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ILLINOIS STATE BAR ASSOCIATION

# BENCH & BAR

*The newsletter of the ISBA's Bench & Bar Section*

# Judges need hugs too: Insights into judicial stress

***By Hon. Patricia C. Coffey***

Judges have it easy. We arrive late, take two-hour lunch breaks, leave early and, when it suits our fancy, take time to don our black robes and reign, arbitrarily and capriciously, in courtrooms where our word is law, at least until it is reviewed by a higher court. Of course, nothing could be further from the truth, but what is truly alarming is how many of you readers are out there, winking and nodding at my words. It seems not so long ago that I was a practicing attorney myself, suffering the slings and arrows of outrageous fortune, and having to answer to clients, my secretary, clerks, bailiffs, assorted court staff, and judges, not necessarily in that order. The civilized, introspective, quiet—even seemingly slothful—life of a judge seemed, by comparison, a walk in the park. Having now served on the New Hampshire Superior Court for over 13 years, preceded by a three-year term on the State's District Court, I feel compelled to set the record straight, to grant a peek at the other side of the bench, and in so doing discuss some of the stressors that affect the quality of life for judges and by implication for lawyers as well. It is only through an understanding of these stressors that we can begin to control them.

Scheduling issues cause as much stress for judges as they do for lawyers. The old joke that the clerk holds the true seat of power in the courthouse is derived from truth. Judges have precious little control over their own daily schedules. We may confer with the clerk, we may arrange our vacation time or organize the days on which we do motions hearings or hear particularly complex cases, but by and large, the clerk sets our work schedule and we hear whatever is assigned to us on a particular day. Just as lawyers are scheduled by their secretaries, sometimes efficiently and sometimes not, judges are likewise scheduled by their clerks. A wise colleague of mine, now retired, referred to himself simply as "a laborer, toiling in the vineyards of justice." Most of the time, that is exactly how it feels.

Work volume is another stressor that neither lawyers nor the public consider when casting a glance at the "glamour job" of running a courtroom. Much of a judge's work is done in chambers, in the library, in times of solitary contemplation, research, and writing. Despite the best possible camaraderie and working conditions, there is an inherent tension between clerk and judge in processing backlogs and sometimes overwhelming caseloads. In our fast food world, the administrator's job is to move as many burgers out the door as possible, while the judge must ascertain that those burgers are cooked well. The tension develops as clerks seek to close out cases and judges slow the process down in the interest of doing justice; not that the clerks are not interested in justice, but their concerns—and rightly so—are geared more toward docket management. This tension has revealed itself on many stressful and over-scheduled mornings when I turn to my clerk and ask, "You want fries with that Order?" However, as former Chief Justice G. Joseph Tauro of Massachusetts has said, "No judge has the privilege of painting a Mona Lisa in his chambers while a thousand litigants wait in the corridors." The tension between quality and efficiency is a constant in every judge's workday.

State and federal budget shortfalls can impact the judge in much the same way that cash flow deficits generate stress in major law firms and solo law offices. Most often, the judge has no control over statewide hiring freezes or lay-offs, which affect her own staff and threaten courthouse morale as fewer people strain to process more cases. Additionally, this may cause delays of days or weeks in mailing out the judge's orders, and so, despite the judge's immediate attention to the case, such clerical delays raise the hue and cry from litigants that "justice delayed is justice denied."

The care and handling of jurors rests fully on the judge's shoulders. Judges instruct juries, choose jurors through the voir dire process, consider excuses and release jurors, and control the jurors' schedules through case

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management as the trial progresses. Judges are keenly aware that they are utilizing the time of conscripted citizens and that it is their responsibility that the juror's experience be a meaningful one, as well as one in which justice is done for the litigants. In jurisdictions where judges are elected, we hear that old adage ringing in our ears, "Remember, they're not just jurors—they're VOTERS!" No judge wants to keep a room full of jurors waiting while her morning motions hearings drone on past their allotted time. At the same time, those motions hearings may be crucial to the advancement of other litigation, and the judge must afford them the time necessary to resolve these interim legal disputes. Another tension develops as the judge must apportion time wisely. In my own personal experience, this sort of tension generally develops right between my shoulder blades.

Keeping in mind that most judges have spent at least a portion of their careers as courtroom litigators, we run headlong into our next stressor: judicial temperament and restraint. As advocates, attorneys become accustomed to speaking their piece as eloquently as possible. They push the bounds of civility into argument, always seeking to further their client's cause with their articulate and persuasive rhetoric. Judges coming from this litigation background—and most judges are not wallflowers—must continually suppress their tendencies to pontificate, whether that is from the bench or as it relates to extra-judicial speech, which is even more closely restrained by the code of judicial conduct. At least one judge in New Hampshire has a small sign taped to his bench that only he can see. It reads "KYDMS" (Keep Your Damn Mouth Shut) as a daily reminder to hold his tongue.

Chief Justice Rehnquist has been quoted as saying, "A judge is bound to decide each case fairly, in accord with the relevant facts and the applicable law even when the decision is not the one the home crowd wants." Judges are often criticized and even ridiculed for decisions that are not popular with the press or the public, the legislature or the executive branch. Some of these attacks may be warranted and some may be unwarranted, but all are stressful to the judge; especially when the judge has taken extra care and time to analyze the issues involved. It takes courage and fortitude to handle this kind of recurring stress.

Finally, the principles to which judges aspire and what is expected of them on a daily basis set nearly impossibly high standards for human beings. C. S. Claxton and P. H. Murrell, in their 1992 monograph "Education for Development: Principles and Practices in Judicial Education" have set forth a number of general expectations for highly developed judges. Judges should be tough-minded and warm-hearted, have the capacity to remain open-minded yet see below the surface of issues, withhold judgment until all relevant information is in, be decisive and firm, be able to explain their legal reasoning, manage their workload efficiently, keep a perspective on the court and their role in it, possess self-confidence and a sense of competence, both tempered by humility, be aware of legal principles and of the fruits of their legal training, be at ease with themselves and open and empathetic to others while taking the perspective of different players in the judicial process, honor the traditions and fundamental fairness of the law in our society, be sensitive to issues of gender and race, and provide leadership. Simply reading this list of superlatives is stressful. Above all, a judge must maintain her integrity and the dignity of the judicial process. The judge is continually aspiring to these goals and is always aware that her decisions have a profound effect on the people appearing in her courtroom as well as the community at large.

The initial premise is that, with rare exceptions, all judges and lawyers want, at the very least, to perform their jobs well. In most cases, we desire to excel; after all, lawyers and judges were once "Type A" law students burning the midnight oil and striving to determine how many legal angels could dance on the head of a pin. We bring this quest for success with us to our later careers. It is not a surprising metamorphosis when that overburdened law student transforms into a zealous advocate until he or she finally emerges, resplendent in judicial robes. Throughout our careers in the law, we are taught that one of the hallmarks of the legal profession is its code of ethics and we meticulously enforce that code within our ranks, as does no other business or profession. However, the very ethical rules that we strive to uphold are those that constrain our conversations, prohibit public communications, restrict participation in charitable and political organizations, and serve to set judges atop the ivory towers that isolate them from both the attorneys who practice in their courts and the communities in which they live. In our attempt to remain neutral and dispassionate magistrates, we become remote. Few understand or appreciate these restrictions in a judge's daily life; does it make any rational sense to your old Kiwanis buddies that you can no longer actively participate in their fundraising duties or to the Little League booster club that, while you may still be able to dish up nachos at the snack-shack, you may no longer take the $2 as payment from the hungry baseball fans? The only rationale we can provide to our friends is that we must scrupulously restrict any possibility that we are using our influence as judicial officers to pressure contributions to our favorite charities. And so it begins. We have become aloof; the community begins to see us as exalted and remote.

The manner in which we deal with stress on the job determines in large part our quality of life generally, whether we are lawyers or judges, plumbers or CEOs, teachers or doctors. The stressors peculiar to a judge's work life, as outlined herein, require careful and constant management to enable the judge to walk out on that bench each day, level the playing field, and dispense justice impartially.

Collegial support is crucial for judges. The understanding and empathy of our colleagues can help to ease the pain of a particularly barbed editorial and general discussions of legal principles at lunch can help to give a judge essential reality checks during stressful trials. Judges who work in single-judge courthouses should make it a point to keep in telephone or e-mail communications with their colleagues in other communities; listserves and message boards can be helpful to expand a judge's (or a lawyer's) perspectives on new developments in the law as well as their reactions to daily stress.

Continuing education, and the opportunity to express oneself in a "safe" academic environment, is a resource often used by judges to improve performance while at the same time renewing the spirit. Since the work of a judge is sedentary, many judges find it helpful to make time for regular exercise or athletic hobbies in their lives. Some judges devote themselves in some manner to religious or

spiritual growth in order to help cope with their responsibilities. Involvement in community and charitable activities are other traditional ways most people alleviate stress, but as we have discussed, a judge's role in such activities is limited and "giving back to the community" is not easily accomplished when fund-raising is constricted. Maintaining close personal friendships and family ties are important to all of us; judges, however, will find their circle of friends circumscribed by ethical codes as their lawyer pals who now appear before them in court will drift further away. Hence, the chance to network amongst other judges and lawyers in collegial organizations like Bar Associations and the American Inns of Court provides judges with an invaluable outlet for stress, in that sharing work-related issues even in a general way, release some of that tension. Judges, in particular, can gain some sense of "giving back to the community" through mentoring younger lawyers in an Inns of Court setting.

Judges are not superhuman, but we recognize the importance of the work we do. We seek balance in our lives, as do lawyers, accountants and nurses. We experience the same kinds of daily stress as anyone else: car pools, groceries, cell-phone bills, personal family issues, daycare crises, and health problems. We are subject to the foibles and weaknesses that torment all mankind: alcoholism, drug abuse, and the seven deadly sins. We are generally ordinary human beings striving to do extraordinary work—work that is based on lofty ideals and constitutional principles. We deal with our stress in a myriad number of ways. Sometimes we just need a hug.

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The Honorable Patricia C. Coffey is a superior court judge in New Hampshire, where she juggles her docket, service on several statewide committees, and a family life. Judge Coffey is a member of the Charles C. Doe American Inn of Court in Newington, New Hampshire, and the Suffolk University Law School Litigation American Inn of Court in Boston, Massachusetts, and also serves on the American Inns of Court Board of Trustees.

# State of the Court Address—March 16, 2005

## Prepared remarks of Chief Judge Charles P. Kocoras for delivery to the Federal Bar Association at Corboy Hall of the Chicago Bar Association

*This article, reprinted with permission from the American Inns of Court and the Honorable Patricia C. Coffey, was originally published in the March/April 2005 issue of* The Bencher*, a bi-monthly publication of the American Inns of Court.*

Good afternoon and thank you all for this opportunity to deliver the annual "State of the Court" address on behalf of the United States District Court for the Northern District of Illinois. I want to especially thank Jack Carriglio and everyone involved in the Federal Bar Association for this opportunity to address you. It is the continuation of a tradition which began many years ago.

And what is the state of the court? Directly stated, it is sad, somber, and tinged with anxiety over the future.

The tragedy we were witness to on February 28th stunned us all, and its horrible dimensions are not diminished because the apparent killer of two innocent people took his own life. Think of Judge Joan Lefkow, and her future without the love of her life. And imagine having to bury your 89-year-old mother—the gentle and kind soul she was, who deserved to leave this earth with the same dignity that she lived her life. Or the life of a father cut short, deprived of his expressed dream of walking each of his daughters down the wedding aisle or those girls, who wanted that dream to come true as much as their father did.

Now turn your attention to the assault on the law we saw. An unsuccessful litigant, unwilling to accept the command of the law, apparently lay in wait to kill the sweetest federal judge I have ever met and whose own sense of fairness is a model for the world. Even as she denied his long-since-rejected claim, her words bespoke a sympathy and understanding of his plight. Joan will judge again, and rule fairly again, but it may not be as easy as before. Her sisters and brothers on our court, indeed, all courts, now will also find the job a little more perilous than before. It is no longer going to be enough to determine the correct legal answer to a myriad of disputes; it will often be necessary, especially with pro se litigants, to attempt to divine how they may receive our rulings.

It is too difficult for me to contemplate an effect on the willingness of citizens to serve as jurors. They may logically ask if the family of a judge is not safe because of a decision the judge made, why should they risk their own safety or their family's welfare when they are asked to make hard decisions affecting the liberty or fortunes of others.

Jurors are the bedrock of both our criminal and civil systems of justice and when citizens participate, it makes our form of government all the stronger. We can never lose that as a nation, and we must never allow it to be treacherous to serve.

Time will only tell how much the rest of us have lost because of the death of Michael Lefkow and Donna Humphrey. We already know how much Judge Lefkow and her daughters lost.

Some have said that the evils we have been witness to these past days represent an attack not only on our civil and criminal justice systems, but on the most fundamental way in which our society is ordered. No principle by which we live as Americans or govern and judge ourselves is worthier of greater respect and fealty than the doctrine of the rule of law. This is more than an empty phrase, and it requires acceptance on everybody's part. Litigants appear before us regularly, and judges understand the gravity and importance to each of them the matters they present to us for resolution.

As judges, we have no vested interest in the cases that we hear; rather, we are obligated to decide cases fairly and objectively.

Respect for the rule of law and the civility it affords requires acceptance of the results the law ordains. If it comes to pass that these evils are perpetuated because each person feels free in decid-

ing for themselves what is right or just, then chaos and anarchy will not be far behind. Each act of violence makes the next act of violence easier to commit and more likely to occur.

I am not here to suggest the triumph of evil over good, because for every sick mind full of hate there are thousands whose hearts are brimming with care and love for others. But it falls to us—especially us—lawyers, judges, and governmental officials—to preach the message of respect for others, and especially for the law. If civility and tolerance mean anything at all, then the welfare of society and the common good must prevail over notions of individual action and force and violence.

As for the future, the time has come for a reevaluation of the manner and circumstances in which federal courts operate. The contributions of the judicial branch to the way in which we live and its vital place in our system of government suggests the value it deserves. The obvious necessity for additional safety measures cannot be denied. Every federal court in the land, including my own, is engaged in this process. The good will of our nation, its citizens, and legislative and executive branch officials, will be necessary for all of us to meet the challenges the current times provide. It is only wise and just that it be forthcoming.

As federal judges, we all took oaths upon taking office to make decisions honestly and fairly and without fear or favor to any person or party. Although there should be not the slightest doubt that we will continue to honor that commitment, the "fear" part of the promise will now be a little harder for us to come by. Be assured that we are a hardy breed, however, and we will continue to render decisions based on the merits of the parties' positions and nothing more. Our citizens deserve no less, and our own devotion to our duties will never be compromised.

Turning our attention from matters of the heart to issues of law and practice, let me discuss some important occurrences that have taken place in the last year. As the criminal practitioners and judges are acutely aware, the Supreme Court of the United States, in the most recent of a series of cases, has changed the landscape of federal sentencing and, in two opinions, allocated and then reallocated the function and power of federal judges.

The first opinion in the *Booker/Fanfan* cases, holding that any fact, other than a prior conviction, which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict, must be admitted by the defendant or proved to a jury beyond a reasonable doubt, reversed over a hundred years of federal district judges sentencing practices. Prior to that, district judges routinely decided facts having an effect on sentences, sometimes materially so.

The effect of the first opinion lasted all of a few pages. As you all know, the second opinion for the court in *Booker/Fanfan* effectively negated the effect of the first opinion by holding the guidelines to be advisory only and not mandatory. This holding rendered moot the application of the Sixth Amendment jury findings to sentencing issues. Additionally, appellate courts have now been charged with the responsibility of reviewing challenged sentences using the standard of reasonableness.

Nobody would suggest that the result of *Booker/Fanfan* positions the law as it existed on 10/31/87. On my court, the Probation Department has been ordered to continue to prepare the presentence report and guideline calculations in the same way they always have. As district judges, we are still obligated to consult the guidelines and be guided, or advised by them. In their review functions, courts of appeals have the body of work of the Sentencing Commission these last 17 years or so, ready made criteria and standards setting forth what a reasonable sentence might be in today's world.

The future of federal criminal sentencing remains somewhat uncertain. What we do know is the Seventh Circuit holding that *Booker/Fanfan* is not retroactive. As for cases on appeal in our circuit, district judges will be asked by the Court of Appeals to state whether they would have imposed the same sentences had the guidelines been advisory rather than mandatory when sentences were imposed.

As for the future, district judges who impose sentences different from what the guidelines suggest will not only have to articulate their reasoning fully and carefully, they must also confront the proposition that a group of people—the Sentencing Commission—probably differ with them in a general way. What the court of appeals will say—a court that will not see a defendant in person or witness events first-hand—while performing their review function remains to be seen.

The answers to these questions will be supplied on a case-by-case basis, as will the congressional response to the Supreme Court's *Booker* decision. The early report from Judge Ricardo Hinojosa, Chair of the Sentencing Commission, is that sentencing practices have not differed much in the short period *Booker* has been the law of the land. That should neither be surprising nor unexpected.

At the least, it seems quite clear that everybody will have to work harder in the foreseeable future. Both prosecutors and defense lawyers can no longer rely on guideline calculations to simply trump other considerations, including some subjective ones unique to a particular defendant. Sentencing judges will have more material to review and evaluate, and must carefully justify their actions and non-actions. For appellate judges, a new review function has been mandated. Workloads are sure to increase.

Judge Sim Lake of the Southern District of Texas, Chair of the Judicial Conference Committee on Criminal Law, offered this perspective: "Sentencing decisions by the Supreme Court are often followed by an increase in the number of criminal appeals and collateral review proceedings. The post-*Booker* era will probably be no exception. As circuit precedent is developed, however, direct appeals and collateral attacks should subside to normal levels." In other words, we will work our way through this situation as well.

Because of *Booker* and newly enacted class action legislation by Congress, the Administrative Office of the U.S. Courts recently requested a $101.8 million supplemental appropriations for the current fiscal year. The AO believes both will drive up the workload of the district and appeals courts, the impact of which could not be taken into account in the judiciary's 2005 appropriations by Congress.

Whatever the outcome, the reality is the District Court is under considerable pressure from Washington to restrain if not reduce its budget. We lost a few positions in the office of the Clerk of Court in this year's budget, but unlike other districts we did not have to resort to shorter hours of operations, day-long courthouse closings or worker furloughs. However, with new work measurement formulas, a general decline in caseload and other factors, the hunt for further reductions


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in our court's budget is certain to continue in the year ahead. While only two-tenths of one percent of the entire federal government's budget, the judiciary may be approaching the limit of what can be cut or reduced in its funding and still provide effective administration of justice in our nation.

Budgetary considerations also impacted the District Court's plans for a new courthouse in our Western Division, in Rockford. In September 2004, the Judicial Conference of the United States placed a two-year moratorium on 42 federal courthouse construction projects nationwide. Eight remaining projects, including Rockford, were allowed to proceed with design only after a thorough review. The new Rockford courthouse was found to be on program, appropriately designed for the 30-year needs of the court, and, most significantly, on budget.

Design work is nearly complete for the new 208,000 square foot courthouse. The building will occupy a two-block, landscaped site in the heart of downtown, with 75 percent of the site devoted to open green space for public use and enjoyment. Three district and two bankruptcy courtrooms will be provided, along with space for the Clerk of Court, Pretrial Services, Probation, the U.S. Marshal Service, and the U.S. Attorney's office.

The building has been designed to maximize interior daylighting and views of the Rock River for both the building occupants and visitors, while providing efficient and flexible space to serve the needs of the judiciary for many years to come. The new courthouse will also be the first federal building in the Midwest, and one of only a few nationally, to achieve a "Certified Silver" rating under the U.S. Green Building Council's Leadership in Energy and Environmental Design, or LEED, program.

The project is now proceeding with the completion of construction documents, based upon the original program and design. This is a testament to the terrific stewardship of the project by Judge Philip Reinhard and the project design team. We are hopeful that construction funding will be authorized at the conclusion of the judiciary's construction moratorium.

From brick and mortar we move to electronic digits. In mid-January the court made the transition to a new docketing and filing system. This system, called Case Management/ Electronic Case Filing, or CM/ECF, is designed to allow documents to be filed with the court electronically via the Internet. As you may know, this system is being introduced in all federal courts. It is already being used in all Seventh Circuit district and bankruptcy courts, for example.

Initially, we have been using the new system internally, on the assumption that it would be important to work out any bugs we might encounter before we open the door to e-filing by attorneys. In early March, we assembled a pilot group with representatives from 15 law firms and the U.S. Attorney's office. We expect that the first e-filing by attorneys from this pilot group should begin any day.

By early April, attorneys will be able to go to the court's Web site and register for training in how to e-file. You can also get information there on how to set up your own e-filing account.

The procedures approved by the court for electronic filing indicate that e-filing by attorneys will be carried out on a voluntary basis at first. However, all other districts that have previously implemented this system have made e-filing mandatory for attorneys. Our court will soon be considering the same issue.

Regardless of buildings or computers, people still make the court work. In 2004, we added one district judge and faced three vacancies—one district and two magistrate judgeships. Judge Mark Filip joined the bench in February after Harry Leinenweber took senior status in 2003. Mark's superior intellect and youthful good looks should serve the court well. Judge Suzanne Conlon also went senior in April of 2004, while Magistrate Judge Edward Bobrick retired in June of last year. The District Court also received authorization for an eleventh magistrate judge in Chicago. The two magistrate judgeships were filled last month with the selection of Maria Valdez and Jeffrey Cole by the District Court judges. They will likely assume their posts in the late spring. Both bring outstanding backgrounds and experience to the court, and I am confident they will make considerable contributions. A special thanks must be extended to the 15-member merit selection panel, chaired by Michael Demetrio, that assisted in filling these vacancies.

That leaves Suzanne's seat. The court is confident that Illinois' two Democratic senators, Richard Durbin and Barack Obama, will work together

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with Republican Speaker of the House, U.S. Rep. Dennis Hastert, to make sure this seat is promptly filled.

Another change took place in the Dirksen Courthouse lobby. As many of you have seen, a roped-off area has been created for television and newspaper cameras and their operators. I am acutely aware of the important role the media play in keeping citizenry informed about the work of our court. Access to the lobby, however, is not a license to endanger others through reckless chases when news makers walk through the lobby. The court will continue a dialogue with the media about this situation in an attempt to meet both the needs of the press and the safety of everyone coming and going in the building.

And briefly, a word on statistics. Handouts featuring charts and graphics are available that detail the workload of our court this past year. While not included in that information, but of special note, is the nature of the criminal filings. Of the 1,362 felony defendants commenced during 2004, 35 percent involved drugs, 22 percent fraud, 11 percent firearms/explosives, 4 percent robbery and 28 percent all other kinds of crime. This continues a trend of drug cases consuming the lion's share of the court's criminal justice resources.

Finally, much of what goes on in our court cannot be accomplished without the active support of the lawyers who practice in the Northern District. I welcome your comments. On behalf of all the judges of the Northern District of Illinois, I thank you for your support in 2004 and ask for your continued input in 2005.

# Imaginative sanctions put pressure on attorneys

***By Judith G. Lysaught; Tribler, Orpett & Meyer, P.C.***

In three recent cases from three different jurisdictions, attorneys have been either reprimanded or sanctioned largely because of the actions of other attorneys. These cases constitute a compelling warning to all attorneys, from solo practitioners to those working in larger firms, and especially to attorneys who act in a supervisory capacity over other attorneys.

The first case, *In re Herbert Cohen*, 847 A.2d 1162 (D.C. App.Ct. 2004), involves the suspension of an attorney from the practice of law for 30 days because of his failure to properly supervise the associate who was working on his file. Respondent was a named partner in a small District of Columbia law firm, which represented a client in a trademark proceeding. The firm sought to register the trademark "ESSIAC" on behalf of its client, but after submitting the application, learned that the trademark was previously registered to a different company. The firm then advised its client that it would have to initiate a cancellation proceeding in order for the Patent and Trademark Office to act on the client's application.

During this time, one of the client's distributors had also been taking an active role in the trademark proceedings, and was authorized by the client to deal directly with the firm. However, a disagreement soon arose between the client and the distributor, and the client instructed the firm not to deal with the distributor any longer. Despite the client's instructions, Jonathan Cohen, the respondent's son, who was the attorney handling the majority of the work on the file, withdrew the client's trademark application at the distributor's request, making the trademark available for anyone to register, including the distributor.

To make matters worse, the client's requests for information were repeatedly ignored by Jonathan Cohen, and the client was never informed that the trademark application had been withdrawn. Not surprisingly, the client filed a complaint against Herbert Cohen alleging numerous violations of the Rules of Professional Conduct. After an extensive hearing, the hearing committee found that Herbert Cohen had indeed violated many of the Rules of Professional Conduct, most notably Rules 5.1(a) and 5.1(c)(2).

Rule 5.1(a) states in relevant part:

> (a) Each partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurances that the conduct of all lawyers in the firm conforms to these Rules.

Rule 5.1(c)(2) states the following:

> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
> (2) The lawyer has direct supervisory authority over the other lawyer or is a partner in the firm in which the other lawyer practices, and knows or reasonably should know of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. (Emphasis added).

During the hearing, Herbert Cohen admitted that basic ethics training was not provided to young lawyers in the firm and that no review mechanisms were in place whereby an associate's work would be reviewed and guided by a senior attorney. Thus, respondent conceded that he and his firm had violated Rule 5.1(a).

With respect to Rule 5.1(c)(2), respondent argued that he could not be personally censured for the actions of another attorney of which he had no knowledge, because under the ABA's Model Rules of Professional Conduct, an attorney can only be disciplined for a violation of the Rules of which he has knowledge. The Board on Professional Responsibility, and ultimately the appellate court, disagreed with Respondent's analysis, reasoning that Rule 5.1(C)(2) places an obligation upon attorneys who supervise other lawyers to become knowledgeable about the actions of the attorneys who work on files for the firm's clients. As the court reiterated, the "reasonably know" provision was purposefully included in the D.C. Rules of Professional Conduct to encourage supervising attorneys to carefully monitor their cases and the junior attorneys who work on them.

Thus, even though many of the ethical violations for which Herbert Cohen was found guilty were actually committed by his son, Jonathan Cohen, the court held that he should not have been a passive spectator in his firm's repre-

sentation of his client. Indeed, had he taken a more active role in the case, he could have prevented the withdrawal of the trademark application and avoided the representation of a client whose interests were directly adverse to those of the original client.

The next case also concerns a violation of the Rules of Professional Conduct. It is a decision from the Supreme Court of Connecticut, *Daniels v. Alander*, 268 Conn. 320, 844 A.2d 182 (2004). It involved Dennis Driscoll, a junior attorney who was reprimanded for his failure to correct misstatements made by Douglas Daniels, his superior, in an ex parte proceeding that Driscoll attended. In that case, Daniels and Driscoll sought an ex parte application in Connecticut awarding their client temporary custody of her two children and a restraining order against the children's father. However, a separate action was concurrently pending in the New Jersey Superior Court to resolve custody and visitation issues. During the hearing, Daniels represented that the client also had an attorney in New Jersey where she was awaiting a ruling from the New Jersey Superior Court deciding issues relating to the children's custody.

When the trial court inquired why the client did not file her application before the New Jersey court, Daniels responded that Driscoll had spoken with the client's New Jersey counsel, Veronica Davis, who recommended that the emergency custody application proceed in New Jersey, not Connecticut.

A short while later, the Connecticut court received a letter from Veronica Davis explaining that, upon reviewing the transcript from the emergency custody proceeding, she was surprised to find that many of the representations made by Daniels were untrue. A hearing was then conducted by the Connecticut court concerning Davis' allegations.

At the hearing, Davis testified that Daniels had misrepresented her opinions about bringing the emergency application before the New Jersey court. Indeed, she had previously advised the client that New Jersey was the appropriate forum in which to raise issues regarding the custody of the children, and that if the client was so inclined, the hearing should proceed before the New Jersey court, and not in Connecticut. Davis also testified that she specifically advised Driscoll not to proceed with the emergency custody application, but if his firm did so, it should proceed before the New Jersey court.

Taking Davis' statements as true, the court found that Driscoll had violated subsections (a)(1) and (d) of Rule 3.3 of the Rules of Professional Conduct by failing to correct false statements made to the court in his presence, and by failing to inform the court of all material facts, including Davis' recommendations concerning their mutual client. Driscoll argued that his failure to correct Daniels' misrepresentations regarding his discussions with Davis cannot form the basis of a violation of Rule 3.3(a)(1), because only the attorney who actually makes a misrepresentation to the court can be censured pursuant to Rule 3.3 (a)(1). Driscoll also argued that the misrepresentations were not material to the custody issues that the court was asked to resolve, and as such, cannot form the basis of a violation of Rule 3.3(d).

Rule 3.3 (a)(1) states:

> (a) In appearing in a professional capacity before a tribunal, a lawyer shall not:
> (1) Make a statement of material fact or law to a tribunal, which the lawyer knows or reasonably should know is false.

Rule 3.3(d) states:

> In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer, which will allow the tribunal to make an informed decision, whether or not the facts are adverse.

The Supreme Court disagreed with Driscoll's position, reasoning that there are circumstances where the failure to make a disclosure pursuant to Rule 3.3 constitutes an affirmative misrepresentation. Moreover, the court stated that it was apparent from the very title of Rule 3.3, "Candor toward the Tribunal," that the rule is not simply intended to limit its application to the party actually making the affirmative misstatement. Indeed, Rule 3.3(a) can pertain to an attorney who fails to correct a misstatement made in his presence by another attorney. The court further explained that the misstatements made by Daniels inaccurately conveyed the contents of a conversation that Driscoll himself had had with Davis. As such, the court admonished Driscoll, because not only was he in the best position to correct Daniels' misstatements by virtue of his knowledge of the conversation with Davis, he was in fact duty-bound to do so as an officer of the court.

Driscoll then argued that Rule 3.3(d) should not apply under the circumstances, because the misstatements were not material to the children's custody, and as a young associate, simply staying quiet while his superior made a misstatement of fact could not serve as the basis for a violation of Rule 3.3(d). The court quickly pointed out, however, that Driscoll was participating in an ex parte emergency custody proceeding, and that the lawyer for the represented party has the correlative duty to disclose material facts known to him, and that he reasonably believes are necessary for the judge to make an informed decision. The court emphasized that this is so even when such disclosures do not help the disclosing lawyer's case.

Therefore, it is the responsibility of all attorneys to ensure that the court has all of the relevant facts before it, and attorneys must be cognizant that misrepresentations made by others can negatively impact them when they have knowledge of the misstatement and fail to correct it.

The last case, *Belleville Catering Co. v. Champaign Market Place, L.L.C.*, 350 F.3d 691 (7th Cir. 2003), does not involve a violation of the Rules of Professional Conduct, but a failure by both attorneys to properly analyze federal jurisdictional issues, which resulted in the Seventh Circuit Court of Appeals dismissing the case and ordering both plaintiffs and defense counsel to provide free legal representation to their clients for the remainder of the litigation. In that case, the plaintiff alleged, pursuant to 28 U.S.C. § 1332, that it was a Missouri corporation with its principal place of business in Missouri, and that the defendant was a Delaware corporation with its principal place of business in the State of Illinois. The defendant's attorney simply admitted the allegations without investigation and filed a counterclaim against the plaintiff. At the trial, the jury entered a verdict against the plaintiff and for the defendant on its counterclaim in the amount of $220,000, and plaintiff appealed.

Upon review, the appellate court visited the issue of jurisdiction and found that both counsel and the magistrate had assumed, incorrectly, that the defendant, a limited liability company, is treated in the same manner as a corporation for purposes of determining citizenship. However, this is not the case, for a limited liability company is a citizen of every state in which any of its members reside. The defendant's attorney then conceded that several of its

members resided in Illinois. As such, the defendant was not a Delaware corporation as admitted by defendant's counsel in the complaint.

The court also determined that the plaintiff was actually incorporated in Illinois, and not in Missouri, as it had asserted in the complaint. When asked to explain why the plaintiff pled that it was a citizen of Missouri when in fact it was a citizen of Illinois, plaintiff's counsel responded that a lease between the two parties described the plaintiff as a "Missouri corporation," and he simply assumed that the statement must be true. Thus, the court's questioning revealed that citizens of Illinois were on both sides of the litigation.

Irritated by the attorneys' lack of investigation into the substance of their pleadings, the court remanded the case to the district court with instructions to dismiss the complaint for lack of subject matter jurisdiction. The court further ordered that, because counsels' lack of analysis of the proper jurisdiction cost not only the court's time but also their clients' money, the attorneys were to perform, without additional fees, any further services necessary to bring the suit to a conclusion in the state court, warning that it is the duty of all attorneys to investigate rather than merely assume that jurisdiction exists. The court counseled that the attorneys should have obtained the appropriate certificates of incorporation, or even searched the Internet for the appropriate information.

Taken together, these three cases illustrate the negative consequences that can result when attorneys fail to act conscientiously and are not attentive to the actions and statements of other attorneys when representing clients. In the first case, it was the respondent's failure to supervise the attorney working on his client's file that resulted in his own 30-day suspension from the practice of law. In the second case, the junior attorney's failure to correct misstatements made by a senior attorney resulted in his being reprimanded by the court. Finally, in the last case, the defendant's attorney lost a $220,000 judgment, and was ordered to provide free legal representation to his client because of his failure to verify the accuracy of the allegations in plaintiff's complaint.

We should all be mindful of the difficult lessons learned by the attorneys involved in these cases and incorporate them into our own practices to prevent similar problems for ourselves and our firms.

# "Post-conviction" relief for ineffective assistance in sexually dangerous cases

***By Tom Bruno***

In *People v. Lawton*, 212 Ill.2d 285, 818 N.E.2d 326 (2004), the Illinois Supreme Court has decided a case that directly affects the rights of persons found to be sexually dangerous under the Sexually Dangerous Persons Act (725 ILCS 205/0.01 et seq.), and which indirectly affects the rights of persons found to be sexually violent under the similar Sexually Violent Persons Commitment Act (725 ILCS 207/1 et seq.). The Supreme Court has provided these defendants with a procedure for review of their cases by means of a section 2-1401 petition.

Gary Lawton was declared a sexually dangerous person and committed to the custody of the Department of Corrections pursuant to the Sexually Dangerous Persons Act. He subsequently petitioned the circuit court of Pike County to obtain relief from that judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401). As grounds for his petition, Lawson argued that he had been denied the effective assistance of counsel. The State moved to dismiss Lawton's petition, arguing that the issues raised by Lawton could not be raised in proceedings brought under section 2-1401. The trial court denied the State's motion, granted Lawton's petition, and terminated his commitment to the Department of Corrections.

The State appealed, and the appellate court reversed, holding that Lawton's petition should not have been granted. (335 Ill. App. 3d 1085). The court stated that proceedings under section 2-1401 are not an appropriate forum for a defendant to raise claims regarding competency of counsel.

The Illinois Supreme Court upheld the appellate court's ruling that Lawton was not denied effective assistance of counsel, but reversed the appellate court's ruling that a 2-1401 motion was not an appropriate vehicle by which to raise the issue of effective assistance. The court noted that a defendant's right to counsel in proceedings under the Act not only is conferred by the statute itself, but also is required by the United States Constitution. Implicit in this right to counsel is the right to the assistance of counsel who is effective. Whether a defendant has received effective assistance of counsel is judged according to the same standards used in criminal cases.

The court stated that principles of fundamental fairness dictate that defendants found to be sexually dangerous be provided with a procedure when their claims of ineffective assistance of counsel go unheard because the same lawyers who represented them at trial handled their direct appeals. The problem is that such defendants cannot invoke the Post-Conviction Hearing Act. The Post-Conviction Hearing Act applies only to persons imprisoned pursuant to a criminal conviction.

The court said that some other remedy must therefore be found for sexually dangerous defendants. Because proceedings under the Sexually Dangerous Persons Act are civil in nature, the Illinois Supreme Court ruled that a 2-1401 petition is the appropriate procedure for such cases. The court noted that one of the guiding principles in the administration of section 2-1401 relief is that the petition invokes the equitable powers of the circuit court to prevent enforcement of a judgment when doing so would be unfair, unjust, or unconscionable. Although the statute is ordinarily used to correct errors of fact, nothing in the language of section 2-1401 limits its applicability to such matters.

The court concluded that, even though Lawton's own claims lack merit, that fact would not deter them from recognizing the propriety of allowing other defendants subject to the Sexually Dangerous Persons Act to utilize section 2-1401 to assert claims of ineffective assistance of counsel. Said the court: "While this defendant's constitutional claims may lack merit, other defendants will have valid claims. It is incumbent on us, as this state's highest court, to insure that such claims do not fall victim to uncertainties in the law."

# Recent judicial appointments and retirements

1. The Illinois Supreme Court, pursuant to its constitutional authority, has appointed the following to be Circuit Judge:
   - William C. North, 20th Circuit, March 7, 2005
   - Orville E. Hambright, Cook County Circuit, 1st subcircuit, April 12, 2005
   - Bettina Gembala, Cook County Circuit, 11th subcircuit, April 22, 2005
2. The Circuit Judges have appointed the following as Associate Judge:
   - Brian A. Babka, 20th Circuit, February 28, 2005
   - Mark Lane Shaner, 2nd Circuit, March 2, 2005
   - Scott J. Butler, 8th Circuit, April 1, 2005
3. The Supreme Court has accepted the resignations of the following:
   - William J. Aukstik, Associate Judge, Cook County Circuit, retired, February 28, 2005
   - James R. Edwards, Associate Judge, 16th Circuit, retired, February 28, 2005
   - Robert E. Cusack, Retired Judge Recalled, Cook County Circuit, retired, March 31, 2005
4. The following Judge has deceased:
   - Allen Hartman, Appellate Court, First District, March 3, 2005

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