



In Brief



November 2017

A Quarterly Publication of the McHenry County Bar Association

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Board of Governors Meeting Highlights

August 15, 2017

OUTREACH:

Drake Shunneson, *Diamond & LeSueur*, proposed adding the SOLACE program to the McHenry County Bar Association. Drake gave a report on the specifics of the program.

LAW DAY:

R. Rosenthal reported on S. Greeley's behalf that the Law Day topic has been announced, "Separation of Powers."

September 19, 2017

CIVIL PRACTICE:

Discussion had about forming a Civil Practice Section.

LEGISLATIVE:

Legislature currently working on marriage and maintenance act tweak.

October 17, 2017

LAW DAY:

Law Day speaker has been determined as John Lupton, *Historian for the Illinois Supreme Court Historic Preservation Commission in Springfield.*

New Members

Meenaz Pradhan
Gianna Venticinque
Vanessa Sheehan
Genna Hibbs
Tyler Mikan
Daniel Nold
Edward Donahue
Patrick Walsh
Jaclyn Wilcox
Ashton Tunk
Duane St. Pierre

President's Page

Rhonda L. Rosenthal

2017/18 MCBA President



While I was impatiently waiting at the airport for my vacation to begin, I read the entire July 2017 Illinois Bar Journal. The standout article was “Reining in Implicit Bias” by Justice Michael B. Hyman. Since my brain was clear of work issues, I was free on my European trip to look for implicit and explicit biases (or at least my understanding of it) in myself and others.

Although I think I appear to be the dumb bumpkin States tourist, others saw me differently. I was mistaken for being German, French, Polish, and Czech. Granted, I allegedly have pure German ancestry and part of our journey was in Germany, but the number of times it was assumed was remarkable. The German flight attendant saw my surname on the manifest and assumed I spoke fluent German. Even though I am sure that I slaughtered the pronunciation, if I spoke just one of the five German words I know, I received a German menu.

Most of the time, the assumption was made based upon my appearance alone. The shuttle bus driver for the cruise line spoke Czech only to me; waitresses and hotel personnel spoke to me in French or German. I do not see how I look French, as I am not a size 0 and a cigarette smoker (my explicit bias), but they did.

Sometimes, even after I spoke English or pleaded “English!,” the person kept talking to me in the language they pre-determined for me, as if that would somehow jog my memory that I really did speak that language. A German museum official persisted in speaking in Polish until I used hand gestures to underscore my nonunderstanding. On the ship, when we spoke English, some of the passengers from other countries assumed that we were Canadian or British.

After a few days, some close observations, and finally direct questioning of other passengers on our ship, I found the possible rationale. Their biases informed them that we did not fit into the loud rude American mold, of which there were a few examples on board. Apparently, my “soft vowel pronunciation,” my routine politeness, my active listening skills, and even my togs, did not meet their version of tourists from the States.

Based upon the difference in the way my husband and I dress (I do not own a Star Wars T-shirt written in Swedish and he does not wear dresses), many people assumed that we were not together. Once we interacted, they adjusted their bias; then again after seeing us holding hands.

I also noted my own biases, some based upon my experiences. There was a couple on the ship consisting of an older man and his middle-aged female companion. My divorce and probate attorney biases immediately identified an aging trophy wife waiting for her inheritance. I even went as far as to assume that the cool interaction between them was due to the wife now regretting her decision. My husband thought it was father and daughter and that they shared a room for cost savings. So naive of him, I thought, until we talked with them and found out that my biases led me astray. The daughter took her father on the cruise so he would not be alone on the first wedding anniversary after the death of his wife, and they had a solo room because they booked it last minute when she saw her father so depressed.

Upon arriving home, I took a Guardian ad Litem CLE that included the required one-hour Diversity and Inclusion credit. This was focused more on race than the subtler biases I was looking for on our vacation. We were required to take an online test during the lecture, which purported to tell us our racial preference. It is a series of faces and words and notes the time it takes for you to do the proscribed task. Not surprisingly, most of us came under the “moderate preference for European faces.” Frankly, the test seemed more to show that I have less than superior hand-eye coordination, a fact I have known since my parents gave us an Atari video game system in the 1980s.

Although a good reminder of our hidden prejudices, the concept of race bias is not new. It gets a lot of attention in the press, and public awareness of its existence is high. Even the theatre has accentuated it in musicals such as AVENUE Q as the puppets proclaim in song, “Everyone’s a Little Bit Racist.” (It is on youtube.com.)

I think that is why I appreciated the other types of biases listed in Justice Hyman’s article. We do not often think about the biases based on things typically not regarded as offensive. And that makes them more insidious. As judges and attorneys, we need to watch out for our implicit biases that may appear when a client, litigant, or other attorney for that matter, has lots of tattoos, does not spell correctly, has dirty or rumpled clothing, has a large age difference with their spouse, or the attorney is from Cook County(!).

I hope that more of the Continuing Legal Education seminars that fulfill the new requirement of 1 hour of diversity and inclusion will also focus on how to identify and guard against these lesser touted biases. And that McHenry County judges and practitioners will continue to accept and celebrate diversity in all forms.

Judge Tiffany E. Davis Swearing in Ceremony



Justice Robert R. Thomas, Illinois Supreme Court



Justice Robert R. Thomas and Tiffany E. Davis





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Combination of Alcohol and Prescription Drug Suspension in Illinois

By: Ray Flavin

A prescription for controlled substances found in your blood or urine after a DUI arrest can be a defense to a Statutory Summary Suspension, with some limitations.

If you have ever read the Notice of Summary Suspension given to a driver after a combination of alcohol and prescription drug arrest you would find it says a driver can be suspended for:

“Any amount of a drug, substance or intoxicating compound in your blood or urine resulting from the UNLAWFUL use or consumption of cannabis as listed in the Cannabis Control Act, a controlled substance as listed in the Illinois Controlled Substances Act, an intoxicating compound as listed in the Use of Intoxicating Compounds Act; or methamphetamine as listed in the Methamphetamine Control and Community Protection Act; your driving privileges will be suspended for a minimum of 6 months.”

In State v. Walters, 2014 Ill. App2d 130712, a Rule 23 case, the appellate court agreed with our own Hon. Judge Joel Berg, that the suspension should be thrown out in the case that the driver demonstrated that they had a prescription (and had not unlawfully used the prescription medication). However, the court in dicta, in this Rule 23 case, found that the State could defend the suspension by proving that the use was illegal. The court went on to explain that the State could prove that the medication was taken contrary to a doctor's prescription (taking more pills than prescribed), or that the driver did not obey the doctor's instructions when taking the controlled substance (driving after being instructed not to drive on the medication).

In a recent case taken to hearing in our courts where a driver had a blow of one half of the legal limit and three prescription medications in his blood, the judge found that although the defendant had testified that he took the medication as per doctor's instructions, the driver would be required to ask to amend the pre-printed form or draft a new petition in order to assert that additional claim. The judge stated that merely checking box #5 on our forms was not enough to bring the petition properly before the court.

Of course in that case the driver could not file a new petition because of *res judicata*, however even if he did file a new petition, the fact that he has consumed alcohol with a prescription medication contrary to doctor's orders would make the use of the prescription drugs illegal, according to Walters.

So be aware in prescription drug DUIs, that you will have to draft a petition that makes the allegation that the use of the controlled substance was legal (therefore the suspension should be rescinded) **and** you will have to prove following the doctor's orders with respect to the use of the controlled substance.

Trial Call

Case Number: 11LA299

Plaintiff: James Augustine

Defendant: The Car Bath

Plaintiff's Attorney:

Donald Brewer

Defendant's Attorney:

Madsen Sugden &

Gottmoller

Trial Dates:

August 7 – August 10, 2017

Judge: Michael T. Caldwell

Directed Verdict: Defendant

Case Number: 14LA381

Plaintiff: Timothy Dorn, Katherine Dorn, Administrators of Diana Dorn

Defendant: Laura Buthod, MD and Centegra Hospital

Plaintiff's Attorney:

Arthur Gold

Defendant's Attorney:

Swanson, Martin & Bell, LLP:

Aiju Thevatheril & Justin Hansen

Trial Dates:

September 5-14, 2017

Judge: Michael T. Caldwell

Last demand: \$5 million

Verdict for Defendants



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WHO REALLY REGULATES ATTORNEYS IN ILLINOIS?
THE SUPREME COURT? THE ARDC? THE IDFPR? --
PERHAPS ILLINOIS LAWYERS SHOULD BE AFRAID --
-- VERY AFRAID

By Ralph J. Schumann, President,
Illinois Real Estate Lawyers Association

Introduction

In April, 2017, the Illinois Department of Financial and Professional Regulation (“IDFPR”) initiated prosecutions of two Illinois attorneys for alleged violation of the Real Estate Appraisal Licensing Act of 2002 (225 ILCS 458/Art. 1) (the “Appraisal Act”). The two attorneys were engaged in representation of clients and were attempting to obtain reductions in the assessed value of certain real estate parcels. In the same manner that they have proceeded in dozens of prior cases in their practices, and in the same manner that hundreds of other Illinois attorneys have proceeded and continue to proceed in similar cases, they submitted briefs in support of their positions setting forth legal arguments on the basis of relevant information, much of it publicly available, urging reductions.

The IDFPR prosecutions claim that the attorneys were engaged in the unlicensed practice of real estate appraisal and seek “cease and desist” orders against the attorneys, as well as civil penalties of up to \$25,000 per violation.

Far from purporting to act as appraisers, or engaging in the development of appraisals, however, the attorneys were engaging in the practice of law. It is not likely anyone was fooled into thinking they were appraisers. They were representing their clients. Yet the prosecutions continue.

Should you be afraid? Totally.

Regulation of the Practice of Law

The regulation of the practice of law in Illinois, and its definition, are the exclusive province of the Judicial Branch of Government, specifically, the Illinois Supreme Court. *Chicago Bar Ass’n v. Goodman*, 366 Ill. 346, 349, 8 N.E.2d 941 (1937); *King v. First Capital Financial Services Corporation*, 215 Ill.2d 1, 828 N.E.2d 1155 (2005).

Following the inception of the prosecutions of Illinois attorneys, the Illinois State Bar Association, Chicago Bar Association, and the Illinois Real Estate Lawyers Association communicated to IDFPR representatives their concerns about the apparent impropriety of the decision to prosecute the attorneys in the manner it chose, but the IDFPR was not dissuaded, and the prosecutions continued. The IDFPR was not persuaded by the observation that, since the attorneys selected for prosecution were engaged in the practice of law and were representing clients in the tax assessment matters, a more appropriate mechanism might be the filing of appropriate complaints with the Illinois Attorney Registration and Disciplinary Commission. If there were really a risk of harm to the public, or if the IDFPR were concerned that the actions of the selected attorneys were bringing the profession into disrepute in some manner, filing complaints with the ARDC would be more appropriate.

“That would take too long”, came the response. The prosecutions continued.

On July 11, 2017, the Illinois State Bar Association filed a complaint in the Chancery Division of the Cook County Circuit Court against the Illinois Department of Financial and Professional Regulation (“IDFPR”), Bryan A. Schneider, in his official capacity as Secretary of IDFPR, and Kreg T. Allison, in his official capacity as Director of the Division of Real Estate of IDFPR, seeking injunctive and declaratory relief (2017CH09418). The ISBA action is not limited to the two proceedings involving the real estate tax attorneys, but more broadly seeks a judicial declaration that the province of defin-

ing and regulating the practice of law in Illinois is that of the Illinois Supreme Court, and that the IDFPR lacks the authority to prosecute, discipline or sanction lawyers for engaging in conduct, like the challenged activities in the two prosecutions, that entails legal representation of clients and not the development or rendering of an appraisal.

The Illinois Real Estate Lawyers Association (IRELA) shares the concerns of the ISBA, and stands ready to take whatever steps are needed to assist the ISBA in protecting Illinois real estate practitioners from what it sees as an overreach in prosecutorial activity beyond the scope of IDFPR's authority. Again, under the Illinois Constitution, regulation and discipline of attorneys is the exclusive province of the Judicial Branch, specifically the Illinois Supreme Court -- not the Executive Branch or an agency thereof.

To its credit, the IDFPR agreed to a moratorium on its prosecutions of Illinois attorneys in this area pending resolution of the ISBA v. IDFPR action, obviating temporarily the necessity of the ISBA seeking any temporary restraining order or injunctive relief in the pending prosecutions.

Said moratorium notwithstanding, the ISBA and IRELA remain concerned about the IDFPR's claim that it has proper authority to prosecute attorneys in these circumstances. At its core, the allegation that an attorney who is seeking a reduction in assessed value of a parcel of real estate is violating the Appraisal Act is an allegation that the attorney is offering an opinion on the value of the real estate in the manner in which licensed appraisers offer such opinions. In fact, however, the attorneys who engage in this area of practice are offering legal arguments to support a different assessed value, and simply bring to bear information, much of which is publicly available, to support their positions. To claim that such activity, which goes on in thousands of proceedings throughout the state, constitutes the practice of "appraisal" is to misconstrue the nature of the professional activity.

The logic of the IDFPR, carried only slightly further, would result in prosecutions of Illinois attorneys engaged in estate planning, or engaged in typical real estate transactional work, where a component of the analysis and representation requires awareness of the value of real estate parcels. Acknowledgment of such real property values may be necessary for proper representation in these areas, but such acknowledgment does not involve acting as an appraiser, nor does it constitute the rendering of an appraisal.

The potential scope of the IDFPR prosecutions is indeed troubling. Thousands of Illinois attorneys are potentially at risk of being blindsided. The chilling effect on the practice of law in any area touching upon or incorporating an awareness of real estate values is significant. The resulting windfall to appraisers of having an appraisal required in every proceeding seeking a reduction in assessed value of a parcel of real estate, no matter how small, might be welcomed by appraisers, but the cost to the public of having to incur this expense cannot be justified on the basis of avoiding harm to the public, which is the touchstone of the Appraisal Act's licensing requirements. It would hamper the ability of members of the public to obtain effective legal representation in the area of real property tax issues. Far from protecting the public from harm, the IDFPR's actions would make it more difficult, and in some cases impossible, for members of the public to obtain needed relief.

The complaints summarizing the charges against the selected attorneys give short shrift to the issue of harm to the public. Did any client of the attorneys selected for prosecution hire his or her attorney really thinking the individual being hired was an appraiser, and then suffer damages as a consequence? It is more likely that each client was fully aware that the individual he or she hired was an attorney who would be engaged in the practice of law on their behalf.

Questionable Reasoning

While it is a given that attorneys representing clients in tax assessment reduction matters cannot act as appraisers without proper licensing, it is likely that only the IDFPR thinks the two attorneys selected for prosecution were acting as appraisers. The attorneys were acting as attorneys, representing their clients. Moreover, in the opinion of this writer, even if the two attorneys selected for prosecution had labeled the appendices to their briefs in large, all-cap letters as "APPRAISAL", this would

not demonstrate that any client was fooled somehow into hiring an attorney when they really intended to hire an appraiser, or that they received gratuitous legal representation on their real estate tax assessment matter when they had thought they were just paying for a written appraisal.

The reasoning employed by the IDFPF seems to “beg the question” (in the traditional logical fallacy sense). The IDFPF seems to be arguing something along the following lines:

IDFPF “SYLLOGISM”:

1. Real Estate Tax Assessment reduction matters (and associated attorney representation) involve consideration of the value of a parcel of real estate;

2. Appraisers develop written appraisals that discuss the value of a parcel of real estate;

THEREFORE: 3. An attorney who comments on the value of a parcel of real estate in the context of legal representation of a client in a real estate assessment matter must be engaging in the unlicensed practice of appraisal.

As President of a state-wide bar association of Illinois real estate practitioners with thousands of attorney members (IRELA -- www.irela.org), I worry that the prosecutorial possibilities of the IDFPF approach are limitless. Where will it stop? In addition to the risk of prosecution for unlicensed practice of appraisal, what about other areas?

Suppose, for example, that one of IRELA’s members, in the context of representing a client in a real estate sales transaction, happens to comment on a statement in a report from a licensed professional home inspector that the kitchen outlets in the subject 75-year old residence need to be replaced with new GFCI outlets. Suppose the IRELA member attorney opines that the inspector’s statement perhaps should be “taken with a grain of salt” (because current building code requirements for new construction may not automatically dictate that this type of upgrade of an existing, older residence be undertaken). Has that attorney now offered an opinion regarding an issue relating to a residential home inspection issue that makes the attorney subject to IDFPF prosecution for the unlicensed practice of home inspection?

Where Do We Go From Here?

Because the possible permutations of the IDFPF approach in these prosecutions extend to almost any area of legal work where the value of real estate is involved in any way, the ISBA has opted to seek a Declaratory Judgment, Injunctive relief, and a Writ of Prohibition. The IDFPF has suggested that the ISBA action is inappropriate, and that each attorney should simply defend the individual prosecution, exhaust administrative remedies, and then seek to appeal if he or she is unhappy with the final result. It makes no sense, however, to have Illinois attorneys be at risk of this type of improper prosecution. Why become embroiled in an endless game of “whack-a-mole” trying to exhaust administrative remedies in a parade of individual prosecutions? Better to address the jurisdictional problem head on.

Since the definition of what constitutes the practice of law, and its regulation, are the exclusive province of the Illinois Supreme Court, the IDFPF may have overstepped its bounds. The argument that the IDFPF has advanced in the prosecutions that it is entitled to define the practice of law to the extent necessary to discharge its regulatory responsibility to enforce the Appraisal Act’s licensing requirements proves too much, and must be rejected.

If allowed to proceed, the proffered exception to the rule would swallow the entire rule. This dangerous approach must be curtailed. IRELA will continue to monitor these actions and take appropriate action to protect the interest of Illinois consumers and of Illinois real estate practitioners.

Member News

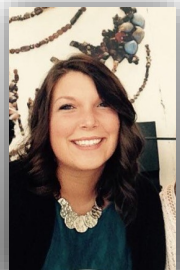
Ward G. Brown is proud to announce the formation of his law office, WARD BROWN LAW.

Ward will focus his practice on civil litigation, commercial and corporate matters. His contact information is as follows:

Ward G. Brown
WARD BROWN LAW
P.O. Box 262
Richmond, IL 60071
(630) 408-0943 (tel.)

New Member

Jaclyn Wilcox is currently a 1L at The John Marshall Law School in Chicago's Central Loop. Jaclyn grew up in Harvard and earned her Bachelor of Arts in English with a minor in Secondary Education from Carroll University in Waukesha, WI. Jaclyn hopes to use her experience to practice School and Family Law in her home county.



FREE HELP WANTED

Our Executive Director, Erin is a whiz in technology, but every once in a while she is tasked with something that is beyond her scope of knowledge. The cost of an hourly advisor or a retained consultant is higher than the Board of Governors (BOG) wants to spend. The BOG is hopeful that one of our members would be available on a needs basis to assist Erin. If you are one of those fortunate people who understands and can process advanced functions of web-sites, etc., we would sincerely appreciate your help. If you are qualified and willing to help, please contact Erin at (815) 338-9559.

Would you be interested in speaking about law outside of the courtroom?

If so, join the ISBA Speakers Bureau.

by Judge Robert Beaderstadt (Retired)

One of the roles which attorneys undertake, often without much recognition, is that of volunteerism promoting the legal profession and the judicial system. The Illinois State Bar Association has encouraged professional development of attorneys and has supported Law-Related Education programs such as Law Day, Mock Trial and Lawyers in Classrooms. Rather than having one's first exposure with the law be a police contact or an appearance in court, LRE presentations by a legal professional is an interactive learning experience which is non-confrontational in a non-judicial atmosphere, often leaving a positive impression.

The Lawyers in Classrooms program places volunteer local lawyers and judges in schools to speak about civics, government and law-related subjects to students of all grade levels, diversities and experience. Many members of the McHenry County Bar Association have each year volunteered their time and talents promoting these presentations in schools throughout McHenry County with great success.

But school classrooms are not the only place where knowledgeable attorneys are needed to discuss the law and civics outside of the courthouse walls. Civic organizations, social clubs, senior citizens' centers and fraternal societies often are looking for speakers to enhance interest at their meetings.

Last year, 22nd Judicial Circuit Judge Michael Chmiel and retired Judge Robert Baderstadt initiated and developed the ISBA Speakers Bureau for adult community groups to invite a local volunteer attorney to speak on a law-related subject in a relaxed social environment. The Speakers Bureau aims to promote public confidence in lawyers, our government and, especially, the judicial system.

If you have experience or expertise in a specific area of law, you may be the perfect speaker to educate and charm such community groups at a discussion about consumer protection, veteran rights, elder law, estate planning, insurance, or any other aspect of the legal practice.

When you sign on as a volunteer speaker, you will designate the topics or areas of law you are comfortable presenting. The ISBA has vast resources and materials available for your use and assistance. The group you will be visiting has, through a request contact with the ISBA website, invited you because of your intended subject matter and familiarity with the community.

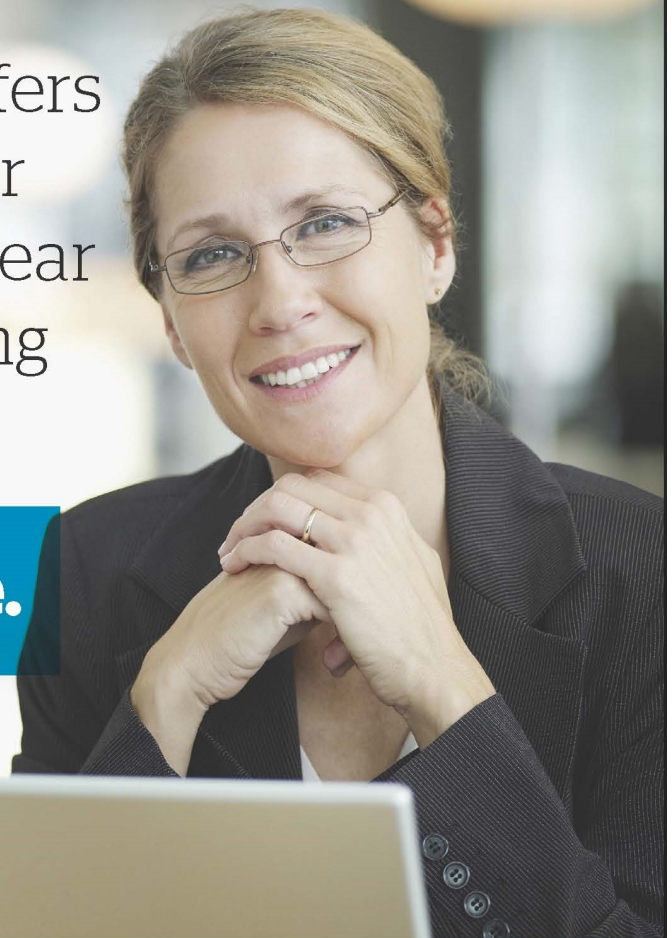
Your presentation should typically last only 30-45 minutes, following a well-developed outline on a narrow legal topic. If you have written materials to handout, the ISBA will work with you regarding copying costs.

The ISBA Speakers Bureau is an Illinois state-wide Law-Related Education civics program. Attorneys and judges from Chicago to Peoria, from Woodstock to Springfield have already volunteered to speak in their communities. Following a presentation, audience feedback enhances the lawyer's performance, communication skills and professional competency. Your participation in the Speakers Bureau will introduce you socially to other active community members and may benefit your law practice.

To join the ISBA Speakers Bureau, go to www.isba.org, tab Public, scroll down to Civics Education. From there you will find the Speakers Bureau, click to open the link for Lawyers “Volunteer to be a speaker” to submit a volunteer application. You may also email Kim Furr at the ISBA office at kfurr@isba.org regarding any questions you may have.

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MCBA Calendar of Meetings & Events

Date	Event	Location	Time
November 14, 2017	Family Law Section Meeting	MCBA Office	Noon
November 21, 2017	Board of Governors Meeting	MCBA Office	Noon
December 7, 2017	Holiday Party	Crystal Lake Country Club	5:30 pm
December 14, 2017	Family Law Section Holiday Party	Rendezvous Bistro, Woodstock	5:00 pm
December 19, 2017	Board of Governors Meeting	MCBA Office	Noon
January 4, 2018	Criminal Law Section Meeting	MCBA Office	Noon
January 9, 2018	Family Law Section Meeting	MCBA Office	Noon
January 16, 2018	Board of Governors Meeting	MCBA Office	Noon
January 23, 2018	General Meeting	Home State Bank, Woodstock	Noon

McHenry County Bar Association
 110 South Johnson Street, Suite 210
 Woodstock, IL 60098