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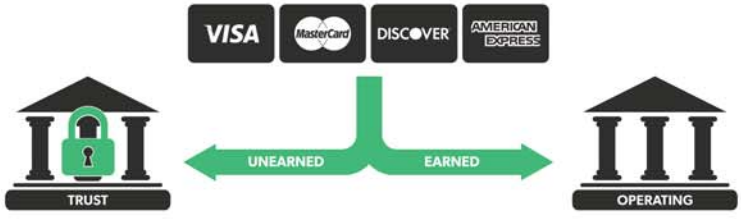

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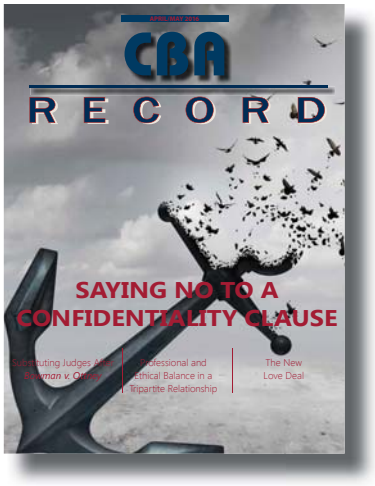

On the Cover
Cover Art Courtesy of ThinkStock.

PRESIDENT'S PAGE

BY PATRICIA BROWN HOLMES

A Year in Review

I wanted to take my last column to express my sincere appreciation for the many kind wishes, thoughts, offers of assistance, help with conferences and seminars, attendance at meetings, kind gestures and support, among all the others things you have all done to make my year as President of the Chicago Bar Association a wonderful experience. I have tried to be as inclusive as possible in every aspect of the association.

Each of you has participated and supported those efforts. So I want to thank everyone who has been involved in making this a fun-tastic bar year! And believe it or not, the year has been chock full of magnificent and impactful activities, including meetings of more than 93 committees, (and 3 new committees–Mindfulness, Creative Arts and Trial Practice), as well as International CLE in Switzerland, CBA Leadership Development Program, Town Hall Meeting on Educational Inequality, Women Lawyers in the Courtroom, Vanguard and Dickerson Award Luncheons, Ruth Bader Ginsburg luncheon, Justice John Paul Stevens Award Luncheon, YLS End Distracted Driving Program, World City Bar Leaders Conference in Barcelona, Herman Kogan Media Awards luncheon, WYCC Television Programming, WTTW Public Announcements, Law Day Celebration, Lawyers Lend-A-Hand, Membership Appreciation Week, and a host of other activities too numerous to mention.

I would like to give a great big "shout out" to:

–The wonderful CBA staff (Beth McMeen, Tamra Drees, Linda Heacox, David Beam, Tim Hogan, Angie Cruz , Brenda Ott, Loretta Wells, Therese Kurth, Karen Stanton, Sharon Nolan, Sharon Stepan, Jennifer Byrne), and especially Executive Director Terry Murphy, for making it all look easy when it really is a LOT of work.

–Special thanks to CBF President Allegra Nethery, and the CBF's great staff, under the leadership of Bob Glaves and Dina Merrell.

–The best Executive Committee and Board of Managers ever! Dan Cotter, Dan Kotin, Judge Mulroy, Jesse Ruiz, Steve Elrod; Matt Passen, Chasity Boyce, Karina Ayala-Bermejo, Tom Boleky, James FortCamp, Natacha McClain, Meredith Ritchie, David Scriven-Young, Judge Amy St. Eve, John T. Theis, Ashly Boesche, Justice Maureen E. Connors, Mary Curry, Matt Jenkins, Eileen O'Connor, Nigel F. Telman, Frank Tuzzolino, and Allison Wood;

–All of the folks at Riley Safer Holmes & Cancila LLP as well as Schiff Hardin LLP for being patient, kind and supportive while I juggled being president of a 22,000 member association while trying to be a good partner and colleague;

It's Where You Belong

The Chicago Bar Association
Membership Dues Renewal

Renew by May 31 and Get Free CLE Coupons*

April 2016

Dear Member:

My heartfelt thanks to each and every one of you for your membership. The Association's continued success lies in the strength, participation and support of our members, and it is only because of you that:

- ✓ The CBA is the leading metropolitan bar association for professional training, continuing legal education programming and member services in the United States.
- ✓ The CBA's 92 general bar and 28 young lawyer committees offer hundreds of cutting edge legal and educational programs, live and online, at no cost to our members. The majority of CBA committee meetings and related legal education programs qualify for Illinois MCLE credit and offer excellent networking opportunities.
- ✓ More than 7,200 members participate in the CBA's CLE*Advantage* program, still only $150 per plan year for unlimited access to hundreds of CLE & LPMT programs (live, webcast and DVD formats).
- ✓ The CBA leads the nation in Law Practice Management & Technology training, which includes an array of how-to seminars, hands-on technology training programs (live and online), and low-cost consulting services for members.
- ✓ The Young Lawyers Section–with more than 9,000 members–continues to be the major source for young lawyer learning, social networking, professional, practice and business development, skills training, community service and leadership opportunities for Chicago-area young lawyers.
- ✓ We will continue several free member programs, including our "Practice Basics" series featuring leading lawyers and judges, one-on-one and group mentoring opportunities, and practical business and legal skills training, career counseling and more.

I am pleased to report that there will be no dues increase for the 11th consecutive year. The CBA's leadership and staff have worked very hard to keep our administrative costs down. Dues auto pay plan and financial hardship dues are also available options.

Together, we have achieved an outstanding level of programming excellence that enhances professionalism and collegiality among members of the bench and the bar. In addition, our legislative program and recommendations for local, state and federal court rule changes are essential services for all Illinois lawyers.

We value and treasure your membership. Thank you and I encourage you to renew your membership and take advantage of our special renewal offer.

Sincerely,

Patricia Brown Holmes
CBA President

Renew at www.chicagobar.org/renew, call 312-554-2020, or return your payment by mail. Thank you!

**Renew by midnight May 31, 2016 and receive free CLE coupons from the CBA and West LegalEdcenter. Details at www.chicagobar.org/renew.*

On the dais at the 2016 Earl Burrus Dickerson Awards. L to R – Dickerson Award Chair Judge E. Kenneth Wright Jr.; honoree Chief Judge LeRoy Martin of the Criminal Court; honoree Judge Marilyn Johnson (ret.), Circuit Court of Cook County, Child Protection Section of Juvenile Court; Chief Judge Timothy Evans, Circuit Court of Cook County; Justice Mary Jane Theis, Illinois Supreme Court; and Young Lawyers Section Chair Matthew Passen.

At the John Paul Stevens Award luncheon at the Standard Club, October 13, 2015, are (left to right): Robert Clifford, past President of the CBA; Timothy Eaton, past president of the CBA; and Judge William Bauer of the U.S. Court of Appeals.

–My husband Michael and my entire family for being super loving and supportive while I was gone all year;

–My judicial buddies from both state and federal court, including Chief Judge Castillo, Chief Judge Evans, Judges Williams, Bauer, Chin, Wood, St. Eve, Coleman, Kendall, Banks, Martin, Burns, Lee, Pallmeyer, Hall, Cunningham, Patti, Ross, Wright, Mulroy, Ball Reed and others who were supportive in a variety of ways–(special shout for Judge Castillo for the Women Lawyers in the Courtroom idea and Judge St Eve for chairing a great committee (you all know who you are—thank you as well!);

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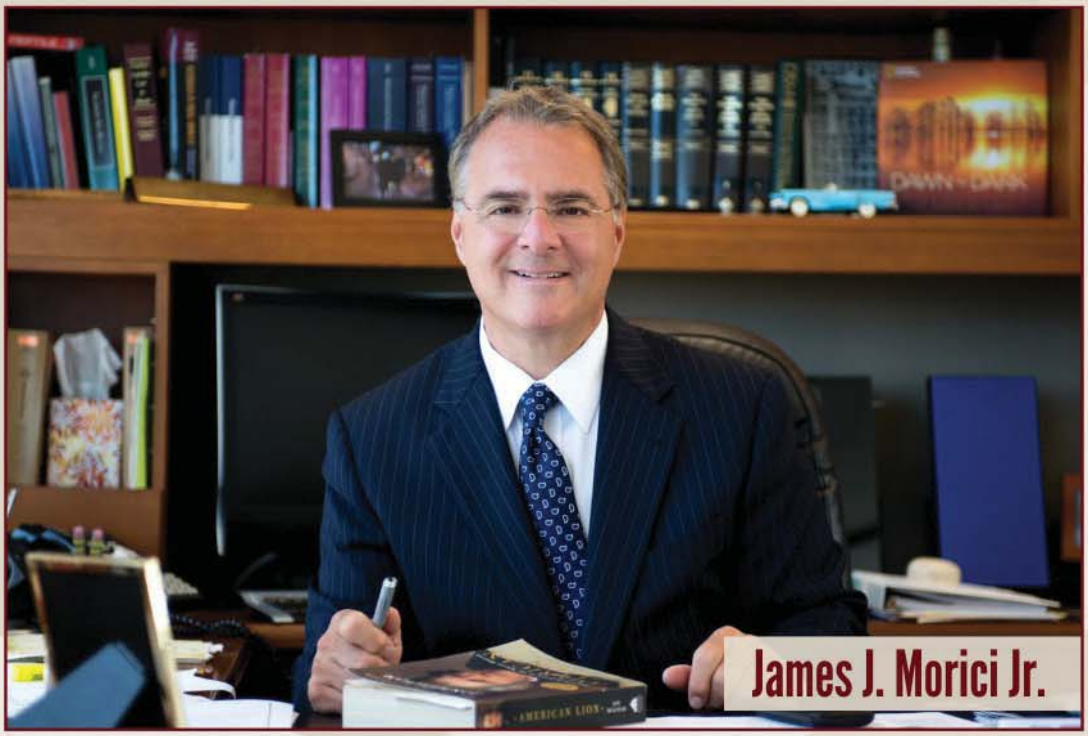

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At the reception following the symposium, Women Lawyers as Lead Council, are CBA Assistant Executive Director Beth McMeen and Judge Holmes. The conference, held at the Federal Courthouse, was attended by 330.

With Judge Ann C. Williams, U.S. Court of Appeals, at the CBA Annual Meeting Luncheon, Standard Club, June 25, 2015.

With Illinois Appellate Court Justice Joy V. Cunningham at the President's Reception, September 24, 2015 at the CBA.

With the 2016 Vanguard Awards honorees at the Standard Club, April 20. Seated, left to right: Zaldwaynaka Scott, Jayne Reardon, Rosa Maria Silva, Sharon Hwang, Hon. Jessica Arong O'Brien, Leslie Richards-Yellen. Standing, left to right: Hon. Ramon Ocasio, Mark Dobrzycki, Judge Patricia Brown Holmes, Hon. William J. Haddad (ret.), Standish E. Willis, Justice Michael B. Hyman.

–All of the CBA award recipients for being eligible for recognition–it takes tremendous time and energy to be involved in the service of our legal community–I commend each of you!;

–All of the diverse bar leaders who participated in programming and collaborated with the CBA to make this an exhilarating bar year;

–All of the chairs and members of various committees who planned special and wonderful events, luncheons, meetings, and who chaired the "hot-bed" topics, like legislation and judicial evals–Carmel Cosgrave, Jeff Finke, Lawrence Suffredin, Tom Suffredin, Howard Suskin, Collins Fitzpatrick, Leslie Landis come to mind…among others;

–All of my colleagues and friends who "hung out" with me at various events and followed along on social media as I traveled and participated in a variety of CBA activities (and particularly those who traveled to London, Switzerland and Rome–what a blast!) (Special thanks to Marc Firestone, Senior Vice President and General Counsel of Philip Morris International, PMI's headquarters in Lausanne, Switzerland, and Sandra Yamate and Sharon Jones–great job!)) And special shout to Aurora Austriaco for a great presentation winning us the rights to the 2018 World City Bar Leaders Conference!)

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KEYS TO PERSONAL, PROFESSIONAL, AND FINANCIAL SUCCESS

Empowering Women Lawyers

By Rosemary Simota Thompson
CBA Record Editorial Board

They had all been there, done that; and they looked great, even though they were wearing suits, not T-shirts. The seasoned panel at the CBA/YLS seminar "Empowering Women Lawyers: Advancing Legal Careers through Education, Salary Negotiations, and Equal Pay" held March 22, all confronted the glass ceiling–and circumvented it. They all challenged the status quo of gender imbalance–powerful women doing powerful work. Here are their stories.

Statistical Realities for Women Lawyers

Emily N. Masalski of Rooney Ripple & Ratnaswamy, LLP spoke on two major topics. She worked on the ISBA initiative to survey Illinois law firms of all sizes to ascertain whether equal pay for equal work is a reality in Illinois. It isn't. Although June 10, 2013 was the 50th anniversary of the passage of the Equal Pay Act, it has yet to become a reality. The hard truth: Women lawyers in Illinois earn less than their male counterparts in large and small firms alike. The exception? The more women in leadership positions in their firms, the greater the pay equality in that firm–whether large or small.

How to rise above the stats? Masalski challenged the audience to push for the implementation of workplace policies that promote the inclusion and advancement of women attorneys. She also explained how she spurred the Illinois Legislature to mandate a special place for nursing mothers in airports. Such facilities are now available at both O'Hare and Midway, thanks to the efforts of a certain new mother–Masalski.

Salary Negotiations and Equal Pay

Kristin E. Prinz of The Prinz Law Firm, P.C., urged the audience to have higher expectations of themselves, and act accordingly. She posed a frank question: "*What do you want out of life?*" Only you can attain what you want, she advised, and you are ultimately responsible for your own happiness–or lack thereof. It begins with your mindset, Prinz stated. She shared her own approach: advocate for yourself and negotiate for what you want, whether at the office or at home. It is no secret that women are often timid in stating their own needs and asking directly for what they want. Prinz urged the audience to approach such a challenge the way she does: square your shoulders, practice your power poses, rehearse and replay your pitch for what you really want/need and why–be it a raise for work well done or getting your significant other to do their fair share of the housework.

Amending the Equal Pay Act of 2003

Senator Jacqueline Y. Collins of the Illinois General Assembly had a first career as a journalist, and she has a unique perspective on how to make gender equality truly happen. Be bold. Speak up. Know that one can truly make a difference. She observed that women run for office to do something, while men run for office to be something. Senator Collins cautioned the audience not to be discouraged, as there is always a way to find fulfillment. She ought to know. After working for CBS-TV as their Emmy-award-winning, first-ever black editor, she was not satisfied with her life's work. So at age 50, she quit CBS to attend Harvard's John F. Kennedy School of Government and Harvard Divinity School. Upon graduation, she entered the political arena and never looked back. A passionate spokeswoman for social and economic justice, Senator Collins noted that fear often hampers women, as they often absorb the negativity around them. She observed that white women make 79 cents for every dollar a man makes; black women earn 64 cents for every dollar a man earns; and Latinas are paid 47 cents for every dollar a man is paid for comparable work. Nevertheless, she noted, "you are more powerful than you know." She concluded her presentation by urging workers to learn about their rights and to educate employers as to their responsibilities under both state and federal laws.

Taking Action: How We Can All Create Lasting Change

Barbara L. Yong of Golan & Christie, LLP is a powerful advocate for women's rights generally and pay equity specifically. She spoke about the genesis of Equal Pay Day Chicago. It started as a rally in April 2011 by a coalition of women's organizations and governmental entities to heighten

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The Chicago Bar Association

143rd Annual Meeting

Thursday, June 23, 2016

Luncheon

2016

-Presiding-
Patricia Brown Holmes
Outgoing President
The Chicago Bar Association

- Report of the Election Committee
- Introduction of Officers and Board of Managers
- Treasurer's Report
- Remarks by Outgoing President
- Presentation of Lincoln Gavel to Incoming President

-Remarks-
Daniel M. Kotin
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2016-2017

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Legal Protections for Rape Victims and Children Conceived by Rape

By Lindsay R. Foye

Attendees at the AFW's monthly meeting on February 23 were privileged to hear attorney Shauna Prewitt give a presentation titled *"When Sexual Assault Results in Parenthood: Legislative Options to Protect Victims' Rights."* Prewitt, an associate in the Litigation Group of Skadden, Arps, Slate, Meagher & Flom LLP, educated the audience about inadequate legal protections in many states for rape victims and children born as a result of rape. She also discussed her advocacy and legislative efforts to improve existing protections, resulting in the enactment of rape-conception custody laws around the nation.

Prewitt opened the audience's eyes to a nightmarish situation that rarely gets the public attention it deserves: a woman who becomes pregnant through rape and decides to raise the child herself may be forced into a custody battle if the rapist decides to assert his parental rights. Even if the attacker is eventually convicted of rape, the slow pace of the criminal justice system means that the mother may have to spend years negotiating visitation schedules and coordinating parenting decisions with the man who attacked her. Prewitt recounted the decision of one family court judge who refused to terminate a convicted rapist's parental rights because the man had formed a relationship with the child during the two-year period between the child's birth and the father's conviction. This judge reasoned that the trauma experienced by the mother when forced to see her attacker again to comply with a court-ordered visitation schedule was not a relevant consideration in applying the "best interest of the child" legal standard. Shockingly, this judge expressly concluded that being a convicted rapist was not inconsistent with being a good father.

Since she was a law student, Prewitt has advocated locally and nationally for changes to custody laws that would prevent such perverse outcomes for women who become mothers through rape, and for their children. Prewitt explained how persistent misconceptions about rape have created barriers to such legislative changes. For example, many people assume that women who become pregnant through rape would not want to raise "the rapist's child" and would therefore choose to either abort the pregnancy or put the child up for adoption. This misconception leads many people to assume that a woman who becomes pregnant through rape and decides to raise the child must not have actually been a rape victim. In fact, Prewitt informed the audience the available studies on this topic reveal that over 30% of women who conceived through rape chose to carry their pregnancies to term and raise the children themselves.

Other barriers include medically ill-informed opinions such as those expressed by former Congressman Todd Akin that "legitimate rape rarely leads to pregnancy." Prewitt garnered national attention in 2012 when she published an open letter countering Akin's obtuse statement by sharing her personal story of becoming pregnant as a result of rape, deciding to keep and raise her daughter, and discovering the legal obstacles for women like her who decide to raise a child conceived through rape.

In spite of these obstacles, Prewitt has had remarkable success in drafting and helping to achieve passage of legislation that makes it easier for rape victims to avoid custody battles with their attackers. In the past five years, Prewitt has drafted and/or helped pass legislation in 14 states, including Illinois, and she is currently working with more states that are considering similar legislation. Prewitt also worked with Congresswoman Debbie Wasserman Schultz to draft the Rape Survivor Child Custody Act, which President Obama signed into law last year as part of the Justice for Victims of Trafficking Act of 2015.

Shauna Prewitt's personal story and professional accomplishments are tremendously inspiring, and her engaging presentation led to much spirited discussion in the packed meeting room. ■

For more information on the CBA's Alliance for Women, go to www.chicagobar.org/afw.

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CLE & MEMBER NEWS

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In April, all members were mailed an annual dues statement for the membership period June 1, 2016- May 31, 2017. As a special incentive for renewing early, if your dues payment is received by May 31, you'll receive free CLE coupons (one free CBA seminar and two free online seminars from the West LegalEd Center, coupon details available at www.chicagobar.org). Renewing is easy: online (www.chicagobar.org), by phone (312-554-2020), by fax (312-554-2054) or by mail. No dues increase for the 11th year in a row!

New benefits include: More free CLE, law firm marketing and business development programs, solo/small firm resource portal, judicial meet and greets, legal news feeds, online practice area document library, personalized career counseling, mentoring programs, how to's on legal and business software, and more. Most of these new benefits are free or very low cost. Please see the member benefit and renewal spread on page 27 of this issue, and visit www.chicagobar.org to see a complete list of what's new at the CBA.

We appreciate your past membership support and look forward to having you join us for another outstanding year. Questions regarding dues statements should be referred to the CBA's Membership Accounting Department at 312-554-2020 or billing@chicagobar.org ■

Dues Auto Pay Plan Available

Wish you could spread your dues payments throughout the year? Tired of getting monthly invoices from the CBA? Want to save on stamps, envelopes and bill payment time? Looking for free CLE coupons?

If you answered yes to any of these questions, you should sign up for the CBA's Dues Auto Pay Plan which allows you to automatically bill your CBA membership dues to your designated credit card on an annual, semi-annual, quarterly or monthly basis. All we need is your authorization and enrollment form. This is a great way to save time and ease up on your budget. See complete details and enrollment form at www.chicagobar.org, or call 312/554-2020. (Installment plans apply to dues only. CLE Advantage fee, voluntary contributions and monthly membership charges are not included in this option. Automatic charges will begin on June 1.) ■

Free Seminars from West LegalEdcenter

The West LegalEdcenter can help you keep current in your practice area anywhere, anytime. With over 65 respected CLE providers, the West LegalEdcenter offers hundreds of online CLE programs including most CBA and YLS seminars.

And now, you can access two free CBA seminars on the West LegalEd Center by renewing your CBA membership by May 31. To receive this special offer, send in your dues payment by May 31 and make sure the CBA has your email address on file. In June 2016 and January 2017, you will receive an email confirmation from West LegalEdcenter with your free registration information. For more information on the West LegalEdcenter and to see current program listings, visit www.chicagobar.org and click on the CLE tab, then West LegalEdcenter. ■

Important Dues Billing Reminders

- Annual Dues. In our ongoing effort to reduce administrative expenses and keep dues at the current level, the CBA has an annual billing cycle.
- Dues Auto Pay. Spread your dues payments throughout the year by signing up for the Dues Auto Pay Plan which allows you to pay your dues automatically on a monthly, quarterly, semi-annual or annual basis at no extra cost via automatic credit/debit card charges.
- Reduced Dues for Financial Hardships. Unemployed members and those with financial hardships may request our reduced annual dues rate of $50.
- eStatement. Receive your CBA bills by email only and save time, postage and the environment.
- Billing Statement. The CBA's statement allows you to choose any or all of the above options and add in your own level of contributions to the Bar Foundation Legal Aid Fund and the CBA Building Fund.

If you have any questions regarding your dues statement, email billing@chicaobgar.org or call 312/554-2020. CBA membership is an important investment in your professional and personal growth. We encourage you to renew, thank you for your support and look forward to serving you in the new bar year. Remember to renew by May 31 to receive free CLE coupons.

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Civil Rights: Criminal Investigation, Prosecution and More
May 3 • 12:00-2:10 p.m.

Storytelling for Lawyers
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Residential Real Estate Closings: The Basics and Beyond
May 5 • 2:00-6:00 p.m.

Diversity Recruiting: From Client Concerns to Candidate Opportunities
May 10 • 12:00-2:10 p.m.

How To... Create a Web Resume with Strikingly
May 10 • 1:45-2:45 p.m. (complimentary)

When Minor Guardianship Get Complicated
May 10 • 3:00-6:00 p.m.

Navigating the Insurance Coverage Case from Inception to Appeal
May 11 • 3:00-6:00 p.m.

State and Local Tax
May 12 • 12:00-2:10 p.m.

Two in One: Digital Literary Assets & IP for Owners and Users
May 12 2:00-5:00 p.m. • May 13 9:00-5:00 p.m. • Palmer House Hilton

Employee Accommodations
May 12 • 3:00-6:00 p.m.

Are Cuba & Iran Now Open for Business?
May 16 • 3:00-6:00 p.m.

Hot Topics in Securities and Delaware Corporate Law
May 17 • 3:00-6:00 p.m. (reception) • Latham & Watkins LLP

The Password is Ethics
May 23 • 2:00-4:15 p.m.

How To... Store, Share and Manage Documents with BlueTie Vault
May 24 • 1:45-2:45 p.m. (complimentary)

Marijuana Update: What's New in Illinois and Around the Country
May 25 • 12:00-1:00 p.m.

Grow Your Legal Practice
May 25 • 3:00-6:00 p.m.

To register, call 312-554-2056 or visit www.chicagobar.org.
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BlueTie Vault

BlueTie is offering 10% off BlueTie Vault to all members of the Chicago Bar Association. BlueTie Vault is a cloud based storage system that allows users to retrieve important documents in second from anywhere and any device.

Save time and money with BlueTie's secure and easily accessible Vault that allows firms to customize and organize digital documents to best suit them. Learn more at http://www.bluetie.com/technology-innovation/bluetie-vault-for-law-firms.

Empowering Women Lawyers continued from page 14

awareness of the wage gap between the sexes. This year, the 6th Annual Equal Pay Day Chicago was held at Daley Plaza on Tuesday, April 12. Featured talent included FM Supreme, Awsomely Luvvie, Women in Comedy, Jacqui Robertson, Global Diversity, Officer, William Blair and Emcee Sally Lou Loveman. ■

What Do You Want Out of Your Life?

Kristin E. Prinz of The Prinz Law Firm, P.C., ended her presentation with her top ten list of points to ponder when negotiating a salary increase:

- Just do it.
- You have to be in the game before you can play the game.
- Know the market. An employer wants to hear what you are worth.
- Negotiate raises and promotions by talking dollars and cents.
- Negotiate everything, but watch your timing. You do not want to approach your boss after he has just had a root canal.
- Practice "the ask."
- Ask for more than you want. It's Negotiation 101.
- Be your best self.
- Base your pitch on your achievements, and learn to strut your stuff.
- Have a team of wing women with you for help, practice and support.

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Chicago Bar Foundation
Report

The Chicago Bar Foundation
Ensuring access to justice for all

Pricing for Access to Justice

The Billable Hour Needs to Go

By Bob Glaves
CBF Executive Director

While it's been years in the making, with some notable exceptions our profession has managed over time to price the proverbial regular guy out of the market for legal services. It has reached the point that many lawyers will tell you only half-jokingly that even they could not afford their own services if they were to encounter a serious legal problem.

In part, this sad state of affairs is a reflection that in too many cases, our services as lawyers really have become too expensive for low and moderate income people who need them. It also is a reflection though that the market for legal services is largely opaque when it comes to pricing: people who might be able to afford the legal help they need often don't even try to get a lawyer because they have no idea what it might cost.

These are problems largely of our own making, and the billable hour is a common denominator. As the primary means of pricing for legal services in the consumer and small business markets, it lacks certainty and misaligns incentives for efficiency, innovation, and value. One of the most important steps we can take to improve access to justice in our community is to simply get rid of the billable hour and replace it with more transparent and value-based pricing arrangements.

This article is adapted from a recent blog post on the CBF website. You can see the full series of "Bobservations" at chicagobarfoundation.org/bobservation

Before going further, I should note that I am talking about the pricing issue only in the context of the consumer and small business market. Whether the billable hour should continue to have a place in the corporate legal services market, where there are more sophisticated buyers of services who have more options and can make more informed decisions, is for others to decide. There is no question many who serve this market already have moved away from the billable hour very successfully though.

Scott Turow's provocative 2007 ABA Journal cover story, "*The Billable Hour Must Die,*" Cravath Partner Evan Chesler's "*Kill the Billable Hour*" column in Forbes in 2008, and Seyfarth Shaw Chairman Steve Poor's more recent observations on the firm's Rethink the Practice blog are just three examples of the many high profile law firm leaders convincingly making this case. This also has been a frequent topic on the ABA's New Normal Blog and is one of the key tenets of the ACC Value Challenge, just a few of many places where that conversation increasingly is taking place.

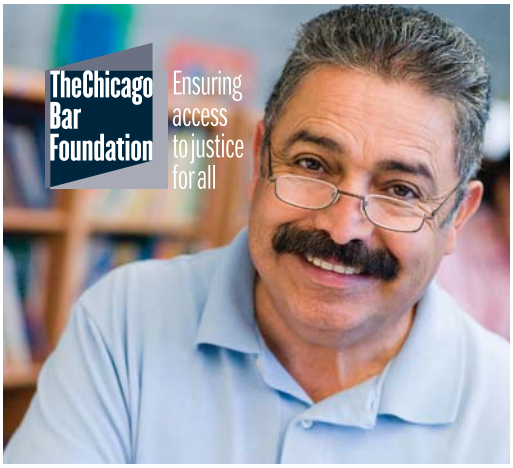
Access to Justice: It's not just a problem facing the poor

When we think and talk about access to justice, it's most often in the context of low-income and disadvantaged people. And rightly so, given that legal help plays such a critical role in leveling the playing field for the most vulnerable in our community yet continues to be out of reach for most people who need it. Yet moderate income people do not fare much better when it comes to finding affordable legal help, with very real consequences for them, the justice system, and the entire community.

To address this growing gap, a lot of attention currently is being paid to expanding non-lawyer services and resources, including self-help services and technologies, online dispute resolution, and accredited non-lawyer providers. While all of these approaches have a place on the continuum of access to justice, they can never come close to fully substituting for the legal services good lawyers provide.

Our profession needs to pay a lot more attention to how we can make our services more affordable, and moving away from the billable hour is a necessary first step towards achieving that goal. That is why one of the core principles of the CBF's Justice Entrepreneurs Project (JEP), which helps newer lawyers develop innovative practices to make their services more affordable and accessible for low and

continued on page 59



Celebrating 10 years
Investing in Justice Campaign 2016

Everyone deserves equal access to justice. For the 10th year, Chicago's legal community has once again shown great leadership through The Chicago Bar Foundation Investing in Justice Campaign, making it possible for tens of thousands of people in need to get critical legal help. The Campaign proves that lawyers and other legal professionals can have a huge impact when we come together around this cause, helping build a fairer, stronger, and better community for everyone.

Our thanks to 2016 Campaign Chair Susan Levy of Northern Trust, to the Campaign Leadership Team, to the thousands of individuals making personal contributions, and to the more than 150 participating law firms, corporate legal departments, and other organizations.

"Together, we are continuing to build on the tremendous progress we have made toward improving the justice system in the Campaign's first nine years. Together, we can continue to make our community a fairer and better place for all of us."

— **Susan C. Levy**
2016 Investing in Justice Campaign Chair
Executive Vice President and General Counsel,
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MURPHY'S **LAW**

BY TERRENCE M. MURPHY, CBA EXECUTIVE DIRECTOR

Congratulations to 2016 Vanguard Award Recipients (seated, L-R) Chicaog Bar Association Honoree Zaldwaynaka "Z" Scott, Women's Bar Association of Illinois Honoree Jayne Reardon , Hispanic Lawyers Association of Illinois Honoree Rosa Maria Silva, Chinese American Bar Associaiton Honoree Sharon A. Hwang, Asian American Bar Association Honoree Jessica A.O'Brien, Black Women Lawyers Association Honoree Leslie Richards-Yellen, (standing, L-R) Puerto Rican Bar Honoree Hon. Ramon Ocasio, Advocates Society Honoree Mark Dobrzycki, CBA President Patricia Brown Holmes, Arab American Bar Association Honoree Hon. William J. Haddad, Cook County Bar Association Honoree Standish E. Willis, and Decalogue Society Honoree Justice Michael B. Hyman. Photo by Bill Richert.

The Association's Annual Meeting will be held on Thursday, June 23, in the Grand Ballroom at the Standard Club. A reception for Outgoing President **Patricia Brown Holmes** and Incoming President **Daniel M. Kotin** will begin at 11:30 a.m. followed by the business meeting/luncheon. The Association's new officers and board members will also be installed at the Annual Meeting. Tickets for the Annual Meeting are $70 per person or $700 for a table of 10. For more information or to make reservations contact Events Coordinator **Tamra Drees** at 312/554-2071 or tdrees@chicagobar.org.

New Leadership

The Nominating Committee, chaired by past CBA President **J. Timothy Eaton,** completed its work and has nominated the following members for the Association's 2016-2017 leadership: **Steven M. Elrod,** Second Vice President; **Jesse H. Ruiz,** Secretary; and **Maurice Grant,** Treasurer. **Patricia Brown Holmes** will continue as a member of the Executive Committee. The following members have been nominated for a two-year term on the Board of Managers: **Alan R. Borlack,** Hon. **Thomas M. Durkin,** Hon. **Shelvin Louise Marie Hall, Robert F. Harris, Michele M. Jochner, Pamela S. Menaker, Paul J. Ochmanek, Jr.,** and **Andrew W. Vail.** Holdover Board members for one year include: **Ashley I. Boesche,** Illinois Appellate Court Justice **Maureen E. Connors, Mary K. Curry, Matthew T. Jenkins, Eileen M. O'Connor, Nigel F. Telman, Frank G. Tuzzolino,** and **Allison L. Wood.** Under the Association's bylaws, Hon. **Thomas R. Mulroy** will automatically succeed to the office of First Vice President, and Daniel M. Kotin, having served as First Vice President this year, automatically becomes President.

Justice John Paul Stevens Award

Justice **John Paul Stevens'** legacy of outstanding service to our City, State and Nation puts him in the pantheon of America's all-time judicial greats. Each year, the Association honors lawyers and judges whose legal careers best exemplify Justice Stevens' integrity and commitment to public service. Nominations for the 2016 Justice John Paul Stevens Award are being accepted and should be submitted on or before Friday, August 5 to the attention of Terrence M. Murphy, 321 South Plymouth Court, Chicago, 60604 or tmurphy@chicagobar.org.

Justice Stevens served as Second Vice-President of the CBA in 1970, and resigned that office on his nomination to the U.S. Court of Appeals by President Gerald Ford. Justice Stevens, who served as an Associate Justice of the United States Supreme Court from 1975-2010, was the third-longest serving Justice of the Supreme Court. Justice Stevens' publications include: *Six Amendments: How and Why We Should Change the Constitution,* and *Five Chiefs,* which is a compendium of memories of each Chief Justice he served with from Chief Justice Fred Vinson through Chief Justice John Roberts. Look for the CBA's announcement and the date for this year's Justice John Paul Stevens Luncheon.

CBA Open House/All Bar Reception

Save the date for the Association's Fall Open House/All Bar Reception to meet incoming CBA President **Dan Kotin** and new YLS Chair **Kathryn Carso Liss** on Thursday, September 22, from 5:00-7:00 p.m. Dan is a partner at Tomasik Kotin & Kasserman, and Katie works in the Law Office of Jean Conde. The reception will be held in Corboy Hall and the Winston & Strawn Presidents Room on the second floor at The Association. There is no charge for the reception, which will include cocktails and hors d' oeuvres. Look for more information about the fall open house reception in upcoming Association announcements.

Congratulations

Justice **John Paul Stevens** celebrated his 96th Birthday on April 20...Hon. **William J. Bauer,** U.S. Court of Appeals for the Seventh Circuit, received the Illinois Supreme Court Historic Preservation Commission's Hon. George N. Leighton Justice Award...Hon. **Ruben Castillo,**

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- CBA Newsstand - free daily email from Lexology providing valuable practice area updates. www.chicagobar.org/newsstand
- Save on legal software and other business expenses. www.chicagobar.org/save

Expand Your Career and Your Networks

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- One-to-one and group mentoring programs. www.chicagobar.org/mentoring
- Networking, and leadership opportunities through the YLS, Alliance for Women, and CBA/YLS committees. 312-554-2131
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- Online Document Library - search practice related articles, checklists, and slide decks presented at CBA seminars and committee meetings. www.chicagobar.org/onlinelibrary
- CBA Lawyer Referral Service, now advertising on WBBM Radio. www.chicagobar.org

Coming Soon!

Programs for retiring lawyers, legal technology compliance certification, business development workshops, expanded leadership training, practical networking events and more.

Chief Judge of the U.S. District Court of Appeals, and Hon. **Amy St. Eve** of the U.S. District Court for their leadership in planning the "Women as Lead Counsel" Seminar on the U.S. District Court ...Illinois Supreme Court Justice **Mary Jane Theis** led a YLS discussion about promoting public confidence in the Court System... Former CBA and ISBA President and Taft Stettinius & Hollister partner **J. Timothy Eaton** was elected to represent Illinois and Ohio on the ABA's Board of Governors... newly-elected Associate Judges: **Sophia Jane Atcherson, Vincenzo Chimera, George Louis Canellis, Jr., Jean Margaret Cocozza, Geraldine Ann D'Souza, Mohammed Mujahid Ghouse, Patrick Joseph Heneghan, Robert Wade Johnson, James Lewis Kaplan, Marc William Martin, Mary Catherine Marubio, Edward Nicolas Roblas** and **Marita Clare Sullivan.**

CBA Secretary and Drinker Biddle partner **Jesse H. Ruiz** received the Association of Professional Fundraising (AFP's) Executive Leader Award...**Kimball Anderson** and **Karen Anderson** received AFP's Distinguished Philanthropists Award... **Sandra Yamate**, CEO of the Institute for Inclusion in the Legal Profession, received the University of Illinois 2016 Asian American Alumni of the Year Award... Northwestern Law School Professor **Thomas F. Geraghty** received the Walter J. Cummings Award for distinguished pro bono service at the annual James B. Moran event...**Peter J. Birnbaum,** President and CEO of Attorneys' Title Guaranty Fund, was re-appointed by Governor Rauner to a six-year term as Chief Justice of the Illinois Court of Claims...**Phil Berengolts** and **Bradley Cohn,** partners at Pattishall, McAuliffe, Newbury, Hilliard & Geraldson, won a landmark unfair competition case in the U.S. Court of Appeals for the Fourth Circuit.

Congratulations to the 2016 Vanguard Award Winners: **Mark Dobrzycki,** Advocates Society of Polish-American Attorneys, Hon. **William J. Haddad** (ret.), Arab American Bar Association of Illinois, **Sharon A. Hwang,** Chinese American Bar Association, Justice **Michael B. Hyman,** Decalogue Society of Lawyers, Hon**. Jessica A. O'Brien,** Asian American Bar Association of Chicago, Hon. **Ramon Ocasio,** Puerto Rican Bar Association, **Jayne Reardon,** Women's Bar Association of Illinois, **Leslie Richards-Yellen,** Black Women Lawyers Association of Greater Chicago, **Zaldwaynaka (Z) Scott,** Chicago Bar Association, **Rosa Maria Silva,** Hispanic Lawyers Association of Illinois, **William Thomas** (posthumously), The Lesbian and Gay Bar Association of Chicago, and **Standish E. Willis,** Cook County Bar Association...**Ashly Boesche**, Pattishall partner and member of the CBA's Board of Managers, coached IIT Kent College of Law's moot court team in the Saul Lefkowitz National Trademark Competition...Hon. **Paul P. Biebel, Jr.** (ret.) has become Of Counsel at Miller, Canfield, Paddock and Stone PLC....**Thomas A. Zimmerman, Jr.** was appointed to oversee a nationwide class action in the Ashley Madison data breach litigation in the U.S. District Court...**John D. Ruark** is a new member of Funkhouser, Vegosen, Liebman & Dunn, Ltd....**Kenneth H. Levinson** spoke about litigating major automobile and death cases to the Cleveland Academy of Trial Attorneys.

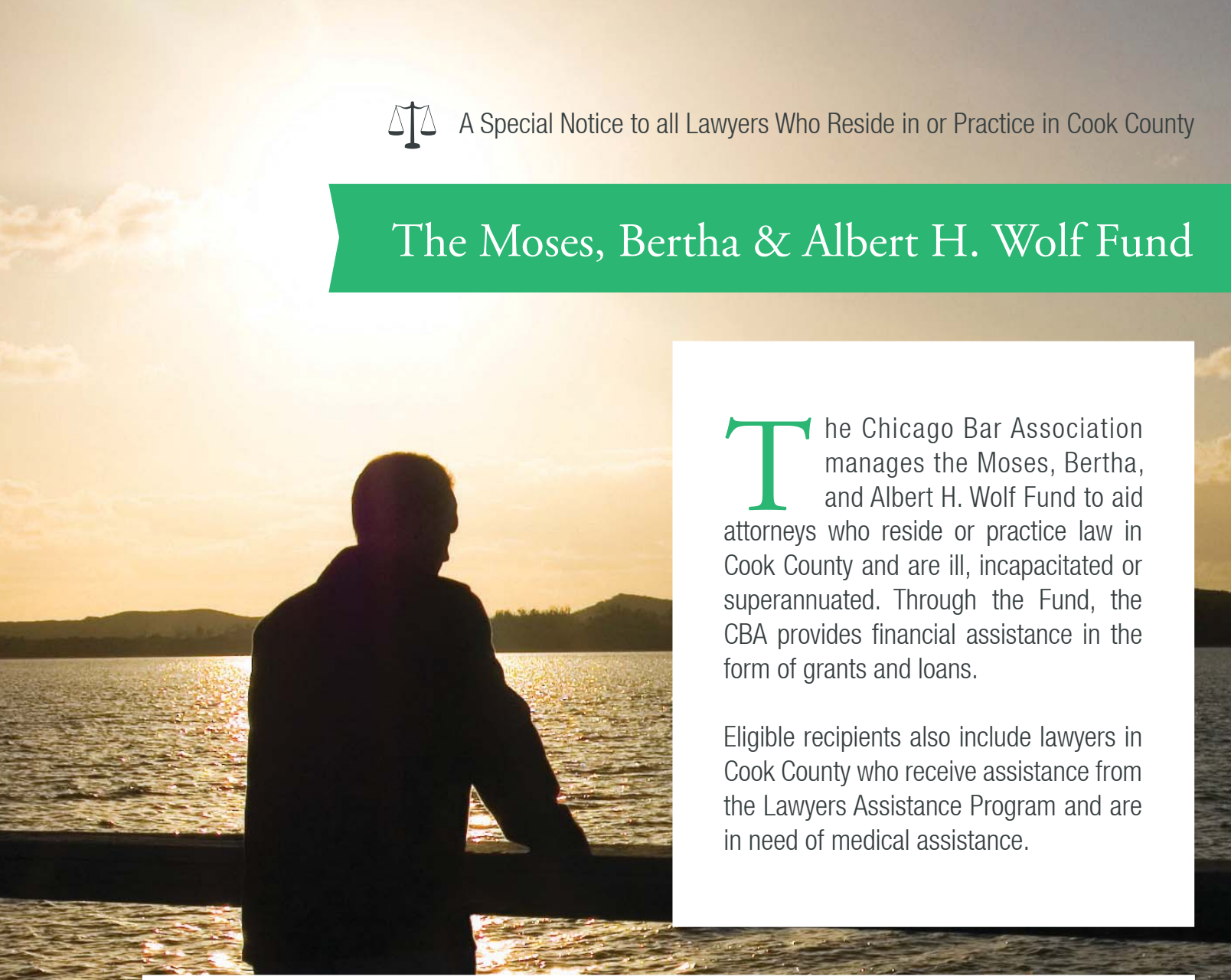
David M. Albaugh is a new associate at HeplerBroomLLC...**Kylie R. Byron** was named association at-large member and **Gregory P. Cheikhameguyaz** was named Treasurer of the National LGBT Bar Association and Foundation...**Michael D. Robson** has become a shareholder at Greenberg Traurig LLP...**Bryan E. Minier** was added to Lathrop and Gage's Bankruptcy Litigation practice group... **Robert P. Walsh, Jr.,** Clifford Law Offices, was a featured speaker at the Illinois Trial Lawyers Association's seminar on Trial Practice...**Lindsey T. Millman** was added to Quarles & Brady's litigation and dispute resolution practice group...**David P. Glatz** has opened the Chicago office of Stradley, Ronon, Stevens & Young...**Guinevere M. Moore** and **Jenny Louise Johnson** have formed Johnson & Moore, LLC...**Bruce R. Pfaff,** Pfaff, Gill & Ports Ltd., spoke at Hinshaw U on Documentary Evidence... Hon. **Grace G. Dickler,** Presiding Judge of the Domestic Relations Division, spoke at a recent CBA seminar about the Role of Social Media and Divorce/Separation... **Mark R. Johnson** has become a partner at McGuireWoods...**Claudia Elizabeth Castro, Mary L. Ryan Norwell** and **Michael K. Smith** are new associates at Odelsen & Sterk...Cozen O'Connor partner **Joseph E. Tilson** has been received Lexology's 2016 Client Choice Award... Much Shelist partner **Robert M. Morgan** was a featured speaker at the Illinois Cannabis Industry Association's Cannabis Symposium...**Lawrence D. Mason,** senior shareholder at Segal, McCambridge, Singer & Mahoney, was appointed to the Property and Liability Resource Bureau Conference Committee.

Valerie C. Byrne, Jacob H. Marshall and **Kevan W. Ventura** are new associates at Goldberg Kohn...**James T. Rohlfing,** partner at Arnstein & Lehr, spoke at the ISBA's Construction Law Seminar on changes to Illinois' Mechanics Lien Act... **Christine A. Campbell** has been named Vice-President and senior trust officer at Attorneys' Title Guaranty Fund... Thompson & Coburn partner **Frederic E. Roth V.** was a featured speaker on mobile medical apps and the FDA's new Cybersecurity Guidance...**Graham C. Grady,** partner at Taft, Stettinius & Hollister, discussed the Future of TIF and the 2016 Fiscal Crisis at a recent seminar...**John E. Thies** is the new president of the ISBA Mutual Insurance Co...Arnstein & Lehr partner **Joanne F. Fenn** was a speaker at the International Right of Way Association's legal symposium...**Timothy M. Whiting** addressed members of the Attorney Information Exchange Group about Trucking Litigation...**Antonio M. Romanucci** was a speaker and moderator at the American Association for Justice's Winter Convention...**Keith J. Shapiro,** Global Vice President and Chair of Greenberg Traurig's Chicago office, received the Albert Schweitzer Leadership Award in New York City.

Catherine P. Gorman is a new associate at Knell, O'Connor, Danielewicz... **Jenna Silver,** Loyola University student member and her colleagues took first place at the International Academy of Dispute Resolution's International Mediation Tournament...**Charles A. Walgreen** is

A Special Notice to all Lawyers Who Reside in or Practice in Cook County

The Moses, Bertha & Albert H. Wolf Fund



The Chicago Bar Association manages the Moses, Bertha, and Albert H. Wolf Fund to aid attorneys who reside or practice law in Cook County and are ill, incapacitated or superannuated. Through the Fund, the CBA provides financial assistance in the form of grants and loans.

Eligible recipients also include lawyers in Cook County who receive assistance from the Lawyers Assistance Program and are in need of medical assistance.

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– Wolf Fund Recipient

THE CHICAGO BAR ASSOCIATION

For more information, please contact Terrence M. Murphy, Executive Director
312-554-2002 • tmurphy@chicagobar.org

practicing with Weltman, Weinberg & Reis...Ice Miller partner **Natalie M. Perry** was named a fellow at the American College of Trust and Estate Counsel...**William T. Gibbs** of Corboy & Demetrio was a featured speaker at the Illinois Association of Trial Lawyers...**Samina Kapadia** is practicing at Faegre, Baker, Daniels... **Tejas N. Shah,** Immigration Counsel at Franczek Radelet, spoke to international graduates from the University of Illinois about the Optional Practical Training Rule for STEM...**George P. Apostolides** spoke at the ISBA's bankruptcy seminar... Hon. **Allen S. Goldberg** (ret.) moderated a court-annexed mediation seminar on "Emerging Arbitration Issues in the Supreme Court"...**Christine M. Sparks,** Vice President and Managing Attorney at Attorneys' Title Guaranty Fund Inc., received ALTA's National Title Professional Award...**Moses Suarez** was named partner at Smith Amundsen...**Susan C. Levy,** Executive Vice President and General Counsel of Northern Trust Corp., will be honored at the Equal Access to Justice Award Luncheon...CBA Past President **Daniel Cotter,** partner at Butler Rubin Saltarelli & Boyd, received his CIPP/US certification as a Certified Information Privacy Professional…**G.A. Finch,** Hoogendoorn & Talbot, was appointed by Governor Rauner to the Illinois Civil Service Commission…**Collins Fitzpatrick,** Chief Executive of the U.S. Court of Appeals for the Seventh Circuit, was selected to receive the American Inns of Court 2016 Professionalism Award… **Adria East Mossing** will be installed as President of the Women's Bar Association of Illinois at the WBAI's Installation Dinner on June 8...**Ian Fisher** has joined Hahn Loeser's Commercial Litigation Practice Division...**Jesse** and **Michele Ruiz** will receive the Chicago Legal Clinic's (CLC) prestigious Cardinal Bernardin Award...**Latham & Watkins, LLP** will receive the Chicago Legal Clinic's Charles J. O'Laughlin Memorial Award... **Marcy Edwards** will receive Chicago Legal Clinic's James D. Jacobson Memorial Award...**Kevin T. Hardy** was named partner at Skadden, Arps, Slate, Meagher & Flom LLP...**Terri L. Mascherin,** past CBA President and Jenner & Block partner, was named a Woman of Achievement by the Greater Chicago/Upper Midwest Regional Chapter of the Anti-Defamation League...**Jeffrey J.H. Koh** of Ropes & Gray received the Chicago Volunteer Legal Services Distinguished Service Award...**Robert N. Sodikoff,** Aronberg, Goldgehn, Davis & Garmisa, authored the "Letters of Credit" chapter in the 2016 edition of *Secured Transactions*...**Karen Osiecki Meehan,** Gould & Ratner, received Habitat for Humanity's Golden Hammer Award... **Mark D. Wood,** Katten Muchin Rosenman, is chairing the Key Disclosure Issues panel at Northwestern Pritzker School of Law's Ray Garrett, Jr. Corporate and Securities Law Institute...**Maryam T. Brotine** was appointed assistant general counsel for the Illinois Association of School Boards... **Ted A. Donner,** Donner & Company.

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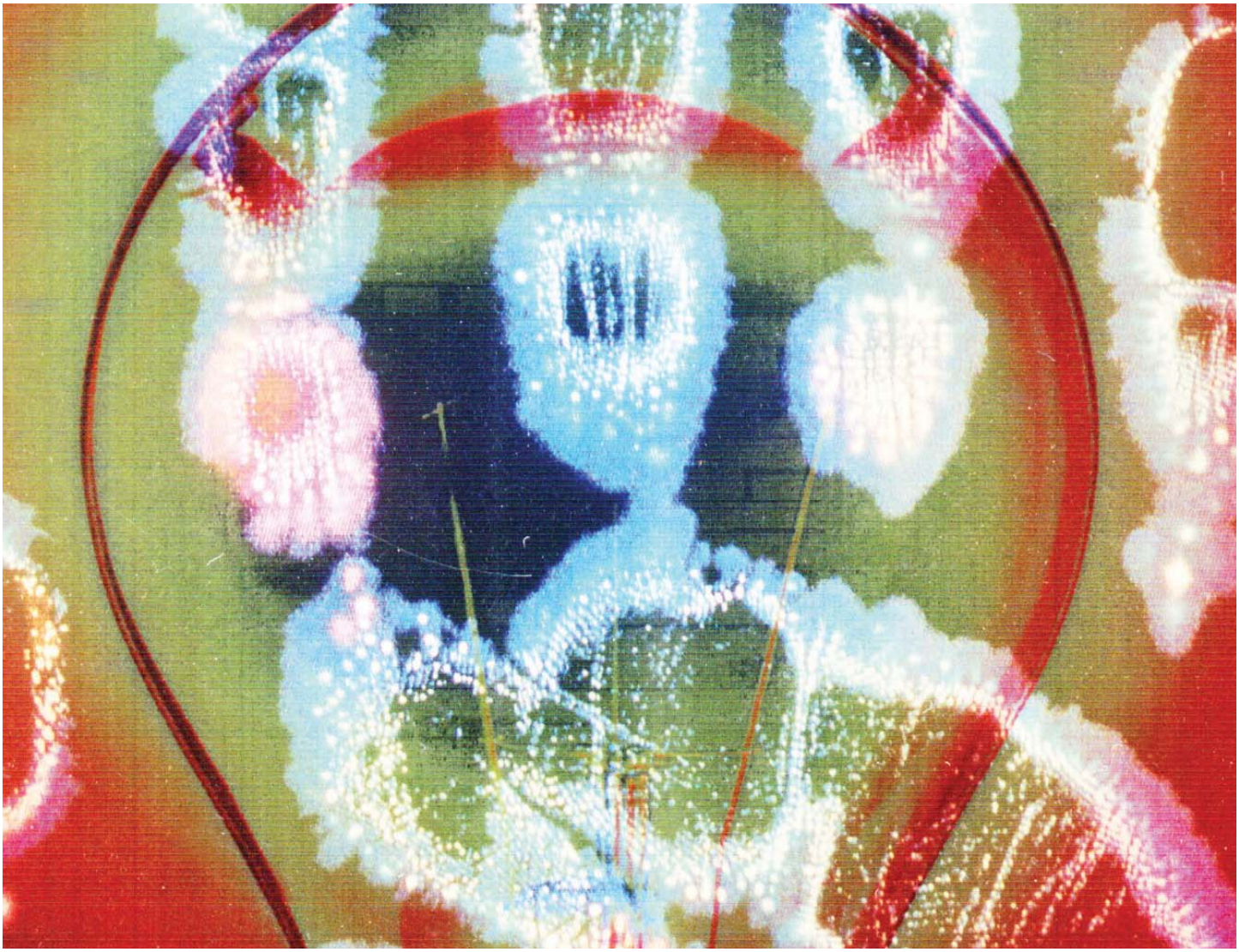
0516

By Shelby L. Drury

Update

Extent of Client Access to Lawyer's File



When a client requests a copy of his or her file relating to the lawyer's representation of the client, what, if anything, is the lawyer required to turn over consistent with the lawyer's ethical obligations? This article examines the ethics opinions on this question from the Illinois State Bar Association and the American Bar Association, and also addresses the requirements set forth in the Illinois Code of Civil Procedure.

The Illinois State Bar Association issued Advisory Opinion on Professional Conduct No. 94-13 (the ISBA Opinion), stating that when a client in Illinois requests its file, the lawyer is required to turn over the "end product," but not the "entire file." The "end product" approach is the so-called "minority approach." The ISBA Opinion was addressed in an article in the November 2013 **CBA Record** authored by the writer's law firm (Shelby L. Drury and Timothy J. Miller, *Ownership and Control of Lawyers' Files Relating to Representation,* **CBA Record,** 38-41).

More recently, the American Bar Association's Committee on Ethics and Professional Responsibility issued Formal Opinion 471 on July 1, 2015 (the ABA Opinion), in which it concluded that the "end product" approach is consistent with the ethical requirements of the ABA Model Rules of Professional Conduct. The pertinent Illinois and ABA ethics rules are the same (Illinois and ABA Rules of Professional Conduct 1.4(a), 1.15(d), 1.16(d)). The ABA Opinion cited the ISBA Opinion, among other authorities.

"End Product" Approach

The "end product" or "end results" approach requires a lawyer to turn over to a client or former client:

- Documents and other materials the client gave the lawyer;
- Correspondence between the lawyer and the client and between the lawyer and third parties;
- Copies of pleadings, briefs, applications and other documents prepared by the lawyer and filed with courts or other agencies on the client's behalf; and
- Final copies of contracts, wills, corporate records and other similar documents prepared by the lawyer for the client's use.

However, a client or former client is not generally entitled to receive:

- *Drafts* of pleadings, briefs, contracts, wills, corporate records and other similar documents;
- Administrative materials relating to the representation such as memoranda concerning potential conflicts of interest or the client's creditworthiness, time and expense records, or personnel matters;
- The lawyer's notes, drafts, internal memoranda, legal research, and factual research materials, including investigative reports, prepared by or for the lawyer for the use of the lawyer in the representation.

The ABA Opinion notes that under the "end product" approach, the client may also be entitled to "investigative reports and discovery for which the client has paid."

Exceptions to the End Product Approach

The ABA Opinion recognizes that in some circumstances a client is entitled under the ethics rules to more than the end product, in order to fulfill the lawyer's ethical duty to protect a client's interests. In that regard, "when the representation is terminated before the matter is concluded, protection of the client's interest may require the lawyer to provide the client with paper or property generated by the lawyer for the lawyer's own purpose." For example, "if in a continuing matter a filing deadline is imminent" and the lawyer has begun drafting documents to meet the filing deadline but the documents are not yet final, "then the most recent draft and relevant supporting research should be provided" to the client.

Illinois Code of Civil Procedure's Approach to Client Access

The Illinois Code of Civil Procedure (735 ILCS 5/8-2005) also addresses the issue of client access to a lawyer's file. The Illinois Code section has never been cited in a reported case, but it is generally consistent with the "end product" approach endorsed by the ABA and ISBA. It provides:

> Upon the request of a client [which "shall be in writing"], an attorney shall permit the client's authorized attorney to examine and copy the records kept by the attorney in connection with the representation of the client, *with the exception of attorney work product.* (emphasis added.)

The ISBA Opinion notes that while its opinion concerns the lawyer's duty under the Rules of Professional Conduct, the lawyer's notes, factual and legal research material, and investigative materials (which the lawyer need not provide the client) are the types of materials that may be considered attorney "work product" in the discovery context. That, however, was not relevant to the ISBA's inquiry.

The Illinois Code provides deadlines for attorney compliance with a client's request for its records and consequences for failure to comply:

> An attorney shall satisfy the requirements of this Section within 60 days after he or she receives a request from a client or his or her authorized attorney. An attorney who fails to comply with the time requirement of this Section shall be required to pay expenses and reasonable attorney's fees incurred in connection with any court-ordered enforcement of the requirements of this Section.

Reproduction Expenses

The Illinois Code provides a mechanism for payment of the expenses associated with reproducing the file for a client, requiring

that "the person requesting the records shall reimburse the attorney for all reasonable expenses . . . incurred by the attorney . . ." and providing guidelines and maximum amounts that the attorney may charge.

The ABA Opinion recommends that attorneys "explain in their retainer letters who is responsible for the costs of copying and under what circumstances," including who should pay for time and cost of duplication of materials upon termination of the representation.

In Illinois, however, attorneys should be mindful of the costs allowable under the Illinois Code.

Applicability

The ISBA and ABA Opinions both assume that the lawyer has been paid in full and do not address retaining liens. Similarly, the Illinois Code "applies only if a client and his or her authorized attorney have complied with all applicable legal requirements regarding examination and copying of client files, including but not limited to satisfaction of expenses and attorney retaining liens." ■

Shelby L. Drury is Of Counsel to Novack and Macey LLP

The Password is Ethics

Monday, May 23, 2:00–4:15 pm

Location:The Chicago Bar Association, 321 S. Plymouth Court, Chicago, IL 60604

Presented by:Energy, Telecommunications and Water Committee, ISBA Section on Energy Utilities Telecommunication and Transportation

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A new game show has come to the fictional town of Nirvana. The contestants (both private attorneys and government lawyers) have been selected and during this program they will be competing for a host of fabulous prizes. It will be interesting to watch as the contestants test the patience of the game show host and struggle to provide direct answers on a diverse range of ethical dilemmas, including issues of attorney-client privilege, client confidentiality, ex parte bans, professionalism and social media use. Play along and know that at each commercial break, a distinguished ethics expert will guide us to a better understanding of the Rules of Professional Conduct (if not necessarily the game show rules).

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By Blake Shuart

Substituting Judges After *Bowman v. Ottney*

Bridge Over Tested Waters

Consider this scenario: The most important, high-stakes case in your current portfolio is right in the heat of discovery, with depositions occurring almost daily. Looming ahead are dispositive motions that will either gut the case or place it in a great position to settle, and the esteemed judge who will hear the motions–Judge Learned Cardozo–has already issued several unfavorable rulings on key discovery issues that make you a bit nervous about what the future will bring. You want to consult with your client about the option of seeking a substitution of judge as a matter of right, but believe that the judge will deny your motion, given that he has already made substantial rulings in the case. You believe that you may be able to get around the issue by dismissing the case without prejudice, re-filing it and immediately seeking a substitution of judge–but assuming it is again assigned to Judge Cardozo. You believe, however, that the "test the waters" doctrine may still bar your ability to substitute judges upon re-filing. You need a clear answer, and begin scouring the case law in earnest.

Attorneys who find themselves in a similar position can now look to the Illinois Supreme Court's opinion in *Bowman v. Ottney* (filed December 17, 2015, *rehearing denied* January 19, 2016) for some guidance, although the Court's opinion–delivered by Justice Freeman–declines to address the question of whether the "test the waters" doctrine is still valid under the post-1993 amendment of the statute governing substitution as of right, 735 ILCS 5/2-1001(a)(2)(ii). The Court's holding is not a shot in the arm for litigants seeking a substitution of judge.

Case Background

Bowman involved a medical malpractice case filed against two defendants–Dr. Michael D. Ottney and Core Physician Resources, P.C.–in Jefferson County. The case was assigned to Judge Overstreet, who presided over extensive pretrial proceedings over the ensuing four years, issuing rulings on substantial issues, including discovery disputes. *Bowman*, 2015 WL 9229316 at *1. [citation forthcoming]

Bowman then voluntarily dismissed her complaint without prejudice prior to trial, then re-filed the case four months later–this time with Ottney as the sole defendant. The re-filed complaint was also filed in Jefferson County, asserting the same claims against Ottney as the original complaint, and was again assigned to Judge Overstreet. The re-filed case was given a new docket number, however.

Upon re-filing, Bowman immediately moved for substitution of judge as of right under 2-1001(a)(2)(ii), which provides that a substitution of judge "in any civil action" may be had as follows: (2) Substitution as of right. When a party timely exercises his or her right to a substitution without cause as provided in this paragraph (2).

(i) Each party shall be entitled to one substitution of judge without cause as a matter of right.

(ii) An application for substitution of judge as of right shall be made by motion and shall be granted if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case, or if it is presented by consent of the parties.

Ottney objected to the motion, claiming it was not timely because Judge Overstreet had made pretrial rulings on substantial issues during pendency of the original action, and prior to its voluntary dismissal. To buttress his argument, Ottney further contended that Bowman had "tested the waters" in the original action. Ottney also cited an appellate court decision, *Ramos v. Kewanee Hospital*, 2013 IL App (3d) 120001, ¶ 88, 372 Ill.Dec. 564, 581, 992 N.E.2d 103, 120 ("[a] motion for substitution of judge may also be properly denied, even if the presiding judge did not rule on a substantive issue, if the litigant 'had an opportunity to test the waters and form an opinion as to the court's disposition' of an issue") (quoting *Cincinnati Insurance Co. v. Chapman*, 2012 IL App (1st) 111792, ¶ 23, 363 Ill.Dec. 401, 975 N.E.2d 203).

The court denied Bowman's motion for substitution of judge, but granted her request for certification of the following question for interlocutory appeal:

In a case which had previously been voluntarily dismissed pursuant to 735 ILCS 5/2-1009 and then subsequently re-filed, does the trial court have discretion to deny a Plaintiff's immediately filed Motion for Substitution of Judge, brought pursuant to 735 ILCS 5/2-1001, based on the fact that the Court had made substantive rulings in the previously dismissed case?

The appellate court (5th Dist.) allowed the application for leave to appeal, and answered the certified question in the affirmative.

Relying, in part, on *Ramos*, the majority held that Bowman's motion for substitution of judge was properly denied under the "test the waters" doctrine. The court held that the doctrine was applicable, and that the denial of Bowman's motion was appropriate because she had "tested the waters" during the original suit.

The Illinois Supreme Court then allowed Bowman's petition for leave to appeal.

The Supreme Court's Analysis

Applying traditional principles of statutory construction, the Supreme Court analyzed 2-1001(a)(2)(ii) in the context of the voluntary dismissal and re-filing provisions of the Code, which are set forth in Code sections 2-1009(a) and 13-217. Section 2-1009(a) allows an action to be dismissed without prejudice at any time before trial or hearing begins, and section 13-217 allows for the re-filing of an action that has been voluntarily dismissed within one year from the date of dismissal.

In support of her argument that the trial court erred in denying her motion for substitution of judge, Bowman contended that a "bright line" rule allowing a substitution as of right should be drawn, even where the motion is presented in a re-filed action after the same judge has made substantive rulings in the case that was previously dismissed. Bowman focused on the specific "in the case" language contained within 2-1001(a)(2)(ii) ("[a]n application for substitution of judge as of right shall be made by motion and shall be granted if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue *in the case* ***") (emphasis added). Under Bowman's strict interpretation analysis, the statute's "in the case" language only applies to the currently-pending case, meaning that the substantive rulings made in the original case should not have been a factor in the court's determination.

Ottney countered that 2-1001(a)(2)(ii) should be construed more broadly to effectuate the statute's purpose, which includes the prevention of "judge shopping." Ottney's suggested interpretation would allow the trial court to consider the overall controversy between the parties–in this case giving Judge Overstreet discretion to deny the motion for substitution, given that he had issued rulings on substantial matters in the previously dismissed action.

As a precursor to deciding the issue, the Court delved into the legislative history behind the 1993 amendment to 2-1001(a)(2)(ii). In brief, the 1993 amendment codified earlier case law holding that a litigant was entitled to one "change of venue" on grounds of judicial bias or prejudice, which right was considered to be "automatic" because the substitution request was required to be supported only by generalized allegations, which need not be proved. *American State Bank v. County of Woodford*, 55 Ill.App.3d 123, 128, 13 Ill.Dec. 515, 371 N.E.2d 232 (1977). Under the new, post-amendment statute, a litigant is entitled to one substitution without cause as a matter of right, so long as the request for substitution is "presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case." After the judge has made substantive rulings in the case, however, subsection (a)(3) of the statute permits substitution for cause only. Thus, the Court concluded:

> [T]he 1993 amendment did not alter the restriction to only one substitution as a matter of right, nor did it change the requirement that the motion be brought before the judge to whom it is presented has ruled on any substantial issue in the case. These aspects of the previous statute are the same today as they were before 1993, and the purpose of the statute remains the same.
> *Bowman* at *5, ¶ 16.

No "Bright Line" Rule

As a forecast of its resolution of the case, the Court then acknowledged case law supporting both the absolute right to a substitution of judge upon proper motion and the requirement that the statute be construed liberally to promote–rather than defeat–the right of substitution. However, the Court observed that liberal construction does not excuse a party from complying with the requirements of the statute. Moreover, the Court declared that it would "avoid a construction that would defeat the statute's purpose or yield absurd or unjust results." *Bowman* at *5 (citing *Krautsack v. Anderson*, 223 Ill. 2d 541, 558 (2006)).

The Court declined to adopt Bowman's proposed "bright line" rule premised on the "in the case" language. Although the case had been assigned a different docket number, required payment of a new filing fee, and required that she again serve Ottney with process, the Court disagreed with Bowman's assertion that it was a "new case" such that she was automatically entitled to a substitution of judge without cause. The Court acknowledged that re-

filed cases have previously been deemed to be new and separate actions for some purposes, but given its primary goal of effectuating the purpose of the statute, declined to construe 2-1001(a)(2) in a manner that "facilitates or encourages 'judge shopping.'"

As further support for its conclusion, the Court found that the strict interpretation suggested by Bowman could create a loophole that would allow the purpose of the statute to be defeated. The Court then held:

> Considering the history of section 2-1001 and the goals sought to be achieved, we conclude that section 2-1001(a)(2)(ii) must be read as referring to all proceedings between the parties in which the judge to whom the motion is presented has made substantial rulings with respect to the cause of action before the court.
> *Bowman* at *6, ¶ 21.

Bowman could have filed a motion for substitution of judge as of right during the proceedings in the original case, the Court observed, but declined to exercise her right before Judge Overstreet ruled on substantial issues. Instead, Bowman attempted to use the voluntary dismissal and re-filing provisions to accomplish in the re-filed suit what she could no longer do in the original suit–precisely the type of "procedural maneuvering that section 2-1001 is designed to prevent."

In its final remarks, the Court observed that the parties had presented arguments as to the continued validity of the "test the waters" doctrine. A source of conflict in the appellate courts (discussed in Justice Kilbride's dissenting opinion, below), the "test the waters" doctrine has previously been used to bar the right of substitution, even when no substantive rulings had been made. The Court declined to address that issue, however, given that it was not explicitly implicated in the certified question.

Dissenting Opinion–Justice Kilbride

In his dissent, Justice Kilbride concluded that the plain language of the statute supported Bowman's position in the case, and that the requirement that the provisions of Code section 2-1001 are to be liberally construed to promote–rather than defeat–the right of substitution is consistent with the statute as well. *Bowman* at *8.

Justice Kilbride's logic was straightforward: (1) section 2-1001(a)(2)(i) "unequivocally grants every civil litigant a statutory right to a single substitution of judge without cause;" (2) the only statutory limitation on a civil litigant seeking a substitution of judge is the requirement that the litigant file the motion for substitution before the judge enters any substantive rulings in the case, pursuant to section 2-1001(a)(2)(ii); (3) in Illinois, a case re-filed under section 13-217 of the Code is considered a new and separate action, not a reinstatement of the old action. (citing *Dubina*, 178 Ill. 2d at 504); (4) it was undisputed that the trial judge had not entered any substantive rulings in the re-filed case; (5) accordingly, under the plain language of 2-1001(a)(2), Bowman's motion for substitution of judge should have been granted. *Bowman* at *8-9.

Justice Kilbride next addressed the majority's decision not to resolve the recognized conflict in the appellate courts over the "test the waters" doctrine, instead finding it to be "intertwined with the certified question presented in this appeal." *Bowman* at *9, ¶ 40. He agreed with the "well-reasoned analysis of the Fourth District Appellate Court's decision in *Schnepf* to reject the 'test the waters' doctrine," and then cited the *Schnepf* Court's conclusion:

> The "test the waters" doctrine was rendered obsolete 20 years ago by introduction of the right to a substitution of judge without cause under the new version of section 2-1001(a)(2). The doctrine not only does nothing to advance the functioning of section 2-1001(a)(2), it affirmatively frustrates its purpose. By inviting the trial judge to make the potentially nuanced, subjective determination of whether he has tipped his hand at some point during the proceedings, the doctrine undermines the movant's right to have the fate of his case placed in the hands of a different judge." *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶¶ 28-30.

Concluding Analysis

Bowman closes the door on a litigant's ability to substitute judges after substantial rulings have been made in the case by dismissing without prejudice, re-filing and promptly moving for substitution as a matter of right under 2-1001(a)(2)(ii). Litigants can seek a substitution of judge in two primary scenarios (excepting judge involvement in the case or contempt proceedings, which are also addressed in the statute): (1) as of right, prior to the judge ruling on any substantial issues in the case (and prior to trial); or (2) for cause under Code section 2-1001(a)(3), which the *Bowman* Court noted is a "heavy burden" to substantiate.

The applicability of the "test the waters" doctrine remains unresolved in the Supreme Court. Given the *Bowman* appellate court's reliance on the doctrine in its opinion, and the existing conflict between the various appellate districts, one might have anticipated a final resolution of the issue in this case. However, due to the narrow scope of the certified question, the Court did not believe *Bowman* was the appropriate forum to resolve the issue. But as both Justice Kilbride and the *Schnepf* Court noted, a strong argument can be made that the 1993 amendment to 2-1001(a)(2) has rendered the doctrine obsolete.

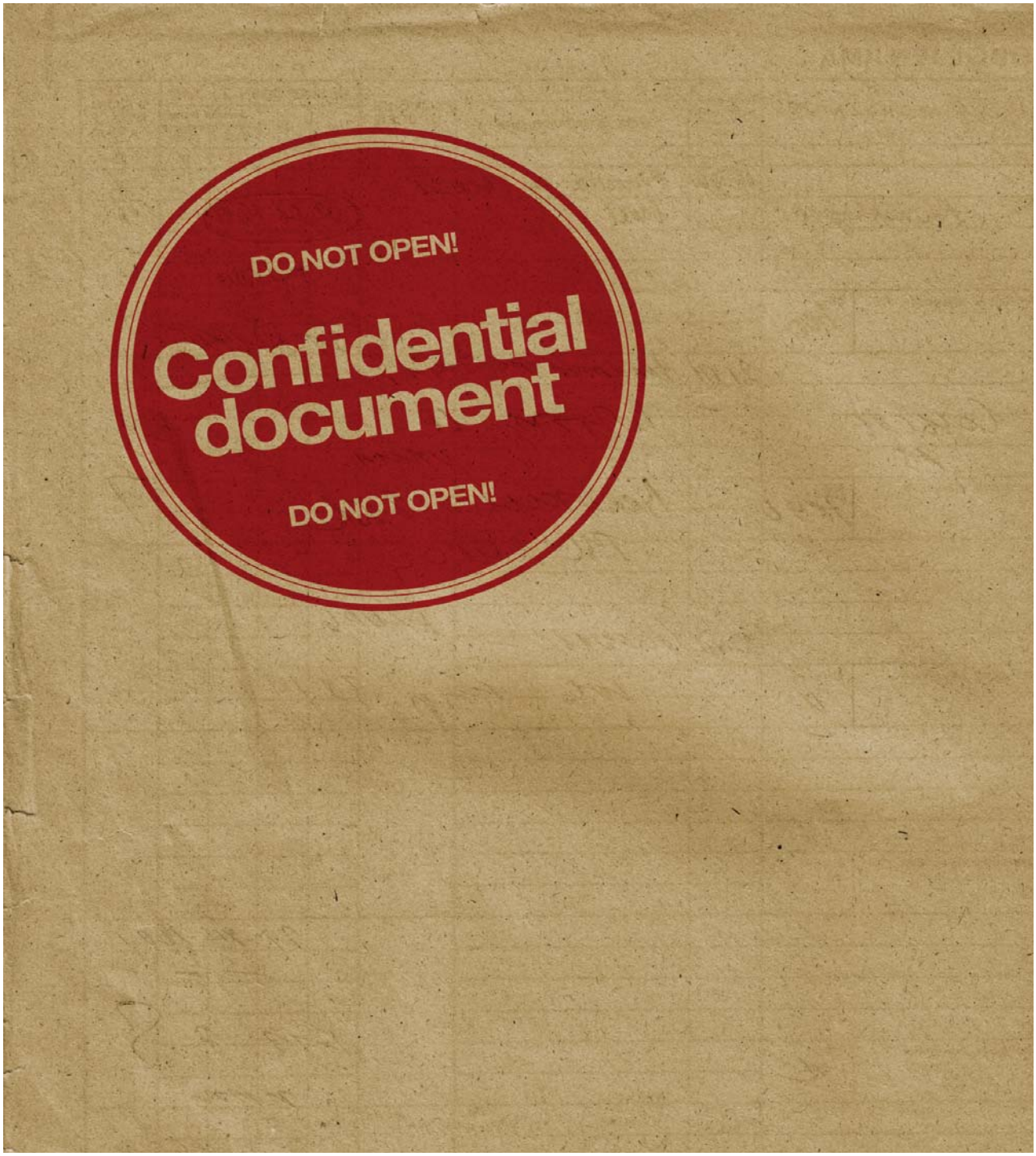
However, for an attorney with a case in its early stages who has concerns about the trial judge, as the old adage might suggest, "substitute now, or forever hold your peace." ■

Blake Shuart is affiliated with Hutton & Hutton LLC in Wichita, Kansas. He has tried several complex injury and wrongful death cases to jury verdict in various jurisdictions across Kansas in solo, first-chair and second-chair capacities.

By Dmitry N. Feofanov

From the Perspective of the Plaintiff's Lawyer

Just Saying "No" to Confidentiality Clauses



There have been many times when I would settle a case on an assumption (and sometimes an explicit representation by the opposing counsel) that "there will be a standard release."

When the "standard release" came, though, I would often find provisions I did not consider "standard"—such as waivers of construction against the drafter, indemnity clauses, and the like. Chief among such surprises would be the confidentiality clause.

For a lawyer who does not want to be a part of such unbargained-for, and unpaid, provisions, the choices are not good. One option is to go to court attempting to enforce the settlement. Often, though, judges, in addition to becoming angry at a plaintiff's lawyer for "sabotaging" settlement, find that there has been no meeting of the minds, and therefore no settlement. Thus, going to court may torpedo the settlement.

Another option is to attempt to negotiate the clause away, although the chances for that are not good either–an hourly-paid defendant's lawyer has no incentive to agree to delete the clause.

A third option–attempting to preempt the issue, by informing both opposing counsel and courts in advance, even before settlement negotiations, that confidentiality is off the table–is not likely to succeed either. Despite unequivocal warnings, defendants still attempt to impose confidentiality, and judges may not understand why such a "standard" practice engenders resistance.

Frustrated with the judiciary's apparent reluctance to enforce settlements and with defendants who would not take "no" for an answer, I looked for a better way. After substantial research into opinions of multiple bar associations across the country, I have concluded that most confidentiality clauses are in fact prohibited by the applicable ethics rules.

Thus "Plan B" was born. I made an ethics inquiry to the Chicago Bar Association's Committee on Professional Responsibility, which provides the invaluable service of responding in writing. In less than two months, I had Informal Ethics Opinion 2012-10, three single-spaced pages from the Opinions Subcommittee.

CBA Professional Responsibility Subcommittee Opinion

At issue was a confidentiality clause drafted as follows:

> Plaintiff and his counsel agree that the existence, substance and content of the claims of the Action, as well as all information produced or located in the discovery process in the Action shall be completely confidential from and after the date of this Agreement. Similarly, the existence, substance, terms and content of this Agreement shall be and remain completely confidential. Plaintiff shall not disclose to anyone any information described in this paragraph, except: (a) if disclosure is ordered by a court of competent jurisdiction, and only if the other party has been given prior notice of the disclosure request and an opportunity to appear and defend against disclosure and/or to arrange for a protective order; (b) Plaintiff may disclose the contents of this Agreement to his attorneys, accounting and/or tax professionals as may be necessary for tax or accounting purposes, subject to an express agreement to become obligated under and abide by this confidential and non-disclosure restriction; and (c) Plaintiff may disclose that the Action has been dismissed.

The opinion answered "yes," "yes," and "no" to the following three questions:

(1) whether this confidentiality clause violated Rule of Professional Conduct 3.4(f);

(2) whether it violated Rule of Professional Conduct 5.6(b); and

(3) whether a lawyer, as part of settlement discussions, may demand that the settlement agreement include a provision that prohibits plaintiff's counsel from disclosing publicly available facts about the case on plaintiff's counsel's website or through a press release.

Rule of Professional Conduct 3.4(f)

Rule of Professional Conduct 3.4(f) states that a lawyer "shall not *** request a person other than a client to refrain from voluntarily giving relevant information to another party" unless that person is a relative or agent of the client and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from disclosure. After quoting the Rule, the subcommittee also quoted Comment 1 to the Rule that the Rule is based on the belief that "[f]air competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like."

After noting that settlement agreements are not exempt from Rule 3.4(f), the subcommittee concluded that, "when negotiating

a settlement agreement, a lawyer cannot ethically request that the opposing party agree that it will not disclose potentially relevant information to another party." The subcommittee explained that the term "another party" means "more than just the named parties to the present litigation," and that the term should be interpreted "more broadly to include any person or entity with a current or potential claim against one of the parties to the settlement agreement." The subcommittee explained that a contrary interpretation would "undermine the purpose of the rule and the proper functioning of the justice system by allowing a party to a settlement agreement to conceal important information and thus obstruct meritorious lawsuits."

As a result, the opinion concluded that "the proposed settlement provision therefore precludes the plaintiff from voluntarily disclosing relevant information to other parties," and as a result "it violates Rule 3.4(f) *and a lawyer cannot propose or accept it"* (emphasis added). The breadth of this conclusion should give pause to anyone who contemplates either proposing or accepting any confidentiality clause.

Rule of Professional Conduct 5.6(b)

Rule of Professional Conduct 5.6(b) states that a lawyer "shall not participate in offering or making *** an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy." In analyzing the rule, the subcommittee pointed out that it is based on three main public policy rationales: (i) to ensure the public will have broad access to legal representation; (ii) to prevent awards to plaintiffs that are based on the value of keeping plaintiffs' counsel out of future litigation, rather than the merits of plaintiff's case; and (iii) to limit conflicts of interest.

The subcommittee relied on the American Bar Association's Ethics Opinion 00-417 in pointing out a distinction between a lawyer's future "use" of information learned during litigation and a lawyer's future "disclosure" of such information. A provision prohibiting "use" of information violates Rule 5.6(b), because preventing a lawyer from using information is no different than prohibiting a lawyer from representing certain persons. However, a provision prohibiting "disclosure" is generally permissible, because a lawyer is already prohibited from disclosing such information without client consent.

However, the subcommittee also pointed out that "not all limitations on the disclosure of information are ethical." Rather, such litigation depends on the nature of the information. The subcommittee observed that, while authorities agree that prohibitions for disclosing "the amount and terms of the settlement" (assuming the information is not otherwise known to the public) are permissible, because that information generally is a client confidence; information that is publicly available or that would be available through discovery in other cases may not be prohibited from disclosure.

On the basis of this analysis, the subcommittee determined that, generally, a settlement agreement may not prohibit a party's lawyer from *using* the information learned during litigation. The agreement also may not prohibit a lawyer from *disclosing* publicly available information, or information that would be obtainable through the course of discovery in future cases. The subcommittee articulated a public policy rationale for striking "an appropriate balance between the genuine interests of parties who wish to keep truly confidential information confidential and the important policy of preserving the public's access to, and ability to identify, lawyers whose background and experience may make them the best available persons to represent future litigants in similar cases." Thus, the subcommittee concluded that the settlement provision "as currently drafted" did not comply with Rule 5.6.(b). While recognizing that it would be permissible to prohibit the disclosure or the "substance, terms and content of" the settlement (assuming it was not already publicly known), the settlement agreement violated Rule 5.6(b) because it "broadly forecloses the lawyer's disclosure of information that appears to be publicly available already."

Restrictions on Attorney Advertisement

Based on the same analysis, the subcommittee concluded that, under Rule 5.6(b), a settlement agreement may not prohibit a party's lawyer from disclosing publicly available facts about the case, "such as the parties' names and the allegations of the complaint," on the lawyer's website or through a press release. The subcommittee cited the seminal D.C. Bar Ethics Opinion 335 (2006) in support of its conclusion.

Practical Results of the Opinion

There is only one practical result of the Opinion for my practice—I no longer enter into confidentiality agreements. Ever. Setting aside my ideological zeal, from a practical standpoint, it simply takes too much time to draft around the ethics rules, and even then it's difficult to be sure there has been no violation. Thus, the most practical solution to the problem is to just say "no" (of course, after bringing the client on board).

I anticipate that such an uncompromising position might torpedo some settlements, and I am resigned to live with this. On the other hand, I save considerable time and effort that I would otherwise have spent either arguing the issue or trying to find an acceptable compromise. So it evens out in the long run.

My uncompromising position also has the salutary effect of convincing opposing counsel that I mean what I say. Too often, a lawyer's "no" may mean "maybe," and vice versa, all part of the complicated back-and-forth of negotiations. For those of us who have not mastered the psychological intricacies of negotiating, a direct approach could be a viable alternative. ■

Dmitry Feofanov of ChicagoLemonLaw.com. is formerly of Brooks, Adams & Tarulis. A copy of CBA Ethics Opinion 2012-10 may be obtained by emailing him at Feofanov@ChicagoLemonLaw.com.

2016 Membership Appreciation Week

Enjoy a Complimentary Event on Us!

Monday, May 16, 2016 | 12:00-1:35 p.m.
Utilizing iPhones & iPads in the Legal Profession
1.5 IL PR-MCLE Credit, subject to approval
Get tools that will help with your day-to-day needs and dive into a few of the top legal applications that lawyers are using to help them be more productive in the field.
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Tuesday, May 17, 2016 | 10:00 a.m. - 3:00 p.m.
Law Practice Management & Technology Expo Hall
Catch up on the latest in LPMT services that can benefit your law practice. Find a list of exhibitors at www.chicagobar.org/memberweek. Door prizes! Complimentary lunch/snacks will be available in the Expo Hall.

Tuesday, May 17, 2016 | 11:00 a.m. -12:05 p.m.
Building a 100 Year Law Firm
1 IL PR-MCLE Credit, subject to approval
More than just succession planning, how building a legacy of value into your law practice is possible now. Chelsey Lambert of Smokeball will give you a set of tools and resources to help you develop your own 100 Year Law Firm Plan.
Thank you to Smokeball

Tuesday, May 17, 2016 | 1:00-2:05 p.m.
Empower Your Client through Technology
1 IL MCLE Credit
Jeffrey S. Krause from Solfecta LLC will explore affordable and intuitive tools to provide client portals, notifications, simplified signatures and forms, online bill pay, appointments, and more. Your clients will thank you.
Thank you to LexisNexis

Wednesday, May 18, 2016 | 4:00-5:00 p.m.
Social Media in a Job Search and in Your Career
Kathy Morris of Under Advisement, Ltd. address how to harness the power of LinkedIn and other social media platforms in your job search and developing business.

Wednesday, May 18, 2016 | 11:00 a.m. - 2:00 p.m.
Professional Photos for Social Media
Take a professional photo suitable for use on a web site or social media with Photographer Bill Richert. $25 per person. Call 312-554-2135 for an appointment.

Wednesday, May 18, 2016 | 10:00 a.m. -12:00 p.m. & 2:00-5:00 p.m.
LinkedIn Profile/Social Media Reviews
Get one-on-one advice from our LPMT Division's Catherine Sanders Reach and Nora Regis on how to put your best foot forward online and through social media. Sign up for an appointment at http://tinyurl.com/z2g3ert.

Thursday, May 19, 2016 | 12:00-1:30 p.m.
Mindfulness And The Law: Is There Really A Connection?
1 IL-PR MCLE Credit, subject to approval
The CBA's new Mindfulness and the Law Committee will examine the science behind mindfulness as well as the benefits of mindfulness for lawyers in their life and legal practice. A brief meditation sitting will conclude the event.

Friday, May 20, 2016 | 12:00-1:30 p.m.
Lawyers and Technology In/Competence
1.5 IL PR-MCLE Credit, subject to approval
Catherine Sanders Reach and D. Casey Flaherty will look at not only common technologies that attorneys should be familiar with to satisfy recent comments to IL RPC 1.1, but also how proficiency in technology can help attract and retain clients.
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Finishing Strong

By Matthew A. Passen YLS Chair

We began this bar year with a simple theme: The Complete Lawyer. My goal was to offer our members opportunities to enhance their practice skills, expand their professional networks, and serve the community in meaningful ways–all attributes of a complete lawyer.

Rather than summarizing all that we have accomplished this year, I'd rather focus on how we're finishing strong.

We recently reached an impressive milestone in our year-long public service effort to "End Distracted Driving" in our community: YLS volunteers have officially given the presentation to *more than 2,000 high school students* this year. Each of those students received a "Family Safe Driving Agreement" to take home to discuss with their family, so the overall impact of this program is exponentially larger.

Our new membership initiative targeting associates at large and mid-sized firms, Lawyer Engagement and Development ("LEAD"), recently finished its fifth installment on "Connecting Through Shared Interests in Civic Engagement," hosted by Sidley Austin LLP. On May 13 we had our final installment, titled "Life After Big Law," at the CBA. This special program included a closing networking reception.

Our celebration of Law Week began April 30 with a "Call-A-Lawyer" session. One event that made a big impact was the May 5 judge's reception at the CBA. In addition to networking with other lawyers and judges, we presented the Liberty Bell Award to Justin Hayford, Case Manager and Paralegal at the Legal Counsel for Health Justice. Justin is an outstanding paralegal and a deserving non-lawyer whose service has strengthened the effectiveness of the American system of freedom under the law.

Lawyers are storytellers–yet most of us probably could use a brush up on how to tell effective stories. On May 4, we hosted our first-ever "Storytelling for Lawyers" program at the CBA. The program began with instruction on how to craft an effective story, followed by a "Story Slam" where participants practiced telling their own stories.

Another fun event you won't want to miss: the YLS Cubs Outing on Tuesday, July 19. We'll meet at Murphy's Bleachers before the game to socialize, then head over to Wrigley Field to watch the night game from the bleachers. Tickets are only $38 and can be purchased on the CBA website.

Finally, I encourage anyone interested in learning more about how to get involved with the YLS to attend our annual meeting on June 8 at 11:30 a.m. at Petterino's. We will celebrate this year's accomplishments and then I will pass the reins over to next year's YLS chair, Katie Liss, who will provide an overview of her goals for next year.

Thanks to the CBA and CBF staff, especially Jennifer Byrne, for their incredible support this year. And thanks to our officers and directors for sacrificing their time to make the YLS the most relevant and successful young lawyer bar association in the country. ■

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THE INTERNATIONAL MEN'S MARCH TO STOP RAPE, SEXUAL ASSAULT & GENDER VIOLENCE

Get Ready to Walk! And Shed Light on Violence Against Women

The CBA Young Lawyers Section is teaming up with Walk a Mile in Her Shoes® to organize a unique walk for men through Chicago's Loop. Men are invited to literally walk one mile through Chicago's Loop in women's high-heeled shoes (women are invited to participate and support the male walkers). The event aims to raise awareness about the cause and effects of sexualized violence and will be a fun way to get people talking about a very difficult subject.

DETAILS:

Thursday, May 26, 2016/5:00-6:30 p.m.
Kick-Off Location: CBA, 321 S. Plymouth Ct., Chicago

REGISTRATION:

Registration is $25 person.
Proceeds will benefit our cosponsor Between Friends. Participants must wear high heels. Participants and supporters are encouraged to wear red. Purchasing (or borrowing) a pair of high heels is the responsibility of the participant.
Bring your friends, bring your colleagues!

SCHEDULE (subject to change):

5:00 p.m. – Registration

5:30-5:40 p.m. – Between Friends, our cosponsor of the event is a nonprofit agency dedicated to breaking the cycle of domestic violence and building a community free of abuse. A representative from Between Friends, will address the crowd and get the walk underway.

5:45 p.m. – Put those heels on and get ready to walk 1 mile through the Loop.

6:30 p.m. - Join us for some fun and socializing after the Walk at downtown bar. Details to follow.

WHERE TO BUY SHOES:

Beatnix (Shoes for $25 and up): 3400 N Halsted St, Chicago 60657 (773) 281-6933
LaDame FootWear (Official Walk a Mile in Her Shoes® Store): (800) 604-1218 x2
Ragstock (Shoes for $25 and up): 812 W Belmont Ave., Chicago 60657 (773) 868-9263
Skyscraper Heels (Shoes for $49 and up, sizes up to 17): 2202 W Belmont Ave., Chicago 60618 (773) 477-8495
Macy's (up to size 15): www.macys.com/shop/shoes/pumps
Payless Shoesource (up to size 13): www.payless.com

Register online at www.chicagobar.org/walkamile.
(or complete form on back)
Learn more at www.walkamileinhershoes.org.

The Young Lawyers Section YLS The Chicago Bar Association

Between Friends
Building a Community Without Domestic Violence

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MAINTAINING PROFESSIONAL AND ETHICAL BALANCE IN THE TRIPARTITE RELATIONSHIP

Stuck in the Middle With You

By Phillip Skaggs

Insurance defense attorneys can often feel stuck between the competing interests of the insurer who retained them and the insured they have been tasked to defend. Illinois follows the majority approach to tripartite relationships, which holds that defense counsel retained by an insurer to represent an insured actually serves two clients simultaneously. Often, the three parties to this relationship share a common interest in successfully defending a claim. However, where the insurer reserves its rights to dispute some aspect of insurance coverage under the policy, or the insured and insurer have differing views on how the case should proceed, a conflict of interest might arise, leaving defense counsel stuck in the middle between two clients. While defense counsel's loyalty may "follow the purse strings" and tend to lean in favor of the insurer (even if unintentionally), defense counsel owes the insured the same ethical and professional obligations as he or she would any other client. This "dual client" relationship requires maintaining a professional and ethical balance between the possibly competing interests of the insurer and the insured. This article addresses three major areas where the otherwise congruent interests of insurer and

insured can differ significantly–the sharing of information, the use of resources, and claim resolution–and what defense counsel should do to avoid any ethical missteps.

Duties to Disclose and Withhold Information that May Affect Coverage

Through the investigation and defense of a case, defense counsel may come upon facts that bear on coverage for the underlying litigation. Although insurer-retained defense counsel is generally under no obligation to independently identify and opine on potential coverage issues, he or she must nevertheless be aware of the impact his or her actions can have on both the insurer's and insured's rights under the policy. In situations where the insurer has issued a reservation of rights as to some aspect of coverage, defense counsel should be familiar with the bases for the insurer's reservation and the potential consequences of disclosing facts that negate or reduce the scope of available coverage. Counsel must therefore carefully evaluate which information should be disclosed to the insurer, how, and when.

The solution is not to simply withhold all information from the insurer. While counsel should generally avoid turning over evidence to the insurer that may jeopardize the insured's coverage, counsel also has an ongoing duty to disclose information to the insurer regarding the status of the litigation. In addition to counsel's ordinary obligations to the insurer as a client, counsel has a duty to disclose information on behalf of the insured pursuant to the policy's "cooperation clause." This common policy condition requires the insured to assist in the insurer's investigation and allow the insurer to obtain records and other information related to the case. Counsel's competing duties to both withhold and disclose pertinent coverage-related information can thus give rise to several ethical dilemmas.

Rule 1.7(a) of the Illinois Rules of Professional Conduct establishes that defense counsel has a duty to the insured not to disclose client confidences or information relating to the representation of a client unless (1) the client gives informed consent, (2) the disclosure is impliedly authorized, or (3) disclosure is specifically permitted by rule. Similarly, Rule 1.8(f) prohibits a lawyer from accepting compensation from someone other than a client–*e.g.* the insurer–unless the information relating to the representation is protected. Nevertheless, when retained counsel represents multiple clients, such as in the insurance tripartite relationship, any claim of "privilege" in withholding documents from the insurer must be evaluated in light of *Waste Management, Inc. v. International Surplus Lines Ins. Co.*, 144 Ill. 2d 178 (Ill. 1991), and its progeny, which generally encourages the full disclosure by an insured to the insurer, but with some caveats.

An insured clearly has no affirmative duty to assist the insurer in its efforts to defeat a proper claim since doing so would clearly be to the insured's detriment. However, Illinois courts have recognized that the "cooperation clause does obligate the insured to disclose all of the facts within his [or her] knowledge and otherwise to aid the insurer in its determination of coverage under the policy." *Waste Management*, 144 Ill. 2d at 204. Similarly, the Illinois State Bar Association has opined that the insured, and by extension Defense counsel, does not have a duty under a policy's "cooperation clause" to reveal adverse information that might diminish the insured's coverage. *See* ISBA Adv. Op. on Professional Conduct, No. 92-2 (July 17, 1992). Where the disclosure of certain information might be prejudicial to the insured's coverage, defense counsel should confer with the insured and his or her personal counsel to delete any incriminating references.

If retained counsel and the insured cannot agree on the permissible scope of disclosures to the insurer, retained defense counsel must advise the insured to the extent that particular deletions may expose him or her to a breach of the cooperation clause. If the conflict cannot be resolved, retained counsel may be forced to withdraw pursuant to Rule 1.16(b)(4) so as not to jeopardize the attorney-client relationship with either the insured or the insurer. When faced with this dilemma, counsel would be well advised not to disclose the underlying facts and basis for the withdrawal, although notifying the insurer of the existence of a potential coverage issue is permissible. The insurer would then have the opportunity to ascertain the withheld facts through a declaratory judgment proceeding in which the defense counsel is not involved.

In sum, while counsel should remain cognizant of its duty not to withhold information from the insurer, counsel should also err on the side of caution and filter all case-related information through the insurer's own reservation of rights and any other potential coverage issues to determine whether the disclosure may prejudice the insured's interest in full coverage. If information cannot be disclosed without jeopardizing coverage, and also cannot be withheld without breaching counsel's fiduciary duty to the insurer or the insured's duty to cooperate, then counsel must identify and discuss the resulting conflict of interests with both clients.

Duty to Preserve and Advise on Potential Coverage Issues and Resources

Insurer-retained Defense counsel can sometimes feel like they are obligated to wear two hats–that of both defense and coverage counsel. As discussed above, the general rule is that defense counsel has no duty to independently identify and assess the strength of coverage defenses, and should certainly avoid helping the insurer disclaim coverage. Counsel is, however, obliged to be familiar with potential coverage issues and recognize latent conflicts of interest inherent to the insurance

relationship. Further, most insureds are understandably concerned with maximizing any available insurance coverage to protect against potential excess judgments and uninsured liability. This is particularly true if the insurer reserves the right to deny coverage for one or more of the underlying claims, or where an insured has available insurance under another policy. Thus, a question arises as to whether defense counsel retained by the insurer has a duty to help the insured maximize or pursue available insurance coverage, or otherwise advise the insured on the status of coverage issues. Recent case law suggests that courts may be willing to extend the tripartite relationship in this regard.

As discussed previously, the tripartite relationship creates simultaneous obligations to both the insurer and the insured. Rule 1.7(a) of the Illinos Rules of Professional Conduct, however, prohibits a lawyer from representing one client if the representation would be directly adverse to another client or if such representation is materially limited by the lawyer's responsibilities to another client. Ill. R. Prof. Conduct 1.7(a). Thus, any advice regarding the scope or availability of insurance provided by the insurer or whether the insured has a cause of action against its insurer arguably creates a conflict of interest prohibited by Rule 1.7(a).

On the other hand, seeking to utilize coverage benefits or maximize available insurance coverage from other insurers or sources may not involve a conflict, and may sometimes provide a direct benefit to both the insurer and insured. For example, whether the insured has excess insurance above the primary policy or other insurance that may potentially contribute to a loss could both secure the insured against an excess judgment and reduce the insurer's proportionate share of liability and defense obligations.

Whether defense counsel, however, *must* investigate insurance issues for the benefit of the insured has not been specifically addressed under Illinois law. Other jurisdictions have held that defense counsel in certain situations may have a duty to advise the insured on coverage and protect the insured's excess coverage. In *Darby & Darby, P.C. v. VSI International, Inc.*, 739 N.E.2d 744 (N.Y. 2000), the insured's independent defense counsel withdrew from representing an insured client due to the nonpayment of attorneys' fees. Subsequent counsel notified the insured that its policy actually covered its litigation costs. The insurer agreed to defend the insured; however, only for the future cost of litigation. When the prior counsel later filed suit for unpaid attorneys' fees, the insured brought a malpractice counterclaim based on the prior counsel's failure to identify and advise on the issue of available coverage for costs. The New York Court of Appeals ultimately sided with prior counsel, but left open the possibility for future claims against attorneys for failure to advise clients on insurance coverage issues. The court specifically acknowledged that law firms have a duty to "keep abreast of emerging legal trends" and that this may include a duty to assess and advise client about potential coverage.

In cases involving a likelihood of excess judgment, the foregoing duty to advise the insured may also include a duty to investigate whether excess insurance is available and, if so, to notify the excess carrier on the insured's behalf. In *Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34 (N.Y. App. Div. 2d Dep't 2006), another New York case, the insured sued its insurer-retained defense counsel for malpractice in failing to promptly advise an excess carrier of the underlying lawsuit. Ultimately, the court held such a duty would turn primarily on the scope of the agreed representation–a question of fact–and on whether, in light of all relevant circumstances, the attorney had "failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession." The court did note, however, that the investigation of available other coverage alone does not necessarily create a conflict in violation of the tri-partite relationship. As recent as December 11, 2015, a North Carolina attorney was sanctioned for not adequately investigating and disclosing her client's available excess insurance coverage. *See Palacino v. Beech Mt. Resort, Inc.,* 2015 U.S. Dist. LEXIS 166244

(W.D.N.C. Dec. 11, 2015).

Illinois defense counsel should be aware of this potential pitfall and consider the option of openly discussing and memorializing the scope of defense counsel's duties with respect to insurance matters prior to the commencement of representation. These types of limitations are permitted under Rule 1.2, and could include the scope of defense counsel's duties to investigate other available insurance, as well as counsel's inability to advise the insured on possible actions against the insurer. For these matters, the insured should then be advised to consult independent outside counsel if the insured so desires. Without such limitations, however, defense counsel should be cognizant of his or her potential coverage-related obligations to the insured.

Duty to Identify and Advise on Settlement and Trial Strategy Conflicts

A third common ethical dilemma of the tripartite relationship arises when the insurer and insured differ on whether and how the underlying case should be tried or settled. In such cases, Illinois holds that defense counsel must notify the insured of a potential conflict of interest and the opportunity to retain independent counsel.

On the one hand, the insurer may encourage expeditious settlement in an attempt to minimize defense expenses and resolve the case, while the insured may want to protect and restore his or her business reputation by winning the case at trial. For example, in *Rogers v. Robson, Masters, Ryan, Brummand & Belom*, 407 N.E.2d 47 (Ill. 1980), defense counsel retained by the insurer settled a claim without proper disclosure to the insured and over the insured's known objection. Defense counsel was then sued by the insured and ultimately found liable for damages. Notably, the insurer was not found liable for damages because its policy allowed it to settle without the insured's consent, thereby leaving counsel solely responsible for his or her arguably good intention. The Illinois Supreme Court noted that, although defense counsel was employed by the insurer, the insured was also a client and, therefore, entitled to full disclosure of the intent to settle the litigation contrary to his express instructions. The Court found that defense counsel's duty to make such disclosure stemmed from the attorney-client relationship and was not affected by the insurer's own authority to settle without plaintiff's consent.

More often than not, however, the insured is interested in quickly settling the underlying case within the policy limits to avoid the publicity of trial and the uncertainties of litigation, while the insurer is primarily interested in avoiding potential multi-million dollar liability. In the California Appellate Court case of *Betts v. Allstate Ins. Co.*, 154 Cal. App. 3d 688 (1984), the insurer refused to settle an underlying civil case even though it had knowledge of unfavorable evidence concerning its insured's liability. Additionally, defense counsel failed to keep the insured appraised of all settlement demands and court-ordered pretrial settlement conference. Pursuant to the insurer's directives, defense counsel repeatedly encouraged the insured to adopt a "no-settlement" position, which improperly exposed the insured to serious risk of excess personal liability. After trial, a judgment was entered that exceeded the policy limits and the insured sued both the insurer and defense counsel for bad faith and negligent infliction of emotional distress. The trial court held, and the Appellate Court agreed, that defense counsel had clearly breached its duty to the insured on several grounds, including failing to disclose a conflict of interest and for favoring the interests of the insurer to the insured's detriment.

Conclusion

Ultimately, defense counsel operating within the tripartite relationship, with an insurer and insured, faces unique ethical dilemmas and very few easy answers on how to maintain the peace. It is important to remember, however, that most serious ethical issues can be identified and potentially avoided entirely by open and continuous communications with both clients. Being stuck in the middle of the volatile insurer-insured relationship can be far less frustrating and intimidating so long as defense counsel maintains a high degree of transparency, remains cognizant of coverage issues, identifies available benefits, and promptly addresses any competing interests that may be revealed as the case progresses. ■

Phillip Skaggs is an associate attorney at Traub Lieberman Straus & Shrewsberry LLP. His practice focuses primarily on insurance coverage, excess monitoring, professional liability and general liability. He is co-chair of the YLS Professional Responsibility Committee, and was previously vice-chair of the YLS Insurance Coverage Committee.

Pro*Files:* Patricia Brown Holmes

By Shawna S. Boothe

Would you briefly describe your work as a lawyer and the path that led you to where you are now?

I am currently a named partner at Riley, Safer, Holmes & Cancila. RSHC is a full-service law firm that I helped found to bring something new to the legal market. I was formerly a partner at Schiff Hardin for 11 years where I served in various leadership roles, including the co-chair of the firm's Compliance, White-Collar and Internal Investigations Team; chair of the firm's Diversity Committee; and member of the firm's Executive Committee. I was the first African American female equity partner at that firm when I joined in 2005. My own practice at RSHC focuses on representing individuals and companies in high-stakes commercial litigation; conducting solid, stealth and credible internal investigations; defending white-collar crime, and client counseling.

My legal career has been a journey–I have explored many sides of the law, ranging from prosecution, defense and the judiciary, and in various practice settings, including federal, state and local government and in large and mid-size law firms. Along the way, I have been guided by one constant: a desire to improve the world for other people. After graduating from the University of Illinois College of Law in 1986, I started my legal career as a Cook County Assistant State's Attorney in the appeals division, quickly working my way up to supervisor. After five years prosecuting state-level crimes, I moved to the U.S. Attorney's Office to prosecute federal crimes as an Assistant U.S. Attorney for the Northern District of Illinois. I was later offered a position with the City of Chicago as its Chief Assistant Corporation Counsel for the municipal prosecutions division, where I led the division for almost three years. In 1997, I was selected to join the bench as an Associate Judge in the Circuit Court of Cook County, where I served for almost nine years until I retired in 2005 and entered private practice.

This profile is the third in a series. One of the YLS's goals this year is to increase the membership and active participation of associates in large law firms. Each month, we will be profiling a Chicago lawyer who has practiced in a large law firm and is active in the CBA. This month, we profile current CBA President Patricia Brown Holmes of Riley, Safer, Holmes & Cancila and former a partner at Schiff Hardin LLP.

My path has also been shaped by my community involvement. I serve as a Trustee of my alma mater, the University of Illinois, which encompasses all three campuses (Urbana, Springfield, and Chicago) as well as the Medical and Research center. I am a Trustee of the La Rabida Children's Hospital and Research Center (formerly La Rabida Children's Hospital). And I am the sole Trustee of the Burr Oak Cemetery, charged with its rehabilitation following a horrific set of crimes including fraud and grave desecrations. I chair Chief Judge Ruben Castillo's Magistrate Judge Evaluation and Selection Committee for the Northern District of Illinois. I was an adjunct professor at Northwestern University School of Law and the Loyola Institute for Paralegal Studies, and was an instructor at the Attorney General's Advocacy Institute–Criminal Trial Advocacy Section of the U.S. Department of Justice. I was a member of Senator Dick Durbin's judicial commission to investigate backgrounds and select federal judges and the U.S. Marshal for the Northern District of Illinois.

How did you first get involved in the CBA?

I first got involved in the CBA during law school–at that time the CBA had a student division–and I have been involved with the CBA ever since. I really enjoyed my student involvement and continued being engaged with the CBA after law school. I have been active on many committees over the years, including the Criminal Law Committee, ad hoc and blue ribbon committees, and the Young Lawyers Section.

What positions have you held with the CBA?

I have been fortunate to hold a number of CBA positions, including being a member of the Board, Secretary, Second Vice President and First Vice President. I am honored to serve as this year's President–only the second African American female and sixth African American to be elected to the position in 142 years.

How has your membership in the CBA helped your career?

One word comes to mind: phenomenal. The CBA has provided me with opportunities to showcase my skills and talents to a diverse group of people in different practice areas and walks of life. Working with others on CBA committees and planning CBA events has allowed me to demonstrate leadership, organization and collaboration–attributes of lawyers that are

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Margaret O'Mara Frossard Uses Mentoring Program to Find Law Graduates Jobs in a Tough Market

Retired Justice's passion for career and professional development is making a mark on law students

After a career of more than 30 years in public service working as an assistant Cook County state's attorney, a judge in the Circuit Court of Cook County and a justice of the Illinois Appellate Court, Justice Margaret O'Mara Frossard (ret.) has carved out a new career path helping students at The John Marshall Law School secure jobs in a challenging market.

When Frossard first joined John Marshall's administration in 2011, she wasted no time in developing a program that gave students the opportunity to learn the importance of professionalism while they were still in school. That same year, John Marshall became the first law school approved by the Illinois Supreme Court Commission on Professionalism to launch the Lawyer-to-Lawyer Mentoring program. Since the program began, Frossard has paired hundreds of mentors and mentees.

"Our students graduate with the skills and knowledge that are making them employable," Frossard said. "They have talent, excellent writing skills, strong research skills and a deep understanding of the law that makes them ready for the job market."

Frossard typically tries to gear the mentoring sessions towards showing students how they can develop the skills of a true professional before they begin serving clients. Two important components of Frossard's work are the Justice Anne Burke Professionalism Series and the In-Classroom Professionalism & Engagement Program.

"In this job market, students need to hit the ground running and be practice ready from day one," Frossard said. "It has been my goal since starting at John Marshall to help students develop their sense of professionalism and engagement during their education. My office works to improve the delivery of services to students while providing the foundation for professionalism and preparing students to become responsible, dignified members of the legal community."

In addition to the programs Frossard administers and more than 60 career-related programs offered by the Career Services Office, students complete four semesters of legal writing and research courses in John Marshall's #5 ranked Lawyering Skills Program—one of the most rigorous foundational legal programs in the country. Students then test their skills in one of John Marshall's Community Legal Clinics, a requirement for graduation.

"Our students graduate with the skills and knowledge that are making them employable," Frossard said. "They have talent, excellent writing skills, strong research skills and a deep understanding of the law that makes them ready for the job market."

Students and graduates alike confirm Frossard's impact on John Marshall.

"The help I have received from Judge Frossard has truly been invaluable," John Marshall graduate Joe Kearney said. "She has served as a mentor and a guide to me during my job search and after. I truly feel fortunate to know her."

As the success of the program continues, five years later, it is clear this success is not just a trend. Frossard has found something special with the Lawyer-to-Lawyer Mentoring program. Using her extensive network of legal professionals, Frossard continues to invite judges, practitioners, alumni and other professionals to serve as guest presenters for John Marshall students. As a follow-up, Frossard recruits alumni to work toward job placement for recent graduates.

"Justice Frossard's alumni jobs network is a perfect example of her commitment to connecting people and ideas, instilling the importance of professionalism within students and alumni and tirelessly advocating on behalf of John Marshall job-seekers in this tough legal market," Kearney said.

Contact Justice Margaret O'Mara Frossard (ret.), Associate Dean for Professionalism and Career Strategy, to learn more about John Marshall's practice-ready graduates.

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LEGAL ETHICS

BY JOHN LEVIN

A Philosophic Digression: "The Justice Factor"

A few months ago the *New York Times* reviewed *The Complete Works of Primo Levi* (Nov. 29, 2015). Levi was a professional chemist. He was also a holocaust survivor and author of *Survival at Auschwitz*. The review stated that the "core of Levi's science…was its refusal of generalizations and theories that transcend the realities of particular things." Levi believed: "You must not trust the almost-the-same…. The differences may be small but can lead to radically diverse results." He stated: "What we commonly mean by the verb 'to understand' coincides with 'to simplify.'… The desire for simplification is justified; simplification itself is not always. It is a working hypothesis that is useful as long as it is recognized for what it is."

Steven Pinker, in his best seller *The Stuff of Thought,* states the same concept:

> "Humans construct an understanding of the world that is very different from the analogue flow of sensation the world presents to them. They assemble these objects and events into propositions, which they take to be characterizations of real and possible worlds. The characterizations are highly schematic: they pick out some aspects of a situation and ignore others …"

Lawyers use the same process in legal reasoning. We analyze fact patterns, sort the facts into appropriate legal categories either directly or by analogy, and then apply rules to the categories of facts. We often reason by "almost-the-same." This is a useful working hypothesis, but we often don't recognize it as just a hypothesis–especially when we apply the precepts of legal reasoning to professional ethical problems.

Sometimes the small differences between the "almost-the-sames" should lead to radically diverse results. Because our legal reasoning is highly schematic, we are often unable to reach such diverse results. I suggest that in cases involving ethical issues, we should apply a "justice factor" to adjust the results to correct for "almost-the-same's".

However, the problem with applying a "justice factor" is that it requires making exceptions to a general rule on an ad hoc basis. The Law–as an institution–does not favor ad hoc decisions. The Law favors firm rules that are strictly followed, even if–at times–injustice may result. A current example is the controversy over strictly applying the Federal Sentencing Guidelines to cases in which the resulting punishment is out of proportion to the crime. Many judges feel the need for discretion to adjust sentencing when the circumstances demand it.

Good examples of applying a "justice factor" in the area of professional conduct arise out the application of Rule 1.6–confidentiality of client information. There have been several "buried body" stories in which criminal defense lawyers have learned the location of victim's bodies but have not disclosed the information, even after the conviction and sentencing of their client and even though it would have brought solace to the victims' family, because it was learned during the representation.

More difficult is the Chicago case of a person wrongfully convicted of murder and who spent 26 years in prison. Lawyers for another individual on trial for another crime were told by their client that he had, in fact, committed the murder; but he did not give informed consent for the attorneys to disclose the information. Not until the client died did the attorneys feel free to disclose the information and obtain the release of the wrongfully convicted man.

There should be some flexibility in the system that would give lawyers permission to do the right thing in the interests of justice. A solution might be a system like medieval equity, where a lawyer could approach some tribunal on a confidential basis to get an exception to strict application of the rules. This approach would insert a justice factor into our system of professional conduct and give some recognition to the "almost the same." ■

John Levin is the retired Assistant General Counsel of GATX Corporation and a member of the CBA Record Editorial Board.

John Levin's Ethics columns, which are published in each **CBA Record,** are now indexed and available online.

For more, go to http://johnlevin.info/legalethics/.

ETHICS QUESTIONS?

The CBA's Professional Responsibility Committee can help. Submit hypothetical questions to Loretta Wells, CBA Government Affairs Director, by fax 312/554-2054 or e-mail lwells@chicagobar.org.

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BY CATHERINE SANDERS REACH

Arsenic and Old Lace: Technology Competency

Following the ABA's Model Rules updates in 2012, the Illinois Rules of Professional Conduct Rule 1.1 (Competence) comment [8] has been updated to read: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, …" effective January 1, 2016. One very real risk posed to a law office by technology that could call into question a lawyer's competency is the continued use of old software and operating systems.

Wave Goodbye

Most lawyers know that maintaining firewalls, up-to-date anti-virus and anti-malware definitions, practicing vigilance when opening attachments and surfing the Internet, and maintaining adequate backup files are all vital for security. Considering that in the ABA's Legal Technology Survey Report from 2015, 42% of respondents affirmed that their firm had been infected with a virus/spyware/malware and 37% reported a hard drive failure, these precautions are absolutely necessary to maintain competency and confidentiality.

What lawyers should also know is that running old, outdated and unpatched software and operating systems puts the firm at such a high risk for infection, data breach and violation of confidentiality. Ten percent of respondents to the ABA's 2015 survey reported using Windows XP, despite the fact that Windows XP–and Office 2003–have not been supported or patched by Microsoft since April 2014. So, what's the big deal?

Unsupported operating systems receive no security updates, non-security hotfixes, support or online technical content updates from Microsoft. The computer will still operate, but becomes more vulnerable to security risks and malware infections. In addition to XP and Office 2003, as of July 2015 Microsoft Security Essentials and Microsoft's Malicious Software Removal Tool are no longer being updated. Threats such as zero day vulnerabilities (high risk security holes) will not be patched. Often the zero day exploit is a code injection that sits undetected in the background, opening a back door to the firm's data and files. Hardly any current software runs on Windows XP, which means that much of the other software running on this operating system is likely also out of support.

Even if a firm has upgraded from Windows XP and Office 2003 to more recent versions there are still heavily used, yet unsupported and unpatched software applications putting files at risk on many law office machines. Adobe Acrobat X Reader/Standard/Pro is no longer supported as of November 2015. Internet Explorer 10 (and 8 and 9) is no longer supported as of January 2016. Mac users are not immune, as OS X 10.6 (Snow Leopard), 10.7 (Lion) or 10.8 (Mountain Lion), no longer receive security updates from Apple.

No-See-Ums

Software that is "invisible" or inactive until used by an interactive website, like Java or QuickTime, is often exploited because computer users ignore the update messages. While some of these exploits have made news, many others do not. It is essential to keep all applications, add-ons, and applets patched on firm machines. Easy targets for hackers include Adobe Flash, Apple's QuickTime, Adobe Reader, and the aforementioned Oracle Java. In fact, as of April 14, both the US government and Trend Micro are recommending Windows users uninstall QuickTime due to vulnerabilities Apple has no intention of fixing. Do not ignore reminders to update these applications. If you are unsure whether the message to update is in itself a virus, a quick Google search will usually confirm whether a patch has been issued.

The Boogey Man

Ransonware is a high-profile security threat that is currently evolving and exploiting old, outdated software. Ransomware is a prevalent threat that infects a computer or network, hijacks and encrypts the files and holds the firm's data ransom for payment in untraceable Bitcoins. Often police and the FBI recommend paying the ransom to free the files. The ransomware builders are becoming bolder and more sophisticated. They are building in countdown clocks and delete files if the ransom is not paid quickly. The ransomware code is delivered often by exploiting vulnerabilities in software like Adobe Flash, or tricking a recipient to open a PDF document or run a macro in a Word document sent via email. Even with a completely up to date system with excellent security protection companies are getting hit with ransomware. However, hackers like easy targets. They are now intentionally exploiting hospitals, police stations and schools–entities that often run out of date and old systems. How long will it be before law firms are targeted?

What to Do?

In addition to replacing outdated software and keeping current software patched and updated, firms must maintain constant vigilance against social engineering, and

Catherine Sanders Reach is the Director, Law Practice Management & Technology at the CBA. Visit www.chicagobar.org/lpmt for articles, how-to videos, upcoming training and CLE, services, and more.

train all staff and lawyers to be wary. Social engineering is a method of tricking a person to open the door for malicious attacks, and usually prey on fear, vanity, or the desire to help someone in need. You've probably seen them: the direct message from Twitter from someone you know asking "what are you doing in this video?;" the email from a friend needing you to send money via electronic transfer because she lost her wallet while traveling outside of the country; the email from the Better Business Bureau requesting you to click through to see a negative report that has been filed; and the list goes on. Learn to recognize the signs, practice defensive computing, and exercise skepticism to avoid having one of these tricks best someone in the firm.

Current (Technology) Awareness

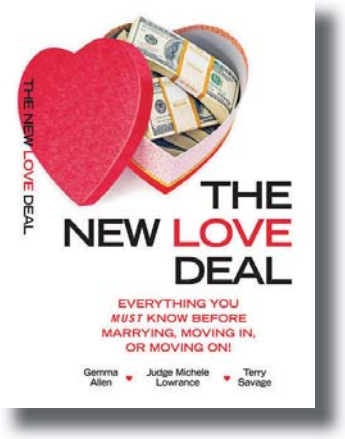
Most of the time, if Google or Dropbox or other large provider has a security issue, or are unavailable for any length of time the news will make the headlines. Take a quick look at the technology section of the daily news (site/show/program) you consume for any breaking headlines. Legal technology and security blogs, like Sharon Nelson's *Ride the Lightning* or the free daily *ABA Journal* email, are also fantastic resources for the current thought on "is it secure enough for a lawyer?" Keep an eye out for press releases, social media notification, email alerts, and blogs for information you may need to know from products that are used in the firm. Feel free to contact the Chicago Bar Association's Law Practice Management and Technology Division with questions, and visit www.chicagobar.org/lpmt for updates.

Technology can be extremely beneficial for lawyers and clients, but it does not come without risk. Education, wariness, and security protocols go a long way to keep firms and client safe from the impacts of malware and viruses, exploits and hacking. Massive and very public breaches from Target to Bank of America suggest that no matter how sophisticated the security, all business is vulnerable. The expectation of the Rules is not perfection, but to intentionally ignore technology's risks and benefits in a law practice is now a matter of competence. ■

SUMMARY JUDGMENTS

REVIEWS, REVIEWS, REVIEWS!

Coupling and Uncoupling



The New Love Deal: Everything you Must Know Before Marrying, Moving In or Moving On
By Gemma Allen, Michele Lowrence and Terry Savage

Reviewed By Steven Rakowski

The break-up of a committed relationship is often a painful, turbulent and stressful ordeal where people are required to make significant financial decisions at a time when emotional distress is at its peak. "The New Love Deal" offers an enjoyable, clear read on how best to have the difficult conversation about money and its use before the couple moves in together or otherwise makes a commitment to one another.

Steven Rakowski is a domestic relations attorney and a member of the CBA's Domestic Relations Committee and Legislative Subcommittees

The book is authored by three women who have experienced perspectives on divorce and relationships. Divorce attorney Gemma Allen, retired Cook County Domestic Relations Division judge Michele Lowrence, and financial consultant Terry Savage share their knowledge about how to increase the odds that a relationship will be successful.

The authors stress that the key to a successful relationship, traditional or non-traditional, state certified or not, is communication. That is not a new message and you have all probably heard it in one form or another. "Don't go to sleep angry." "Communication to a relationship is like oxygen to life." "The way we communicate with others ultimately determines the quality of our lives." Whereas these platitudes convey a general message "The New Love Deal" delves deeper - it points out the critical importance of making sure you know your partner's expectations, needs and goals on money - before moving in together or marrying.

The Pre-nup

The book begins by pointing out that every form of committed relationship has some aspects of a business deal. And the business deal should be in writing - a prenuptial agreement. Lowrence points out that during her years on the bench, she observed many divorces caused by differing attitudes between the spouses on how to manage money. She adds that if the couple has the difficult conversations about their attitudes on money and its use before a commitment, they stand a much greater chance of staying together.

A prenuptial agreement often gets a bad rap. Many people view it as planning for failure. The authors assure us otherwise: A prenuptial agreement can enhance the romance by reducing later conflict because it forces couples to face fears and assumptions on issues that may later divide them. Easier said than done, right?

But, what if one party has more wealth or power than the other and one of the parties feels that they have no voice? The authors encourage readers to adopt a different outlook. Obviously, a person with more power values something in the other. There is an attraction. In the early stages of a relationship, generally it is the most balanced. That is precisely when a prenuptial agreement should be discussed because each person more readily recognizes what the other brings to the relationship.

Replace Conflict with Compromise

To make it easier for couples to undertake the difficult task, the authors provide specific advice on how to begin the conversation. They suggest that the pathway to meaningful communication is to share your feelings and needs. Conflict is urged to be replaced by compromise, and steps are offered on how to avoid conflict in planning a joint future. The authors stress that talking about money is a critical part of the new love deal.

After the conversation is finished and a deal is made, the authors then explain how to go about creating a prenuptial agreement. Rules are shared from knowing the law in your state to obtaining separate lawyers. Myths are debunked, too. The most common myth is that prenuptial agreements are easily broken. Most often, the "deal you make is the deal you take." You should never count on the judge to make a better deal for you. Help is also offered on how to pick a lawyer or mediator.

I was delighted to see that the authors also mentioned "Collaborative Process" as a method of deriving the prenuptial agreement terms. The authors identify it as a growing practice area that is a particularly effective method when the parties are willing to work toward a common goal. This process is particularly well suited to facilitating development of prenuptial agreement terms because it focuses on the

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Pro*Files*–Patricia Brown Holmes continued from page 44

highly sought by our clients. For example, through my work as chair of a blue ribbon committee on juvenile justice, I was later hired by one of my fellow committee members to represent him in a big case. He wanted me as his lawyer because he said he was impressed with the work ethic and leadership I showed on the committee. Without even knowing I was auditioning, my work in the CBA was being noticed by other members and helped to build my professional reputation and career.

What advice would you have for young lawyers at large law firms about becoming involved in the CBA?

Do it, and do it well! It can be difficult for associates at large law firms who tend to be focused on the billable hour to find the time to be involved in the CBA. But it is important for young associates to understand that involvement in bar associations and organizations like the CBA will help them make a name for themselves, work with people outside their firms, grow their professional networks and skyrocket their careers. So, carve out the time to do it. Active involvement is the key. Young associates should make an effort to rise to a leadership position that will provide them with opportunities to showcase their skills and talents to other members. There are many ways to be actively involved: help organize some of the CBA's programming, seek out a mentor within the CBA, or take part in pro bono work through the CBA's community outreach events. My goal as President is to challenge young lawyers to create their own path and leave their own legacy within the CBA.

What is your favorite annual CBA event and why?

I like them all, but my two favorites are the annual Bar Show and the International CLE trip. The Bar Show is a satirical musical review that is produced and directed by lawyers who also star in the show. I love the Bar Show because it gives lawyers a chance to be creative, outside the law, and to do something they enjoy. It's a fun way to showcase talent. People always say lawyers are pent-up actors and actresses anyway. Watching these folks who are often serious trial attorneys sing and dance is magnificent! I also enjoy immensely the International CLE. There is nothing like traveling with colleagues and exploring other cultures and their legal systems. It helps develop a true appreciation for other legal systems and a deeper bond with lawyers with whom we might never come to appreciate otherwise. It's a great opportunity that should be experienced by everyone! ■

The New Love Deal continued from page 56

needs and goals of each party and requires them to identify, respect and work toward achieving the other's goals. If a sticking point remains, the parties are assisted by collaborative attorneys trained to minimize conflict.

Other tips like finding "fairness" are offered. The authors caution that parties rarely have the same definition of fairness because the definition is formed by one's personal experiences and ideals. As such, "The New Love Deal" suggests ways to create a definition that works for both. And the authors stress that if the parties do not provide some definition of fairness in the agreement, they are leaving the definition up to the judge who may be asked to interpret it.

"The New Love Deal" is a treasure trove of common sense and wisdom gained from the authors' professional and personal experiences. A reader of any age or personal experience will find valuable and practical tools on how to achieve a more peaceful and lasting relationship. Family law practitioners will find new ways to explain the importance of prenuptial agreements to their clients and how to minimize conflict in negotiating terms.. ■

CBF Report continued from page 20

moderate income people, is to offer fixed fee and flexible representation options.

It wasn't always this way, and there is no reason it needs to continue

When you bring up pricing through means other than the billable hour to most lawyers practicing today, you'd think the billable hour had been with us since the Big Bang. It actually is a much more recent phenomenon though, and only became the primary mode of pricing in our profession a few decades ago.

Many parts of our profession already function pretty well without ever using the billable hour, with practices focused on personal injury, real estate closings, traffic matters, and immigration services as just a few examples. Companies like Avvo increasingly are offering fixed fee services to the larger consumer market in other areas of law as well.

Shifting the conversation and charting a new and better path

Any discussion of pricing should focus on the value being delivered for the client. I shared some thoughts on the value we provide as lawyers in my January blog post on "Access to Justice and the Future of our Legal Profession," and there are clearly some better ways to reflect that value than pricing by the hour.

There are three fundamental problems with the billable hour being the method of pricing when you look at it through the client value lens. The first, noted at the outset, is that the client has no idea how much the services are going to cost, and as a result, generally is not in a position to make a cost/benefit judgment about the value of the services.

The second fundamental problem is that the billable hour focuses only on the lawyer's "inputs" rather than the value the client is getting from the services. Clients are not seeking to buy your time as they would when they get a massage; what they want is to buy your services to help them achieve a particular end goal (e.g., a business deal, recovery or protection of funds, peace of mind, etc.). When the lawyer earns money based only on the amount of time spent, and not on the results achieved, those goals are not aligned well. And all of the risk effectively sits with the client if things do not go as planned.

The third fundamental problem with the billable hour, closely related to the first two, is that it creates perverse disincentives to efficiency and innovation. This is not to say that lawyers consciously or intentionally put more time into something just to make more money, though I think virtually all of us who have practiced unfortunately have seen that occur. The real problem is that when the lawyer uses technology and other steps to be able to resolve things faster and more efficiently—which is usually exactly what the client is looking for—the lawyer makes less money despite delivering greater value.

We can see this when we look at contingency fee practices like personal injury and other law practices that do not bill by hour. What we tend to see in those instances is a much different ratio of lawyers to other professionals on their staff (i.e., more paralegals and other assistants, fewer lawyers), and many more regular and innovative uses of the latest technologies. The reason for that is they have no incentive to spend any more lawyer time on something than is justified to reach the best outcome, and every incentive to reach that outcome as efficiently and expeditiously as possible.

NEW PRICING TOOLKIT

The CBF and Justice Entrepreneurs Project recently released a new Pricing Toolkit that provides practical guidance for lawyers on pricing legal services to be more affordable and accessible for regular people. One of the core principles of the JEP is to make legal assistance more affordable and transparent to low and moderate income people by offering fixed fees and flexible representation options to potential clients.

Thanks to a team effort of partners, volunteers, and staff, this new toolkit is a practical resource for lawyers seeking pricing arrangements other than the billable hour. The toolkit also contains a two page summary matrix that provides a brief overview of various alternative pricing options that can be effective in the consumer market. Download the toolkit at: chicagobarfoundation.org /pricing-toolkit.pdf

This is not to say that transparent and high-efficiency services can never happen when lawyers are using the billable hour. There certainly are examples of good lawyers who are doing all the right things while still using the billable hour, but it is much harder to do in that context and a lot less transparent than it needs to be.

The way forward

Because the billable hour is so ingrained in our profession today, and the current market is so opaque, there won't be much specific guidance yet about the right form of alternative pricing for every potential client you are going to see. While it will require some experimentation for you to understand what works best for particular types of cases, lawyers willing to take that plunge already are proving it can be done in a way that is a win-win for the lawyer and the client.

There are a variety of value-based pricing approaches that can work well, and reviewing them all here is beyond the scope of this article. There are some good resources to help you in the journey, including the CBF and JEP's newly released Pricing Toolkit (see accompanying text box). You can also be part of the ongoing discussion on these issues with the CBA Young Lawyers Section Future of the Profession Task Force, and through the CBA's many great Law Practice Management programs and resources.

The way forward starts by simply committing to a better, value-focused pricing approach. While I know that is easier said than done, if it was easy, everyone else already would be doing it. We can make some big strides for access to justice and our profession's future if we are just willing to try. ■

Murphys Law
continued from page 26

becomes President of the DuPage County Bar Association in June…**Timothy S. Tomasik,** Tomasik Kotin & Kasserman, will moderate the ABA's 22nd National Institute on Arbitration Litigation Seminar in New York on June 1.

Condolences to the family and friends of Illinois Appellate Court Justice **Laura Liu, Ian H. Levin, John T. Cusack,** and **Molly Warner Lien.** ■

With CBA 1st Vice President Dan Kotin, who will succeed as President of the CBA, at the 2015 Annual Meeting Luncheon.

With Judge William Bauer, U.S. Court of Appeals, at the President's Reception.

With Justice Thomas L. Kilbride of the Illinois Supreme Court at the President's Reception.

With CBA Treasurer Steven Elrod, Trisha Rich and Mark Wojcik at the President's Reception.

The 2015 Justice John Paul Stevens Honorees (left to right) John G. O'Brien, James R. Figliulo, Hon. Shelvin Louise Marie Hall, Edward I. Grossman, William A. Von Hoene, Jr., Mary Meg McCarthy, Paula H. Holderman and Daniel E. Reidy.

At the September 21, 2015 luncheon for U.S. Supreme Court Justice Ruth Bader Ginsberg.

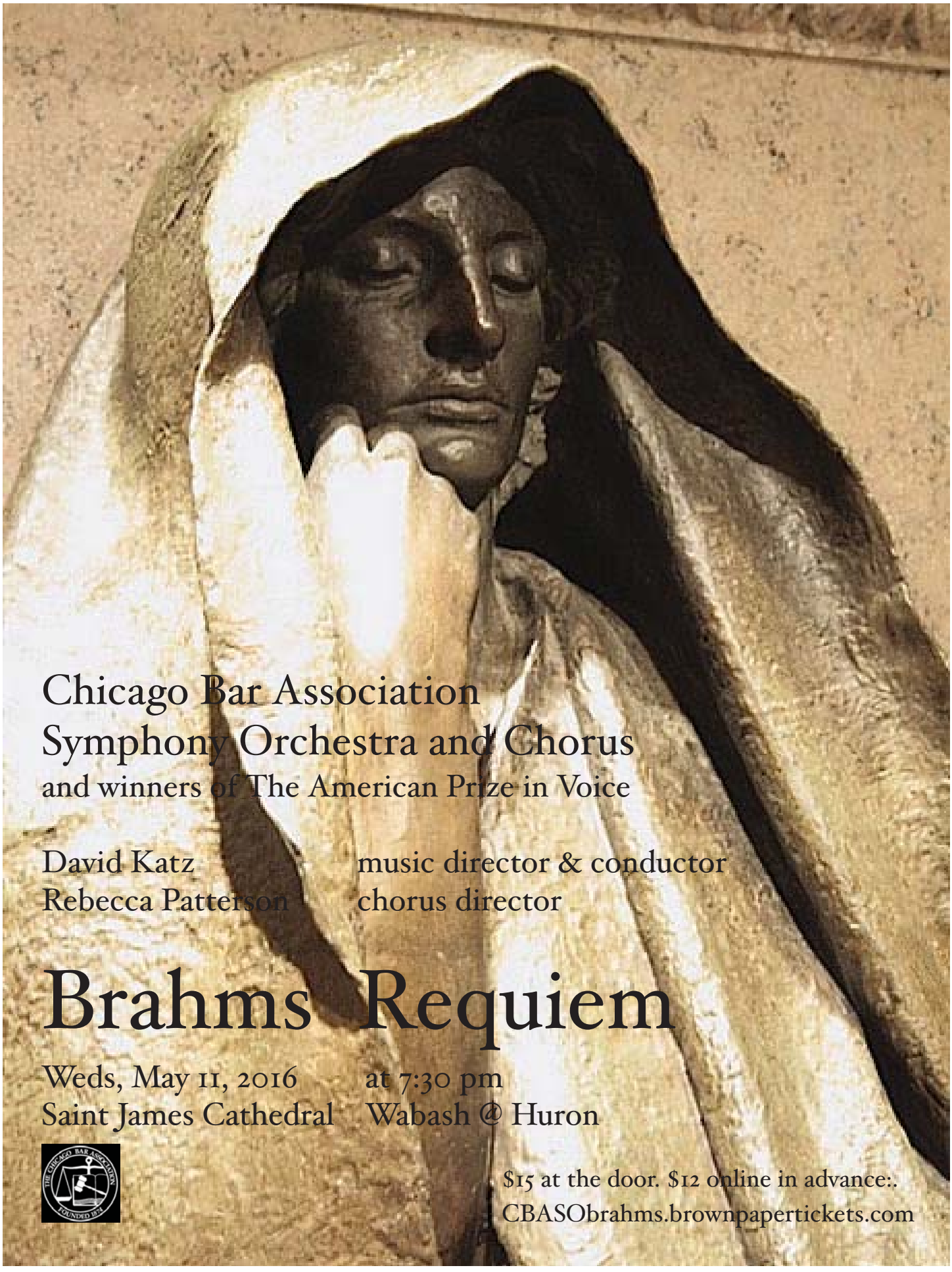
With 2015 Illinois State Bar President Paula Holderman (left), and Justice Joy V. Cunningham, Illinois Appellate Court, at the President's Reception.

–Matt Passen for being a tremendous YLS Chair and convening some great programming–End Distracted Driving must continue!

–Jeanine Cordero, Ricardo Islas and all of the folks at WYCC who produced top-notch Justice and Law Weekly shows–excellent late night television!;

–And finally, Tto all of our committee chairs and vice chairs for your outstanding leadership and to all of our members who participate and support the important work of our great Association in so many ways. Your participation is vital. I am truly much obliged!

Thank you all for a fabulous experience! ■



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