, in the course of a conversation, she was paid considerably less than a male colleague. In fact, she subsequently discovered she was paid less than all of her male colleagues. This suit ensued. The Ninth Circuit stated that the district court must evaluate the business reasons given by the County and determine whether it used prior salary "reasonably in light of [its] stated purpose[s] as well as its other practices."[2]

The Ninth Circuit used *Kouba v. Allstate*[3] as precedent. In *Kouba*, the Ninth Circuit held that an employer may prove that paying women less is not based on sex but on a business factor. Allstate claimed that the use of prior salary is "a factor other than sex" within the meaning of the statutory exception; however, Kouba argued that the use of prior salary caused a wage differential that constituted unlawful sex discrimination.[4] In *Kouba*, the Ninth Circuit created a roadmap to guide the lower court in evaluating Allstate's reasonableness in effectuating factors other than sex through the wage differential. In providing the roadmap, the Court recognized the pretextual nature of "other business factors"[5] that could be used to circumvent the Equal Pay Act and permit discriminatory practices. However, the Ninth Circuit noted that courts have limited ability to protect against such abuse because the Equal Pay Act entrusts employers, not judges, with determining how to accomplish business objectives.[6] The Court noted that the Equal Pay Act does not prohibit the use of prior salary. Furthermore, the Court noted that although there exists the fear that an employer might manipulate its use of prior salary to underpay female employees, a court must first find that the business reasons given by an employer do not reasonably explain its use of prior salary before finding a violation of the Equal Pay Act.[7]

What Lies Ahead?

With division among the circuit courts on this issue, perhaps it is ripe for a Supreme Court ruling. Some jurisdictions are not waiting, including Massachusetts, Philadelphia, and New York City. All three ban salary history requests by employers.

Additionally, Allstate settled Kouba's claim in a class action matter in 1984, nine years after she filed suit, for $5M. The class included 3,100 women who were either current or former Allstate employees.[8]

It would not be shocking for the *Rizo* case to end in a settlement, particularly since some California cities are also considering a salary history ban. In fact, at the federal level, Representative Eleanor Holmes Norton (D.C.) has introduced the Pay Equity for All Act that would prohibit employers from asking for salary history prior to making a job or salary offer.[9] ■

1. No. 16-15372, 2017 WL 1505068 at *1 (9th Cir. April 27, 2017)
2. *Id.*
3. 691 F.2d 873 (9th Cir. 1982)
4. *Id.* at 875.
5. *Id.*
6. *Id* at 876.
7. *Id* at 878.
8. <http://www.nytimes.com/1984/10/02/business/payments-to-women-by-allstate.html>
9. <https://norton.house.gov/media-center/press-releases/following-9th-circuit-decision-norton-delauro-nadler-speier-introduce>.

Recent appointments and retirements

1. Pursuant to its Constitutional authority, the Supreme Court has appointed the following to be Circuit Judge:
   - Debra Ann Seaton, Cook County Circuit, 2nd Subcircuit, May 18, 2017
   - David R. Navarro. Cook County Circuit, 4th Subcircuit, May 25, 2017 ■

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