

NORTH SUBURBAN BAR ASSOCIATION

NSBA NEWS

Winter 2013

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PRESIDENT'S MESSAGE – JANUARY 2013



By Anna Krolikowska, President

Dear North Suburban Bar Association Members:

Happy, healthy, and prosperous New Year! I hope all of you enjoyed a wonderful holiday season with your families and friends. However, regardless of how much we enjoy the holiday season eventually it comes to an end. January seems to be the perfect time to consider our individual goals, both professional and personal. The beginning of a new year offers a perfect opportunity to reinvigorate networking and business development goals. I am proud to report that our efforts in the past few months have brought many new members to our association. We look forward to continuing that trend. I hope, that as you re-asses your various commitments for this year you will consider joining the NSBA for the following upcoming events.

The next NSBA meeting will take place on February 12, 2013 at 6:00 p.m. at the Happ Inn, 305 Happ Road, Northfield, IL 60093. We will have the pleasure of learning from the Honorable Martin Moltz about practice pointers in the Circuit Court of Cook County. Judge Moltz will draw on his judicial experience, as well as his prior experience as an attorney for what promises to be an informative and interesting presentation.

In addition, I hope you will join us for the annual Gary Wild Dinner, which will take place on March 12, 2013 at 6: 00 p.m. at the Glenview Park Center, 2400 Chestnut Ave., Glenview, Illinois 60026.

During the annual Gary Wild Dinner, named in the honor of a past NSBA president, we raise funds to support worthwhile local causes. This year we will honor the John Marshall Law School's Veterans Legal Support Center and Clinic. You may recall that during our most recent Installation and Awards' Dinner we were also able to award 4 law student scholarships in honor of our former president, Gerald Schur, to current John Marshall Law School students. The scholarships were earmarked for service members of The John Marshall Law School and clinical students working in the Veterans Legal Support Center & Clinic. The scholarships will be awarded annually, and contributions to the scholarship fund are welcome throughout the year. However, our most active fundraising efforts for this scholarship will take place on March 12th. We hope that you will contribute to this worthwhile cause, and help us to honor both our friends, and past NSBA presidents, Gary Wild, Jerry Schur, and the John Marshall Law School's Veterans Legal Support Center and Clinic. Tickets to this event are available. Please direct any scholarship fund contributions to NSBA at, P.O. Box 731, Glenview, IL 60026. Please make any checks payable to NSBA with a "NSBA Scholarship" notation in the memo line. For additional information, to reserve a ticket, or to discuss available sponsorship options please contact Anna Krolikowska at anna@kandrfamilylaw.com, or (847) 715-9328.

I look forward to seeing all of you at our wonderful future events!

Anna Krolikowska



From the Editor's Desk:

Please be sure to submit any articles, stories or upcoming events for the next NSBA Newsletter!

Thanks to all members (and new members) able to attend the January 8, 2013 CLE on Appraisal and Valuation by James Minchella, ASA of Micor Analytics, Inc. We look forward to hearing Practice Tips from the Bench by Hon. Martin Paul Moltz at our next CLE on February 12, 2013.

As the NSBA website is still being re-designed/reconstructed, please send any updated contact information to anna@amrlawgroup.com or raymond.ricordati@huschblackwell.com.

Again, thanks!

Anna Morrison- Ricordati

PLEASE WELCOME New NSBA Member:



John A. Zrnich
The Zrnich Law Group, P.C.
Foreclosure Defense

NSBA Officers & Directors:

Officers

Anna Krolikowska, *President*
Jan S. Weinstein, *1st Vice President*
William Herst, *2nd Vice President*
Anna Morrison-Ricordati, *3rd Vice President*

Ray Bartel, *4th Vice President*
Ray Ricordati, *Secretary*
Rosanne Barrett, *Treasurer*
Richard J. Mortell, *Past President*

Directors (2 year term):

Brian Clauss
William Ensing
Keith Goldberg
Burton Grant
Hon. Jesse G. Reyes

Continuing Directors (1 yr term):

Hon. Steven J. Bernstein
Paul Plotnick
Robert Romanoff
John Stimson
Phil Witt

January 8, 2012 CLE: Expert Appraisal and Valuation



James Minchella, ASA
Senior Accredited Appraiser, President
Micor Analytics, Inc.
Valuation, Due-Diligence & Asset Management Services
7538 Saint Louis Ave.
Skokie, IL 60076
Phone: (847) 329-8590
Fax: (847) 328-8599

Special thanks to James Minchella for a great presentation on appraisal and valuation in the law!

News From the Courts:

- Effective January 1, 2013, Supreme Court Rules 11 (allowing e-mail service of pleadings except summons & complaint), 138 (prohibiting the inclusion of personal identification information in court filings); and 201 (requiring the filing of a certificate of service of discovery, but not the discovery itself) have been adopted.
- Effective January 14, 2013, certain Cook County Courthouses have banned cell phones (see Order of Chief Judge Evans below).

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State of Illinois
Circuit Court of Cook County

Chambers of
Timothy C. Evans
Chief Judge

Press Release
For Immediate Release

50 West Washington Street
Suite 2600
Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-6000
December 11, 2012

**Chief Judge Evans enters order which prohibits cell phones in courthouses where
criminal matters are heard**

Circuit Court of Cook County Chief Judge Timothy C. Evans today announced beginning January 14, 2013, the public will not be permitted to bring cell phones and other electronic devices into any Circuit Court of Cook County courthouse facility except for the Richard J. Daley Center Courthouse. The ban will affect only those courthouse facilities in which criminal matters are heard.*

Included in the ban are all electronic devices capable of connecting to the Internet or making audio or video recordings, including laptops and tablet computers.

Chief Judge Evans said, "Judges brought their concerns to me that people attending court proceedings were using their cell phones to photograph witnesses, judges, jurors, and prospective jurors. They also said persons appeared to be texting testimony to witnesses waiting their turn to testify outside the courtroom, while others were attempting to stream live to media comments by judges from the bench."

"The court is sending a strong message to gang members and others that any attempts to intimidate witnesses, jurors, and judges in court will not be permitted," said Chief Judge Evans. "The ban will help to ensure that justice is properly done by preserving the integrity of testimony and maintaining court decorum."

Anyone violating the ban could face prosecution for contempt of court.

The new ban on cell phones and electronic devices in all courthouse facilities in which criminal matters are heard is taking place pursuant to General Administrative Order 2012-8 entered by Chief Judge Evans today, December 11, 2012.

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Cell phones and electronic devices will continue to be allowed into the Daley Center but the order restricts use of all such devices to public areas, away from courtrooms. Primarily civil matters are heard in the Daley Center, along with some quasi-criminal, misdemeanor, and traffic offenses.

In addition, the order exempts persons on official business with proper identification who will be allowed to bring such devices into courthouse facilities in which criminal matters are heard. The use of all such devices by these persons will be restricted to public areas, away from courtrooms. The following persons are exempted from the ban: current or former judges; licensed attorneys; all law enforcement officers; all government employees; persons reporting for jury service; jurors (subject to the authority of the trial judges); building and maintenance workers, equipment repair persons and vendors; and anyone authorized by order of court.

Members of the news media are also exempted from the ban. Following the anticipated approval of the circuit court's application for extended media coverage by the Illinois Supreme Court, the media will also be allowed to use their electronic devices in the courtroom.

The new policy also provides for judges to be able to enter orders permitting the use of electronic devices in any courtroom in any court facility as they deem appropriate.

*There are 13 courthouse facilities into which the public is prohibited from bringing cell phones and electronic devices as follows:

- The George N. Leighton Criminal Court Building at 2600 S. California Ave., Chicago
- The Cook County Juvenile Center, 1100 West Hamilton Ave., Chicago
- The Domestic Violence Courthouse, 555 West Harrison St., Chicago
- The Second Municipal District Skokie Courthouse, 5600 Old Orchard Road
- The Third Municipal District Rolling Meadows Courthouse, 2121 Euclid Road
- The Fourth Municipal District Maywood Courthouse, 1500 Maybrook Drive
- The Fifth Municipal District Bridgeview Courthouse, 10220 S. 76th Ave.
- The Sixth Municipal District Markham Courthouse, 16501 S. Kedzie Parkway
- 5555 W. Grand Ave., Chicago (First Municipal District criminal branches 23 and 50)
- 2452 W. Belmont Ave., Chicago (First Municipal District criminal branches 29 and 42)
- 155 W. 51st St., Chicago (First Municipal District criminal branches 34 and 48)
- 727 E. 111th St., Chicago (First Municipal District criminal branches 35 and 38)
- 3150 W. Flournoy St., Chicago (First Municipal District criminal branches 43 and 44)

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

General Administrative Order No: 2012-8

Subject: Cell Phones and Other Electronic Devices

IT IS HEREBY ORDERED:

Except as noted below, all mobile computing and telecommunication devices including, but not limited to, cellular telephones, smart phones, laptop and tablet computers, and other electronic devices capable of connecting to the Internet or making audio or video recordings are prohibited in the Circuit Court of Cook County, Illinois.

The following are exempt from the above prohibition:

1. Persons at the Richard J. Daley Center, 50 West Washington Street, Chicago, Illinois, who may use the telephone, SMS (short message service) texting, instant messaging, email, and word processing functions of a cell phone or other electronic device only in the public areas of the courthouse outside the courtrooms, unless otherwise ordered by the trial judge presiding;
2. The following persons at other circuit court courthouse facilities, all of whom must have proper identification and be on official business in the courthouse:
 - a. current or former judges;
 - b. licensed attorneys;
 - c. members of the news media. Upon approval by the Illinois Supreme Court of the Circuit Court of Cook County's application to participate in extended media coverage, approval by the trial judge presiding, and subject to denial or limitation by the chief circuit judge, pursuant to the Illinois Supreme Court's Policy for Extended Media Coverage in the Circuit Courts of Illinois, Ill. S. Ct., M.R. 2634 (eff. Jan. 24, 2012), members of the news media may also use their electronic devices in the courtroom to communicate with news media colleagues, provided court is not in session.
 - d. local, state, and federal law enforcement officers;
 - e. employees of any local, state, or federal government agencies and/or offices;
 - f. any person reporting for jury duty pursuant to summons. Individuals selected for jury service are also subject to the order(s) of the trial judge presiding, who may make orders as to the possession or use of electronic devices by potential or sworn jurors during trial sessions and deliberations.

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- g. building and maintenance tradespeople, equipment repair persons, and vendors with proper authorization for whom such devices are necessary in the performance of their job;
- h. Any other person authorized by order of court to possess an electronic device as defined above.

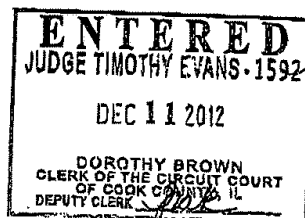
The persons described above in section 2(a-h) may use the telephone, SMS (short message service) texting, instant messaging, email, and word processing functions of a cell phone or other electronic device only in the public areas of the courthouse outside the courtrooms, unless otherwise ordered by the trial judge presiding.

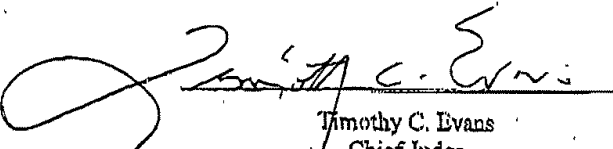
Pursuant to Illinois Supreme Court Rule 63(A)(7), nothing in this order shall be interpreted to permit the taking of photographs in the courtroom during sessions of the court or recesses between proceedings, or the broadcasting or televising of court proceedings unless authorized by order of the Supreme Court.

Any person in violation of this order may be subject to prosecution for contempt of court. Nothing in this order shall be construed to infringe upon the authority of the Cook County Sheriff to deny access to any person in the interest of preserving public safety.

Dated this 11th day of December, 2012, effective January 14, 2013. This order shall be spread upon the records of this court and published.

Enter:




Timothy C. Evans
Chief Judge
Circuit Court of Cook County

Press Release - January 7, 2013 – For Immediate Release

Contact: Hannah Stanley

Phone: [708-320-1184](tel:708-320-1184)

Hannah@11thStMedia.com

Local Law Student Speaks With President Barack Obama on Christmas Day

United States Coast Guard Chief Petty Officer David Weiss Speaks With President Obama About Law School And The Veteran's Legal Support Center & Clinic At The John Marshall Law School Chicago, IL via Camp Leatherneck, Afghanistan:

Christmas greetings from the President to military service members are a time-honored tradition. This year, Chief Petty Officer David Weiss was one of only two Coast Guard members selected to speak with the President on Christmas Day. "It was a privilege and an honor to speak with the Commander in Chief" said Chief Weiss. "The President has a million important things to do - and that he took the time to speak with service members all over the globe speaks volumes."

Chief Weiss joined the United States Coast Guard shortly after high school and remained in the Coast Guard Reserves after his initial commitment. He completed college and enrolled in law school at John Marshall Law School. His first orders for active duty during law school came this past October, 2012. Upon deployment, Weiss had to withdraw from all classes at The John Marshall Law School. "The staff and faculty were very supportive and helpful to me" said Weiss.

"The President laughed when I thanked him for my activation orders - thereby saving me from law school finals." The President inquired what type of law Chief Weiss would like to practice. "I told the President that I would like to advocate on behalf of veterans - and talked with him about The John Marshall Veterans Legal Support Center & Clinic, and the free legal assistance we provide to veterans there."

"Many students who work in the Veterans Clinic go into the JAG Corps upon graduation, and we have a number of student veterans who work in the Clinic too. But, David (Weiss) is our first student who was called to active duty during the school year." said Clinic Executive Director Brian Clauss. "The staff and students are all anxious to hear news from David. Having a student deploy is like having one of your own children deploy...you worry about them and hope and pray for their safe return."

"David is an incredibly hard working student. He started a Student Veterans of America Chapter, works tirelessly on many cases and projects in the Clinic, and was recognized by the North Suburban Bar Association for his work. All this while raising a young child and meeting his Reserve obligations." said Steven M. Novak, a supervising attorney in the Clinic. Asked what he plans to do when he returns to civilian status next year, Weiss said "Spending time with my little boy, and family is the main priority. Then getting back to school, getting back to work in the Veterans Clinic, and passing the bar. Then I'm going to find a job advocating for veterans."

"It was indeed a distinct privilege and honor to speak with the President" concluded Weiss, "he was just a friendly, regular guy - who happens to be the leader of the free world."

Chief Weiss is scheduled to return from deployment in Afghanistan and complete his studies at The John Marshall Law School in late 2013.

The John Marshall Law School's Veteran's Legal Support Center Executive Director, Brian Clauss is available for interviews regarding Chief Petty Officer David Weiss, The Veteran's Legal Support Center & Clinic at The John Marshall Law School, topics involving an employee (or student) deploying, as well as issues faced by veterans.

For Scheduling, please contact: Hannah Stanley, 11th Street Media, Inc. [708-320-1184](tel:708-320-1184)

Veteran's Legal Support Center & Clinic

The John Marshall Law School

315 S. Plymouth Court

Chicago, Illinois 60604

Phone: [312.360.2656](tel:312.360.2656)

Web: www.jmls.edu/veterans Email: vlsc@jmls.edu



ON THE TIP OF YOUR TONGUE,

By Angela Peters

FAMILY LAW

[In re Marriage of Mathis](#), 2012 IL 113496 (December 28, 2012) Champaign Co. (THEIS) Appellate court reversed; circuit court vacated; remanded. In a bifurcated dissolution of marriage proceeding, when a grounds judgment has been entered, and when there is a lengthy delay (10 years in this case) between the date of entry of grounds judgment and hearing on ancillary issues, the appropriate date for valuation of marital property is the date of dissolution. (FREEMAN, KARMEIER, and BURKE, concurring; GARMAN, KILBRIDE, and THOMAS, dissenting.)

[In re Marriage of Epting](#), 2012 IL App (1st) 113727 (December 7, 2012) Cook Co., 6th Div. (R. GORDON) Affirmed. (Court opinion corrected 12/14/12.) Defendant husband filed pro se motion to reconsider his previous motion to vacate prove-up, arguing that marital settlement agreement (MSA) was unconscionable and that he signed it only because his first attorney pressured him to do so and because stress of dissolution made him feel he had no choice but to sign it. Defendant provided no evidence to substantiate his claims, as no transcript or bystander's report filed. No evidence that Defendant was coerced or treated unfairly in negotiations process or MSA. (LAMPKIN and HALL, concurring.)

[Department of Health Care and Family Services v. Cortez](#), 2012 IL App (2d) 120502. Record contains no indication that trial court's denial of father's claim for custody was a final order per Rule 304(a), and order stated that court did not have jurisdiction over mother for purposes of custody determination "at this time". Denial of custody was a dismissal without prejudice, not a permanent determination of custody and did not resolve custody of child. Thus, denial was not a final and appealable order per Rule 304(b)(6). (ZENOFF and BIRKETT, concurring.)

[Walker v. Walker](#), Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 11 C 2967 Dist. Ct. erred in denying petitioner-husband's request under ICARA implements to Hague Convention on the Civil Aspects of Child Abduction to compel his wife to return their three children to Australia, where petitioner alleged that his wife had wrongfully retained their children in U.S. after having filed for divorce. Record showed that children had resided in Australia for 12-year period prior to family coming to U.S. and did not support Dist. Ct.'s finding that children's habitual residence had become U.S. during seven-month period between their arrival and petitioner's filing of instant petition for their return to Australia to resolve parties' custody dispute. Moreover, Ct. rejected Dist. Ct.'s finding that petitioner had failed to exercise his custody rights or had expressly consented to children's permanent residence in U.S. during unsuccessful negotiations with wife. Fact that Illinois state court had awarded sole custody of parties' children to wife did not preclude Dist. Ct. from acting on instant petition. Remand, though, was required for determination as to whether parties had intended initial trip to U.S. as permanent move, and whether petitioner's participation in Illinois divorce proceedings constituted consent for children's retention in U.S.

[In re Marriage of Razzano](#), 2012 IL App (3d) 110608. Court properly used guidelines in Section 505(a) to modify husband's child support obligation, rather than Section 513(a)(2). Modification of parties' separation agreement, via handwritten note, indicated parties agreed to redefine "child support" to include post-secondary-

education expenses, rather than reserving issue for future determination. As agreement was incorporated into judgment of dissolution, it was an enforceable order of the court. (LYTTON, concurring; McDADE, concurring in part and dissenting in part.)

[In re Marriage of Digiovanni](#), 2012 IL App (1st) 101876. Court properly granted husband's petition to modify maintenance, and applied substantial change in circumstances to wife's petition to modify wherein she requested increase in maintenance from \$14,500 to \$35,000 per month. Court properly found that wife had not in good faith attempted to find work, despite her ability to obtain gainful employment as a licensed social worker, and thus court's judgment did not improperly require wife to liquidate her assets to satisfy judgments against her and support herself. (QUINN and CONNORS, concurring.)

[Grunstad v. Cooper](#), 2012 IL App (3d) 120524. Court's custody decision reflected thorough consideration of evidence for custody, and did not err in granting mother's motion for directed verdict. Court was within its discretion in denying father's motion to conduct in camera interview of parties' 14-year-old child, as court had other evidence of child's custody preference. (HOLDRIDGE and McDADE, concurring.)

[In re Marriage of Nash](#), 2012 IL App (1st) 113724-B (October 1, 2012) Cook Co., 1st Div. (ROCHFORD) Vacated and remanded. (Court opinion corrected 10/4/12.) In absence of clear Section 501(c-1)(3) finding that both petitioner and respondent lacked financial ability or access to assets or income for reasonable attorney fees and costs, court was without statutory authority to order respondent's former attorney to disgorge funds to petitioner's attorney in payment of her interim attorney fees, or to child representative for her fees. (HALL and KARNEZIS, concurring.)

[In re Marriage of D'Attomo](#), 2012 IL App (1st) 111670 (September 26, 2012) Cook Co., 3d Div. (STEELE) Affirmed. In dissolution proceeding, court's ruling that home equity loan funds were an investment in bakery, rather than a loan to the business, was not against manifest weight of evidence. Court within its discretion in valuation of bakery business; and in awarding wife maintenance in gross, without requiring that she seek gainful employment or become employed commensurate with her law school education, previous law firm and accounting firm experience, and training. (SALONE and NEVILLE, concurring.)

[In re: the Parentage of H.L.B.](#), 2012 IL App (4th) 120437 (September 27, 2012) Edgar Co. (COOK) Affirmed. Alleged father of child did not sign voluntary acknowledgment of paternity (VAP), but signed Agreed Order to be bound by results of genetic testing and failed to appear for testing, so that default administrative paternity order was entered. Section 7(b-5) of Parentage Act claim for nonpaternity should be narrowly construed, and can be brought only under marital presumptions, not where presumption of paternity arises out of VAP. Claim for nonpaternity must be filed within 2 years of knowledge of relevant facts, not knowledge of all facts. Default administrative order, and dismissal of his paternity petition, are res judicata bar to nonpaternity claim. (APPLETON and KNECHT, concurring.)

[In re T.P.S.](#), 2012 IL App (5th) 120176 (October 9, 2012) Williamson Co. (STEWART) Affirmed in part and reversed in part; remanded. Parties, who were two women, had been in long-term romantic relationship, during which time they agreed that Respondent would conceive two children by artificial insemination, whom they would raise together as equal coparents. As to children born of artificial insemination, under facts of this case, Illinois law does not bar common law contract and promissory estoppel causes of action for custody and visitation brought by nonbiological parent. Children are entitled to physical, mental, emotional, and monetary support of both their "parents". As Petitioner participated in the decision and process of children's birth, she has a common law obligation to financially support the children, and to provide them with physical, mental, and emotional support. Parental rights may be asserted based on conduct evincing actual consent to artificial insemination procedure by unmarried couple along with active participation by nonbiological partner as a coparent. (SPOMER and WEXSTEN, concurring.)

[In re Rico L.](#), 2012 IL App (1st) 113028-B (September 14, 2012) Cook Co., 6th Div. (GARCIA) Affirmed. (Court opinion corrected 9/18/12.) Court properly found adoptive mother "unable" to provide for

disabled minor, after she refused to pick him up after his medical clearance for discharge from psychiatric hospital. Court entered order of protective supervision, and properly reverted custody of disabled minor to DCFS, as court properly ruled that minor's best interests warranted the court's action. (PALMER, concurring; GORDON, dissenting.)

CIVIL MISCELLANEOUS LAW

[Hernandez v. Pritikin](#), 2012 IL 113054 (December 13, 2012) Cook Co. (KARMEIER) Appellate court affirmed; remanded. A party claiming res judicata bears the burden of showing that res judicata applies, and thus has a duty to clarify the record so as to clearly demonstrate their entitlement to application of res judicata. A party cannot use oral pronouncements of the court which are ambiguous indicators of the court's intent to explain otherwise unambiguous written orders. (KILBRIDE, FREEMAN, THOMAS, GARMAN, BURKE, and THEIS, concurring.)

[Area Erectors, Inc. v. Travelers Property Casualty Company of America](#), 2012 IL App (1st) 111764 (December 7, 2012) Cook Co., 5th Div. (HOWSE) Affirmed. Court properly entered judgment on the pleadings, and properly found that actual cash value was the proper valuation, under the policy, for the loss of a construction crane. Bona fide coverage dispute existed, as other insurer contended that replacement value was the proper method of valuation. Thus, court properly denied claims for Section 155 penalties on the crane claim. (PALMER and TAYLOR, concurring.)

[Ingrassia Interior Elements v. Illinois Workers' Compensation Commission](#), 2012 IL App (2d) 110670WC (December 10, 2012) Winnebago Co. (HUDSON) Circuit court reversed; Commission decision reinstated; remanded. Circuit court erred in not giving deference to Commission's construction of Section 7030.40 of Workers' Compensation Act, which is reasonable, not in conflict with plain language, and entirely consistent with ordinary principles of contract law. The fact that a transcript was not filed within the time period specified in Section 19(b) of the Act does not deprive the Commission of its statutory authority to hear and consider cases under the Act. (HOFFMAN, TURNER, and STEWART, concurring; HOLDRIDGE, specially concurring.)

[Department of Health Care and Family Services v. Cortez](#), 2012 IL App (2d) 120502 (December 7, 2012) Kane Co. (McLAREN) Appeal dismissed in part and affirmed in part. Record contains no indication that trial court's denial of father's claim for custody was a final order per Rule 304(a), and order stated that court did not have jurisdiction over mother for purposes of custody determination "at this time". Denial of custody was a dismissal without prejudice, not a permanent determination of custody and did not resolve custody of child. Thus, denial was not a final and appealable order per Rule 304(b)(6). (ZENOFF and BIRKETT, concurring.)

[Deutsche Bank National Trust Co. v. Akbulut](#), 2012 IL App (1st) 112978 (October 18, 2012) Cook Co., 4th Div. (PUCINSKI) Affirmed. Failure to mention a process server's employment status in return of process does not invalidate service. Court was entitled to rely on amended affidavit of service, in which process server averred that he was an employee or agent of detective agency appointed as special process server, to cure any defect in return of process. (FITZGERALD SMITH and STERBA, concurring.)

[Martin v. Keeley & Sons, Inc.](#), 2012 IL 113270 (October 18, 2012) St. Clair Co. (BURKE) Appellate court reversed; circuit court affirmed. General contractor had no duty, based on voluntary undertaking or other special circumstance, to preserve concrete I-beam supporting bridge deck on which employees were standing; I-beam collapsed and employees fell into creek and were injured. Spoliation of evidence claims cannot stand in absence of duty to preserve evidence. (FREEMAN, THOMAS, GARMAN, KARMEIER, and THIS, concurring; KILBRIDE, dissenting.)

[Collection Professionals v. Schlosser](#), 2012 IL App (3d) 110519 (September 28, 2012) La Salle Co. (WRIGHT) Affirmed. Court properly restricted cross-examination to not allow Defendant to present evidence that Plaintiff collection service routinely accepted less than the entire billed amount, to show that billed amount

was not medical provider's customary charge; evidence as to amounts paid by collateral sources of other patients was not relevant. Court properly found that medical providers complied with Fair Patient Billing Act. (HOLDRIDGE and O'BRIEN, concurring.)

[In re Tiffany W.](#), 2012 IL App (1st) 102492-B (September 21, 2012) Cook Co., 6th Div. (HALL) Reversed. (Court opinion corrected 10/2/12.) Failure to provide Respondent with written information as to alternative treatment requires reversal of order for involuntary administration of psychotropic medication. Procedural safeguards of Mental Health Code are not mere technicalities but essential tools to protect a respondent's liberty interests. Absent compliance with Section 2-102(a-5) of Code, State failed to prove by clear and convincing evidence that Respondent lacked capacity to make a reasoned decision about proposed treatment. (HOFFMAN and ROCHFORD, concurring.)

[Combs v. Schmidt](#), 2012 IL App (2d) 110517 (September 12, 2012) Winnebago Co. (HUDSON) Reversed and remanded. Although there was no per se request to preserve evidence in case involving fire of rental house, there was the functional equivalent of one sufficient to put defendants on notice that they were potential litigants, given ample evidence of complaints about faulty electrical system that had been communicated to landlords, but evidence was not so clear as to insurer. The house stood for less than two months after the fire, and tenant did not have notice of its impending demolition; genuine issues of material fact preclude entry of summary judgment on spoliation of evidence counts. (ZENOFF, concurring; BURKE, specially concurring.)

[Madison Miracle Productions v. MGM Distribution Company](#), 2012 IL App (1st) 112334 (September 28, 2012) Cook Co., 1st Div. (ROCHFORD) Reversed and remanded. Plaintiff film distribution and production companies filed breach of contract suit against studio, alleging that it failed to properly distribute a movie. Parties had agreed that movie would be marketed and distributed in Illinois, no evidence that studio sought to have Illinois specifically targeted as part of initial theatrical release, and independent third parties, and not studio itself, conducted marketing and distribution activities in Illinois. As no evidence of agency relationship, activities of those third parties are not imputed to Defendant. Defendant lacked sufficient contacts with Illinois for personal jurisdiction to comport with due process. (HOFFMAN and KARNEZIS, concurring.)

[In re: the Estate of Doman](#), 2012 IL App (4th) 120123 (October 11, 2012) Champaign Co. (McCULLOUGH) Reversed and remanded with directions. (Court opinion corrected 10/15/12.) Wife filed petition for dissolution of marriage, and after June 2011 hearing, court entered written dissolution judgment on grounds only, reserving ruling on ancillary issues. Husband died intestate on July 4, 2011, and on July 5, 2011, court docket entry noted that wife's counsel called and advised of husband's death, and cause is dismissed. As court acknowledged death and dismissed cause, July 5, 2011 order is a dismissal of divorce proceeding in its entirety, thus restoring wife to same position as if she had never filed for divorce. Wife is thus decedent's surviving spouse within meaning of Probate Act, and entitled to surviving spouse's share of estate. (APPLETON and POPE, concurring.)

[Dolan v. O'Callaghan](#), 2012 IL App (1st) 111505 (September 28, 2012) Cook Co., 5th Div. (PALMER) Affirmed. Attorney filed breach of contract suit against Defendant attorney, for whom she had worked as associate attorney from 1981 to 1984. Court had authority to sanction Defendant under Rule 219(a) or (c), as Defendant was a "deponent", regardless of capacity in which he was deposed. Court has inherent authority to control its docket, in response to Defendant's unreasonable refusal to answer deposition questions and causing other unduly delays, forcing Plaintiff to file motion to compel, motion for sanctions, and motion for attorney's fees. (GARCIA and GORDON, concurring.)

[Illinois Insurance Guaranty Fund v. Virginia Surety Company, Inc.](#), 2012 IL App (1st) 113758 (October 12, 2012) Cook Co., 5th Div. (McBRIDE) Reversed. Section 1(a)(4) and Section 4(a)(3) of Workers Compensation Act do not require a borrowing employer to duplicate the coverage that a company lending employees is contractually obligated to obtain, or to pay duplicate premiums, or to increase its self-insured

retention to cover borrowing employees. An employer and its insurer cannot selectively omit an employee from coverage of a workers compensation policy. (PALMER and TAYLOR, concurring.)

CRIMINAL LAW

[People v. Mayor](#), 2011 IL App (2d) 120050 (December 28, 2012) Du Page Co. (SCHOSTOK) Affirmed. Error of the Secretary of State, as to improper length of suspension, is not a proper basis for rescission of statutory summary suspension. (ZENOFF, concurring; McLAREN, specially concurring.)

[People v. Brexton](#), 2011 IL App (2d) 110606 (December 28, 2012) Stephenson Co. (SCHOSTOK) Affirmed in part and vacated in part. Defendant's conviction of retail theft must be vacated under one-act, one-crime rule, as that conviction and conviction of theft by emergency exit were based on a single theft of a TV from retail store. Where defense counsel did not object to trial date, but stated that trial date was "fine" and that court had scheduled trial in accordance with Defendant's right to a speedy trial, the trial continuance is considered agreed to by Defendant. A defendant must object to a trial delay to avoid tolling the speedy-trial period, regardless of whether Defendant then realizes that trial is set outside of 120-day window. (BURKE and JORGENSEN, concurring.)

[People v. Smith](#), 2011 IL App (2d) 120307 (December 27, 2012) Lake Co. (ZENOFF) Reversed and remanded. Officer testified that he smelled slight odor of fresh cannabis from inside vehicle stopped for cracked windshield, performed warrantless search, and located fresh cannabis in sealed bottle inside car, after K-9 sniff on exterior of car alerted. Officer's testimony was not so inherently implausible that court was obligated to reject. Olfactory evidence need not be treated as a form of scientific evidence subject to threshold determination of reliability. Thus, court improperly granted motion to suppress on grounds of lack of probable cause. (JORGENSEN and SPENCE, concurring.)

[People v. Lipscomb-Bey](#), 2011 IL App (2d) 110187 (December 28, 2012) Du Page Co. (BURKE) Affirmed in part and reversed in part. Evidence was insufficient to show a substantial step for crimes of being an attempted armed habitual criminal. State was required to show that Defendant took a substantial step toward receiving, selling, possessing, or transferring a firearm, but evidence showed only that Defendant showed up only to negotiate terms of a sale, that there was no meeting of the minds, and that a separate encounter would have been necessary to transfer the gun. Though evidence showed Defendant's intent to sell a gun, Defendant did not possess a gun, and many essential steps remained toward commission of offense. (JORGENSEN and SCHOSTOK, concurring.)

[People v. Herman](#), 2012 IL App (3d) 110420 (December 13, 2012) Will Co. (WRIGHT) Reversed. Village police officer issued traffic citations to Defendant, including for DUI. Before trial, Village amended citations to strike out State of Illinois as prosecuting authority and replace it with Village, but did not amend citations to allege only violations of municipal code. Village did not acquire authority to prosecute Defendant for DUI under Vehicle Code, and State did not give its permission to allow Village to prosecute. DUI conviction is thus reversed due to lapse in prosecutorial authority. (LYTTON and McDADE, concurring.)

[People v. Bauman](#), 2012 IL App (2d) 110544 (December 12, 2012) McHenry Co. (BIRKETT) Reversed. Court erred in denying Defendant's motion to dismiss DUI charge for violation of right to speedy trial. A date set by a party as a status date for return on a subpoena is not a date "set by the court", as Section 103-5(b) of Code of Criminal Procedure requires to find a waiver of a valid speedy-trial demand. If Defendant had failed to appear for return date on State's subpoena, he would have waived only his right to object to production of subpoenaed documents, and would not have thereby caused any delay in proceedings, as his absence could not have tolled the speedy-trial time period. (ZENOFF and HUDSON, concurring.)

[People v. Bailey](#), 2012 IL App (2d) 110209 (December 10, 2012) Du Page Co. (BURKE) Appeal dismissed. Defendant failed to file a timely postplea motion from the sentencing judgment and the trial court was not revested with jurisdiction by the State's arguing against Defendant's untimely motion. Thus, Defendant's

notice of appeal was untimely and did not confer jurisdiction on the appellate court. (SCHOSTOK, concurring; McLAREN, dissenting.)

[People v. Petty](#), 2012 IL App (2d) 110974 (December 12, 2012) Du Page Co. (SCHOSTOK) Reversed. Defendant's conduct, moving his car about in gas station parking lot, was consistent with several innocent scenarios, officers came upon him by coincidence, and officers had no reason to suspect that criminal activity had occurred. Officers saw Defendant make hand-to-hand exchange with someone, but did not describe it in detail, and Defendant was not in a high crime area. Thus, investigatory stop was illegal, and court should have granted Defendant's motion to suppress cannabis found in Defendant's front pocket, which was evidence obtained as a result of illegal stop. (BURKE and JORGENSEN, concurring.)

[People v. Tramble](#), 2012 IL App (3d) 110867 (December 10, 2012) Knox Co. (McDADE) Reversed and remanded. (Court opinion corrected 12/10/12.) Vehicle Code requires an appropriate signal be used when a vehicle makes a turn, changes lanes, encroaches onto the other side of the street, and leaves the roadway. Moving within a single traffic lane, including moving as far right within the lane as possible, does not require a signal, and to have made traffic stop only on that basis would not be sufficient for probable cause, for purposes of ruling on a motion to suppress. (LYTTON, concurring; WRIGHT, concurring in part and dissenting in part.)

[People v. Haissig](#), 2012 IL App (2d) 110726 (September 12, 2012) Lake Co. (BIRKETT) Affirmed. (Court opinion corrected 10/18/12.) Defendants were convicted of two counts of theft of over \$100,000 from their employer; common allegation in counts was that Defendants intended to permanently deprive their employer of the use or benefit of funds it paid for the elevator work, from a company which Defendants had formed, without disclosure to employer. Whether a Defendant has that intent is determined only by the Defendant's actions, intended or performed, toward the owner's property, and does not depend on any value or ultimate pecuniary loss that Defendant gives or intends to give the owner. (McLAREN and ZENOFF, concurring.)

[People v. Allen](#), 2012 IL App (4th) 110297 (October 22, 2012) Schuyler Co. (COOK) Affirmed as modified; remanded. Defendant, after being convicted of DUI and other traffic violations, was sentenced in absentia to jail and ordered to pay \$172.60 for emergency response restitution. Scope of statute does not permit restitution merely for traffic stop enforcing the violation of Section 11-501 of Traffic Code. The costs of enforcing DUI violation are internalized through other imposed fines, fees, and costs from conviction. The external costs of emergency response, otherwise borne by the public, would not be internalized but for Section 501.01 of the Code. (TURNER and STEIGMANN, concurring.)

[People v. Smith](#), 2012 IL App (1st) 102354 (September 28, 2012) Cook Co., 6th Div. (LAMPKIN) Affirmed; mittimus corrected. (Court opinion corrected 10/24/12.) Defendant was convicted, after jury trial, of two counts each of attempted first degree murder of a peace officer and aggravated discharge of a firearm, and sentenced to 55 years in prison. Given statutory language, court properly applied firearm sentencing enhancements, which must be added to the higher 20- to 80-year sentencing range, to Defendant's sentence. (PALMER, concurring; R.E. GORDON, dissenting.)

[People v. Lara](#), 2012 IL 112370 (October 18, 2012) Cook Co. (KILBRIDE) Appellate court reversed; remanded. Corroboration is sufficient to satisfy corpus delicti rule if evidence, or reasonable inferences based on it, tends to support commission of a crime that is at least closely related to the charged offense. Corroboration of only some of the circumstances related in a defendant's confession which tend to connect the defendant with the crime is sufficient. (FREEMAN, GARMAN, KARMEIER, BURKE, and THEIS, concurring; THOMAS, specially concurring.)

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5 SEPTEMBER 2012

Liability Minute



The Illinois Appellate Court Rejects The Fiduciary Duty Exception To Overcome Privilege By Attorneys In Malpractice Actions

Two recent cases out of the First District of the Appellate Court in Illinois have bolstered the right of attorneys to assert the attorney client and work product privileges to withhold documents in the context of a malpractice claim against them. In Garvey v. Seyfarth Shaw LLP, 2012 Ill. App. LEXIS 132; 966 N.E. 2d 523 (1st Dist. Mar. 1, 2012) and MDA City Apartments, LLC v. DLA Piper LLP (US), 2012 Ill. App. LEXIS 201 (1st Dist. Mar. 22, 2012), the Court rejected the application of the "fiduciary-duty" exception to the attorney client and work product privileges. The opinions give instruction as to the underlying facts and factors which will frame and preserve an attorney's asserted privilege as against his or her former client.

As developed in the context of trust law, the "fiduciary-duty" exception nullifies the privileged status of legal advice given to a trustee or other fiduciary when the advice sought was motivated by and concerns the interests of the trust itself (and its beneficiaries). In such cases, the "real client" is often a beneficiary who is entitled to have access to that material.² Courts in other states have expanded the fiduciary-duty exception to other fiduciary relationships besides that of trustees.

Contrarily, the Illinois First District twice, in the space of one month, rejected the application of that exception to claims by clients against their attorneys. In *Garvey v. Seyfarth Shaw LLP*, supra, a client brought malpractice claims against the attorneys on one matter, but agreed to allow the attorneys to continue to represent them on another matter. In *MDA City Apartments, LLC v. DLA Piper, LLP*, supra, DLA attorneys first faced a motion to disqualify filed by the opposing party (based on a conflict stemming from work the attorneys had done for members of a business entity that had a common ownership and interests of the opposing party), and later faced malpractice claims from MDA for allegedly not properly disclosing those conflicts in a timely fashion.

In both cases, the plaintiff clients sought communications between the defendant law firms and their in-house and outside counsels that dealt, as it turned out, exclusively with the ancillary malpractice claims being made against them. In both cases, the advice was not related to the representation of the complaining clients nor was it paid for by the clients—but rather the firms themselves. In both cases, the court found that the attorneys had the right to obtain legal advice for themselves in the handling of the actually or potentially adverse actions, and that the attorneys had a reasonable expectation that such advice would be confidential.

Liability Minute By Joseph R. Marconi¹

These messages are a service to our policyholders prepared by Joseph R. Marconi. He is a shareholder of Johnson & Bell, Ltd., the head of the Business Litigation/ Transactions group and co-chair of the Employment group. Joe Marconi gratefully acknowledges the assistance of Johnson & Bell, Ltd. associate Alan Succari, for the research and drafting of this article.

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The holdings of these cases touched on several aspects of both the attorney-client relationship and the nature and extent of privileged communications. With respect to the “fiduciary-duty” exception, the Court rejected the argument that communications discretely related to the claims or potential claims by clients against a firm were part and parcel with communications generated in the course of representing that client. The topic matter, the segregated administration and maintenance of the files, and the source of the payment for the representation were all material factors considered by the Court in its ruling.

The Court further rejected the assertion that the Professional Rules of Conduct³ which require attorneys to keep their clients reasonably informed or which preclude concurrent conflicts of interest do not impair the attorney’s expectation of confidentiality when consulting other professionals.

Attorneys are advised to ensure the viability of subsequent privilege claims by obtaining the resulting communications at their own expense, without billing the client for any fees or costs involved. The communications and work product sought for their own benefit must be completely segregated from the files generated in the course of representing the client. This is particularly important, and somewhat tricky, when motions to disqualify counsel are raised by the opposition in the underlying claim. When such issues arise, separate, segregated materials ought to be kept out of the underlying file. Attorneys should think long and hard about what information must be, should be, or should not be, imparted to the client—that is, what material was obtained for the client’s benefits and what materials were paid for by the client.

[1] Joe is a shareholder of Johnson & Bell, Ltd., and the chairman of the business litigation/transaction group and co-chair of the employment group. He appreciates the assistance of Johnson & Bell paralegal, Mike Castelloneta, J.D., for his assistance in the drafting of this article.

[2] For a history of the fiduciary-duty exception to attorney-client privilege, including the factors to consider in determining the “real client” able to claim the privilege in jurisdictions where the exception is recognized, see *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313 (2011).

[3] Ill. Rs. Prof’l Conduct Rs. 1.4 and 1.7.



CALENDAR OF EVENTS

**Feb. 12, 2013
6:00-8:00 p.m.**

***CLE – Judge Moltz: Practice Tips from the Bench**

**March 12, 2013
6:00-8:30 p.m.**

Gary Wild Dinner: Honoree: Veterans Legal Support Center & Clinic, Glenview Park Center, 2400 Chestnut Ave., Glenview, Illinois 60026

April 16, 2013

Ethics CLE (6 hours), Skokie Courthouse, 5600 Old Orchard Road, Skokie, Illinois 60077.

**May 14, 2013
6:00-8:30 p.m.**

**Judges Night, North Shore Country Club,
1340 Glenview Rd., Glenview, Illinois 60025**



**June 11, 2013
6:00-8:00 p.m.**

***CLE TBA - Annual Meeting/Elections**

***NSBA CLEs are held at the Happ Inn, 305 Happ Road, Northfield, Illinois 60093. Cost: \$31.00 for dinner and 1 hour CLE credit. Food choices include (1) Vegan/Vegetarian, (2) Fish or (3) Chicken/Beef. RSVP to Anna Krolikowska: akrolik06@gmail.com**

NOTE!!! \$25.00 cancellation fee will be charged for no-shows, unless you substitute someone else in your place.

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HAPPY NEW YEAR!

