



# FEDERAL CIVIL PRACTICE

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

## New Procedural Rules—and more may be on the horizon

By Camille M. Knight

As many know by now, several changes to the Federal Rules of Civil Procedure and many Local Rules took effect on December 1, 2009. The changes standardized various time periods for filing, tying them to seven-day intervals and doing away with provisions for discounting intervening weekends. Additional changes alter the time period for plaintiffs to amend complaints without leave of court, and for filing post-judgment motions.

At the same time, a bill was introduced in the House in mid-November that would affect various procedures related to diversity cases by amending the statutes that govern those cases. That bill currently sits in committee awaiting action or alternatively, death. Even if the bill dies during the 111<sup>th</sup> Congress, however, its proposed amendments most likely will not.

The new rule changes in effect, local rule changes in the three district courts in Illinois, and the statutory changes that may come to fruition in the future are summarized below.

### December 2009 Amendments

A brief overview of the December 2009 amendments to the Federal Rules of Civil Procedure<sup>1</sup> is as follows:

#### New Fed. R. Civ. P. 6:

- Includes intervening weekends and holidays in computing all time periods;
- Clarifies that filings are due electronically by midnight in the court's time zone where they are filed electronically (and prior to the close of business at the court clerk's office when

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## Question: How is the legal profession responding to the challenges of the recession? Answer: Alternative billing practices

By Patrick T. Driscoll, Jr. and Patricia M. Fallon<sup>1</sup>

Has the recent economic downturn affected the way firms bill? Are clients' expectations of law firms changing? Or are current billing practices outdated? These are just some of the questions the legal profession is forced to consider and answer due to the recent recession and the reality of balancing a firm's budget when faced with reduced profitability. In a 2009 *Wall Street Journal* ("WSJ") article titled, "Billable Hour Under Attack—In Recession, Companies Push Law Firms for Flat-Fee Contracts," it

is apparent that a shift in billing practices has taken place and it is not temporary. Companies are abandoning the hourly rate billing system, which critics claim offers the opportunity to rack up a bigger bill, in favor of flat fee contracts. One survey quoted in the WSJ article maintained an increase of more than 50 percent in 2009 for corporate spending on alternatives to the traditional hourly rate billing practice. This shift affects all

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## New Procedural Rules—and more may be on the horizon

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- filed by other means); and
- Clarifies that service electronically still entitles the responding party to an extra three-day period after receipt of notice.

### **New Fed. R. Civ. P. 15:**

- Plaintiffs may amend complaints without leave of court within 21 days of being served with an answer or Rule 12 motion—the filing of an answer no longer cuts off a plaintiff's ability to file an amended complaint without leave of court. Plaintiffs have a limited time, however, to file an amended complaint after being served with a Motion to Dismiss.

### **New Fed. R. Civ. P. 50, 52 and 59:**

- Time periods for filing Motions for Judgment as a Matter of Law, Motions to Amend Findings and/or Judgments, and Motions for New Trials are now 28 days rather than 10 days. These time periods may not be modified, pursuant to Rule 6(b)(2).

### **New Fed. R. Civ. P. 62.1:**

- A truly new rule that allows district courts to enter "indicative rulings" when they have lost jurisdiction over a case to an appellate court. Concomitantly, appellate courts now have the power to remand cases to district courts for further proceedings (i.e., amending portions of a district court's judgment) while retaining jurisdiction.

### **Local Rules in District Courts in Illinois**

In Illinois, the United States District Court for the Northern District of Illinois issued General Order 09-025, noting its approval of a proposal to amend the Local Rules to comply with the Statutory Time Period Technical Amendments Act of 2009 (Pub. L. No. 111-016).<sup>2</sup> The General Order clarifies that various time periods are now changed to occur in multiples of seven days. One clear exception to the Federal Rule changes is also noted—Local Rule 5.3(a) remains unchanged, requiring a two-day notice period for most motions, and providing that individual judges' requirements for notice are also unchanged pending further orders by the individual judges themselves.

The United States District Court for the Central District of Illinois issued an Emer-

gency Order on January 19, 2010, adopting the district's Local Rules in their entirety on an emergency basis. They do not modify the Federal Rules that were amended effective December 1, but do include many new rules relating to filing by CM/ECF for that district.

The United States District Court for the Southern District of Illinois issued Local Rules that also went into effect on December 1, 2009.<sup>3</sup> The Southern District's Local Rules, however, do not modify the Federal Rules that were amended effective December 1.

### **Potential Changes for the Future**

In addition to the recent rule amendments, other procedural changes may be on the horizon. House Bill 4113, introduced during the 111<sup>th</sup> Congress in November 2009 by two members of the House Judiciary Committee, Subcommittee on Courts and Competition Policy (representatives Lamar Smith (R-TX) and Howard Coble (R-NC)), seeks to clarify various jurisdiction and venue issues.

Naturally, the proposals contained in this bill stand a statistically greater chance of dying in committee than being passed and ultimately put into practice. In fact, some of the proposals contained in the bill died in committee when they were introduced during the 109<sup>th</sup> Congress. But the logic and effect behind several of the proposals contained in H.R. 4113 appear to be ripe for addressing. They include:<sup>4</sup>

#### **• Treatment of Resident Aliens**

28 U.S.C. § 1332 would be amended to direct that resident aliens would be treated as citizens of the state in which they are domiciled for purposes of diversity jurisdiction (H.R. 4113, Sec. 101).

#### **• Treatment of Insurance Companies**

28 U.S.C. § 1332 would be amended to direct that insurance companies would be treated as a citizen of every state where it was a citizen, has been incorporated, and where it has a principal place of business for purposes of diversity jurisdiction (H.R. 4113, Sec. 102).

#### **• Amount in Controversy Requirements**

The bill would also require that, starting on January 1, 2011, and continuing on January 1 every fifth year thereafter, the minimum amount-in-controversy requirement in 28 U.S.C. § 1332 be adjusted by an amount

tied to the change in the Consumer Price Index over the previous five years (H.R. 4113, Sec. 103).

#### **• Changes to Removal Procedures**

The bill would also affect diversity cases by amending 28 U.S.C. § 1441 to state that if a plaintiff files a declaration in state court providing that plaintiff will not seek or accept an award of damages exceeding the federal amount-in-controversy requirement listed in 28 U.S.C. § 1332, a case that could otherwise be removed (based on diversity of citizenship and the amount-in-controversy requirement being met) would not be removable. Additionally, if a case were removed from state court, a diverse plaintiff would have 30 days in which to file such a declaration in the district court—which would then be required to remand the case to state court "unless equitable circumstances warrant[ing] retaining the case" existed (H.R. 4113 Sec. 104).

Additionally, the bill would amend 28 U.S.C. § 1441 by providing that non-removable state claims would be severed from federal question claims that were removed to federal court from state court. The severed state claims would be remanded (H.R. 4113 Sec. 105).

The procedure for removal would also be clarified by amending 28 U.S.C. § 1441 to specifically state that in cases involving multiple defendants, each defendant would have 30 days in which to file a notice of removal. Earlier-served defendants would have the ability to consent to removal in such circumstances, even if the time periods for the earlier-served defendants to remove a case had expired (H.R. 4113 Sec. 105).

Finally, the bill would include a provision in 28 U.S.C. § 1441 allowing for removal of cases to federal court after the usual one-year cutoff if warranted by equitable considerations (i.e., when a plaintiff is found to have deliberately avoided disclosing the amount in controversy specifically to prevent removal) (H.R. 4113 Sec. 105).

Many of the amendments envisioned by H.R. 4113 will likely live on even if the pending legislation does not. For instance, the last time the amount-in-controversy requirement was increased was in 1996.<sup>5</sup> Many courts undoubtedly would like to see that amount go up, as it would necessarily have an impact on diversity cases and in theory,

protect judicial resources in those districts handling large numbers of diversity cases. Under this rationale, the provisions in H.R. 4113 regarding removal and remand may also enjoy the quiet support of such districts who would like to keep the old adage that litigants should not “make a federal case” out of certain claims. ■

1. Amendments to the Federal Rules of Appellate Procedure also went into effect on December 1, 2009. Those changes involve Rule Nos. 4, 5, 6, 10, 12, 12.1, 15, 19, 22, 25, 26, 27, 28.1, 30, 31, 39 and 41, and can be reviewed at <[http://www.ca7.uscourts.gov/Rules/FRAP\\_rule\\_changes.pdf](http://www.ca7.uscourts.gov/Rules/FRAP_rule_changes.pdf)>.

2. Available at <[http://www.ilnd.uscourts.gov/home/\\_assets/\\_news/TimeChangesStatutory.pdf](http://www.ilnd.uscourts.gov/home/_assets/_news/TimeChangesStatutory.pdf)>.

3. Available at <[http://www.ilsd.uscourts.gov/Forms/Local\\_Rules\\_Rev6R.pdf](http://www.ilsd.uscourts.gov/Forms/Local_Rules_Rev6R.pdf)>.

4. All references herein to the provisions of H.R. 4113 are taken from the text of the bill, which may be accessed at <<http://www.govtrack.us/congress/billtext.xpd?bill=h111-4113>>; last visited January 30, 2010.

5. In 1789, the requirement was first set at \$500. It was increased to \$2,000 in 1887, to \$3,000 in 1911, to \$10,000 in 1958, to \$50,000 in 1988, and to \$75,000 in 1996. See <[http://en.wikipedia.org/wiki/Amount\\_in\\_controversy](http://en.wikipedia.org/wiki/Amount_in_controversy)>; last visited Jan. 31, 2010.

## Question: How is the legal profession responding to the challenges of the recession? Answer: Alternative billing practices

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attorneys and areas of practice as billing is a universal issue.

Traditionally, the professional standard has been to bill clients at an hourly rate. The billable hour has been a staple of firm life. However, other payment options include flat fees, retainers or contingent fees.

**Traditional hourly rate**—An attorney is paid an agreed upon hourly rate for all work done and all hours expended on a client’s case until the matter is resolved. The hourly rate does not distinguish between different tasks or the substance of the work performed; it is uniform for the most part and, therefore can add up very quickly.

**Flat fee contracts**—The flat fee contract is an alternative to hourly billing where the client can pay a flat fee at the inception of the litigation and the firm agrees to work toward the desired result efficiently for no additional fees regardless of how much time the lawyer spends on the case.

**Retainer**—A fee paid up front before legal representation commences. In some cases, a retainer is a non-refundable fee paid for the privilege of retaining the lawyer, especially if it is a high profile lawyer or firm. In other instances, the remainder of a retainer fund could be refundable to the client at the conclusion of the case.

**Contingency fee**—An arrangement where an attorney is paid a portion (usually a percentage) of any recovery on a legal matter he/she handles. In most contingency fee arrangements, the client does not pay anything

to the attorney unless there is a recovery.

Of course, some attorneys and clients may agree to an arrangement which combines one or more of the above-listed billing practices. For example, an attorney may agree to be paid at a reduced hourly rate with the understanding that an additional contingency fee (or a higher percentage) will be paid upon recovery.

### How has the recent economic downturn affected the way firms bill?

In almost every industry, employers are being forced to reduce their workforce by laying people off or instituting mandatory furloughs. Companies and individuals are filing for bankruptcy on a daily basis all across the country. Unfortunately, the legal profession is not exempt from this recession; in fact, quite the opposite is true. Large law firms have instituted programs whereby they are deferring the hiring of new associates for at least one year in an effort to cut costs. Law firms have endured massive reductions, specifically the attorney workforce. In a 2010 article on <[www.law.com](http://www.law.com)> titled, “Revenue and Profits Fall at Mayer Brown,” the revelation that in April 2009 the firm laid off 45 attorneys and 90 staff in the United States in response to the economic downturn was shocking. Additionally, the overall attorney head count to date at Mayer Brown is down by 144 with most of that number, 96 attorneys, coming from the firm’s U.S. offices. Mayer Brown saw a dramatic decrease in profits in 2008 when its net income fell by

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2008 Edition



By Gino L. DiVito

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19 percent. According to *Crain's Chicago Business* February 15, 2010 issue, the number of attorneys who lost their jobs nationwide in 2008 was cited at approximately 5000 compared with less than 1,000 in 2008. Moreover, revenue at 50 of the 100 largest law firms fell 4 percent last year, following a 7 percent rise in 2008 and an average gain of 12 percent during each of the previous seven years, according to Citi Private Bank, a unit of Citigroup Inc. in New York.

Law firms have also reduced their hourly rates in an effort to retain clients who are unable to pay last year's high hourly rates. In a recent Chicago Tribune article, Natalie Spears, a litigation partner at Sonnenschein Nath & Rosenthal was quoted as saying, "Clients are challenging their law firms to take a fresh look at the legal service model in order to deliver greater value." Spears headed the Sonnenschein committee that revamped associate pay in 2008, basing that process on core concepts of business development. Spears was also interviewed for the *Crain's* article and she did not believe this change in hourly rates was temporary or that any assumptions could be made about when or if firms would return to pre-2008 billable practices. According to Spears, "At the end of the day, it's how corporate America has been doing business for a long time. And law firms are now taking a page out of that book."

Obviously, the recession has made a significant impact on the ways in which lawyers bill their clients. One of the most notable changes to the traditional business model in the legal profession is the sharp increase in flat fee contracts or "value billing" as opposed to the traditional hourly fee model. Flat fee contracts were once used primarily for specific legal matters such as a Standard Lease, Simple Marital Agreement or Simple Will, just to name a few. However, the considerable increase in this alternative billing arrangement was borne out of the combination of a shrinking corporate legal budget as well as clients demanding greater value for legal services and more certainty about their legal billing. A flat fee arrangement is a wonderful tool that can be used to control a firm's budget and limit the amount of time spent reviewing invoices or creating fee petitions. These tough economic times have forced law firms to restructure their business practices or face reduced profitability. Thomas Fitzgerald, Managing Partner at Winston & Strawn LLP, Chicago's 4th largest law firm, noted that he expects alternative billing practices, including monthly retainers and flat fee arrangements,

to approach 20 percent of assignments this year, according to the *Crain's* article.

The economic downturn is creating more demanding clients, and in turn, pushing forward thinking law firms to re-think the way they do business. A client expects to pay a fee that corresponds, at least somewhat, to the amount of time spent by the attorney. Unfortunately, one of the problems with the billable hours system is that it makes no distinction between the hour spent on trivial activities and the hour spent on substantive matters. Further, it affords the opportunity for the worst kinds of excess, such as padding hours, thereby increasing revenue without supplying value. The days of lofty hourly rates and automatic raises at large law firms appear to be over as clients are looking for certainty in fees and placing efficiency at a premium; hence, the sharp increase in flat fee arrangements.

### **How else are Alternative Billing Practices being implemented?**

One way the change in billing practice is being felt in the City of Chicago's Law Department is the relatively new procedure of sending cases out to private attorneys for a flat fee, as opposed to an hourly rate, in order to reduce the cost of defending the case. Additionally, that flat fee arrangement is sometimes contingent on the private attorney seeing the case through to trial. According to Law Department spokesperson, Jennifer Hoyle, who has been quoted in the Chicago Tribune recently, there has been a significant increase recently in the number of "small-value lawsuits," defined as under \$100,000, being filed against the Chicago Police Department. Upon a directive by Jody Weis, Chicago Police Department Superintendent, the Law Department was directed to litigate those cases, in an attempt to deter additional meritless lawsuits against the Police Department. In other words, if plaintiffs know that their complaint will in fact be litigated, they will be more concerned with the factual validity of the complaints filed. As a result, Hoyle stated that the City Law Department is invoking even more flat fee arrangements in order to cut costs as well as ensure that cases are not quickly settled but in the alternative, vigorously defended. It is an attempt by the City to continue farming out cases when necessary but, at the same time, save money because the billing practice is "value-billing" in the form of a flat fee contract.

In 2010, the Office of the Cook County State's Attorney created an internal Conflicts

Counsel Unit to handle any litigation involving potential conflicts with the State's Attorney's Office. The past practice was to send the aforementioned cases out to outside counsel due to antagonistic defenses between a Cook County entity and an individual. However, with the deficit in the County Budget increasing, the Office created this Conflicts Counsel Unit in order to save money by reducing the need for outside counsel when such conflicts arise. This cost cutting measure could potentially save the County millions, which was paid for cases sent to outside counsel in prior years.

It is well-known that taxpayers are routinely paying attorney fees for private firm litigation against government entities. Notwithstanding, it is also known that the lofty hourly rates of private attorneys can be difficult to fight. Just this month, U.S. District Court Judge Wayne R. Andersen reduced the fee request of several Chicago law firms in the *Shakman* litigation involving the City of Chicago. In a unique twist, Judge Andersen's ruling noted that this litigation involves "public service work, and the city has faced substantial budget problems since 2008." Judge Andersen reduced plaintiffs' counsels' fees from \$600 hourly to \$400 and from \$491 hourly to \$350 per hour which was significant given the fact that plaintiffs' counsels have argued successfully for their current hourly rates for years in this decades-long litigation. Interestingly, Jennifer Hoyle stated that the City was not satisfied with Judge Andersen's ruling which denied plaintiffs' counsels approximately \$100,000 in fees and she indicated a possible appeal of that decision.

In short, times are changing and attorneys are being forced to change with them in order to stay viable. The shift in billing practices will affect all attorneys from private lawyers to attorneys representing governments, regardless of whether they are in house or paid outside counsel. ■

1. Patrick T. Driscoll, Jr. is Deputy States Attorney and Chief of the Civil Actions Bureau in the Cook County State's Attorney's Office. He is a member of the ISBA Standing Committee on Government Lawyers and the ISBA Federal Civil Practice Committee. The opinions expressed herein are solely those of the author and not those of the Cook County State's Attorney's Office.

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

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

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

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

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

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

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

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

**Tuesday, 4/20/10- Bloomington, Double Tree Hotel—**Intellectual Property Coun-

sel from Start-up to IPO. Presented by the ISBA Intellectual Property Section. 8:30-3:30. Cap 80.

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

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

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

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

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

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

### May

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

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

**Wednesday, 5/5/10- Chicago, The Standard Club—**Tips of the Trade: A Federal Civil

Practice Seminar. Presented by the ISBA Federal Civil Practice Section. 9-4:30.

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

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

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

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

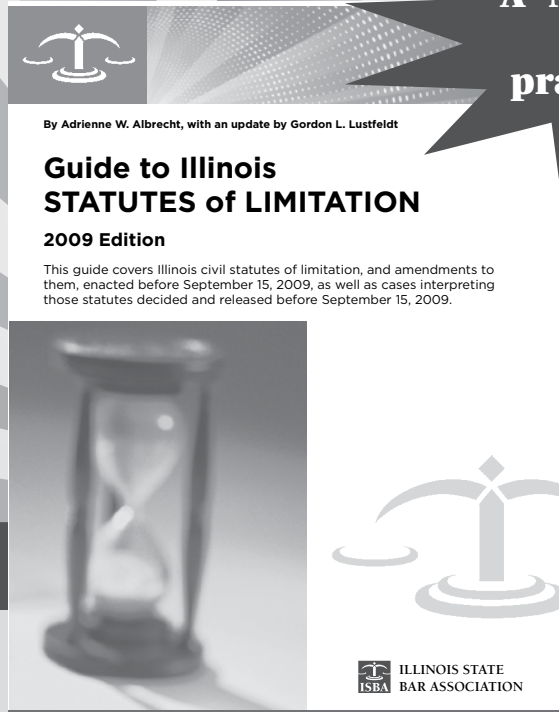
## Save the Date: May 5, 2010!

The Federal Civil Practice Section Council is sponsoring its third annual seminar on federal civil practice in the Northern District of Illinois. Currently, 30 district court and magistrate judges have confirmed their participation at the day-long seminar in the Chicago loop.

The judges will speak during six panel discussions:

- Pleading in Federal Court
- Discovery Practice
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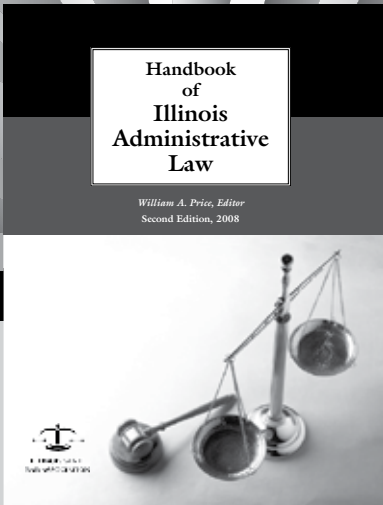
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