September 2021

McHenry County Bar Association Quarterly Newsletter

In Brief

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2021/22

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Shaina Kalanges
Young/New Lawyers
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Upcoming Events

Date	Event	Location	Time
September 9	Criminal Law Section Meeting	Virtual	Noon
September 9	Civil Law Section Meeting	Virtual	Noon
September 14	Family Law Section Meeting	Virtual	Noon
September 21	Board of Governors Meeting	Virtual	Noon
September 28	General Meeting	Virtual	Noon
October 7	Criminal Law Section Meeting	Virtual	Noon
October 12	Family Law Section Meeting	Virtual	Noon
October 19	Board of Governors Meeting	Virtual	Noon
October 26	General Meeting	Virtual	Noon

Board Meeting Minutes

June Meeting Minutes

July Meeting Minutes

August Meeting Minutes

Inside this issue:

President's Page

By Peter Carroll

2021/22 MCBA President

Bring Back Medieval Craft Guilds!

As your newly-elected President, my "platform" this year will be: Bring Back Medieval Craft Guilds!

According to *Brewminate* (an online *Bold Blend of News and Ideas*): "Guilds were organized so that workers would learn skills from others connected with the guild." Apprentices were young, they usually lived with their employers, and received no pay for their work. Their primary job was to *learn the skills of their trade.* After a few years, they would become Journeymen. A Journeyman had sufficient skill and experience to be employed and get paid for their work. Masters were at the top of their trade. They could run their own businesses and hire Apprentices and Journeymen to do the work while they supervised.

I will soon reach the 38th anniversary of my admission to the Illinois Bar. When I was younger, I believed that I could handle almost any legal matter that walked through my door. On my own. That was a mistake. One can only be good at a limited number of things. We owe it to our clients – and to our profession – to provide superior legal advice, wisdom, and experience. I shudder to think of the number of clients who paid me to learn my trade. They deserved better.

My practice is primarily in the family law arena, although I will write a will and close a residential real estate transaction. I recently asked for advice from a personal injury attorney concerning an auto accident case that I had decided to handle to trial or settlement myself. I was quite surprised to learn all the ways I could have better served my client before the case had ripened to its current status. Fortunately, a settlement was reached which exceeded expectations. No harm, no foul. But that was luck, not skill. I should have contacted a "Master" for sage advice earlier.

Lawyers are generally willing to share their expertise when asked. Our egos certainly can be fed when advice is sought. And so, if you are at the Apprentice level, the Journeyman level, or even the Master level, there are aspects of the law where you lack experience. Don't be afraid to admit you need guidance. Seek out a mentor to learn skills that you don't yet have. Draw on the experience of those who have specialized knowledge.

If you have been practicing law for less than five years, you can be part of the Mentor-Mentee program offered through our Bar Association. That would be a good way to get into the habit of seeking guidance. And Mentors – don't hesitate to admit the limits of your knowledge. Send your Mentee elsewhere whenever appropriate.

Let's regain the pride in our profession that was the goal of forming medieval craft guilds. Let's call on the Masters among us to help us learn new skills and avoid pitfalls. Let's improve the overall reputation of lawyers by providing top quality service, and thus reduce unhappy clientele to a minimum.

Record Retention

By: Bill Bligh

For just over two years now, I have been the McHenry County Bar Association newsletter editor. I have hounded two people for an article for the newsletter four times a year, resulting in sixteen (16) people now less excited about a call from me than before. Based on history and tradition, we have worked our way down the list of the Board of Governors. And while I knew exactly when I was going to be on the hook for an article, it still took me an exorbitant amount time to figure out a topic.

I first thought about an article concerning the top ten things clients have taught me. (The number one thing is to be wary of any client who shows up for the initial consultation with one or more tote bags of paperwork. But since we ALL know this, and I could not come up with a full ten things, that article died.) Then my mind drifted to the possibility of an article about the importance of time: Not only do we trade our time for money, but we also have to be great stewards of our time outside of work for our own mental and physical health. A third possibility was an exploration of pupillometer technology which was part of a 2004 Illinois State Police grant and study designed to get fatigued drivers off the road, a topic about which I knew nothing but that article trailed off into nothingness.

But ultimately it was my practice, or more specifically my office, that dictated what the topic should be. I have closed files everywhere: In this filing cabinet, in that filing cabinet, in a lateral file, in bankers' boxes, in plastic carrying cases, and yes I have even have closed files shoved in my main open files cabinet. I have files from my time as a Special Public Defender (2010-2013) and (2017-2019) and I have files from house closings I did as a sole practitioner all the way back to 1999. The physical office then begged the questions: What do I HAVE to keep? What can I discard? When can I have a controlled burn? The hope is that by answering these questions for myself, maybe I could benefit a fellow bar association member with his or her practice.

There are three sources of guidance in determining what we need or should keep: Illinois Supreme Court Rule 769, Illinois Rule of Professional Conduct 1.15 and advisory opinions from the Illinois State Bar Association. A great resource that discusses all three of these sources is a November 2016 article in the ISBA Journal Are You Getting File Retention Right? By Ed Finkel.

The number one thing we attorneys must maintain is a *client list***.** There are only three requirements of the list: the name of the client, the last known address of the client and the status of the case (open or concluded.) The actual text of rule is as follows:

> It shall be the duty of every attorney to maintain originals, copies or computer-generated images of the following:
>
> **(1)** records which identify the name and last known address of each of the attorney's clients and which reflect whether the representation of the client is ongoing or concluded;
>
> **Illinois Supreme Court Rule 769 (a).**

This list should be maintained indefinitely. *Please see Advisory Opinion 12-06 below.* Since this list also serves as a conflicts check list, it only makes sense that an attorney or firm should maintain that list indefinitely.

The second part of Rule 769 is as follows:

> **(2)** all financial records related to the attorney's practice, for a period of not less than seven years, including but not limited to bank statements, time and billing records, checks, check stubs, journals, ledgers, audits, financial statements, tax returns and tax reports. *Id at (b).*

This is the familiar seven (7) year rule and applies to the financial records of the firm. When one gets past that seven years, one can destroy those records. However, thanks to the scanner, cheap memory and digital technology, it now makes sense for an attorney or firm to keep those financial records in a digital format indefinitely.

A second authority is Illinois Rule of Professional Conduct 1.15, which also affirms the seven (7) year rule and states, in part, as follows: Complete records of client trust account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation. **Illinois Rule of Professional Conduct 1.15.**

Finally, a third area of legal authority comes from **ISBA Professional Conduct Advisory Opinion 12-06.** The key element in this advisory opinion is contained right in the digest on the first page:

> A LAWYER MUST MAINTAIN RECORDS THAT IDENTIFY THE NAME AND LAST KNOWN ADDRESS OF EACH CLIENT, AND REFLECT WHETHER THE CLIENT'S REPRESENTATION IS ACTIVE OR CONCLUDED, **FOR AN INDEFINITE PERIOD OF TIME**. A LAWYER MUST KEEP COMPLETE RECORDS OF TRUST ACCOUNT FUNDS AND OTHER PROPERTY OF CLIENTS OR THIRD PARTIES HELD BY THE LAWYER AND MUST PRESERVE SUCH RECORDS FOR AT LEAST SEVEN YEARS AFTER TERMINATION OF THE REPRESENTATION. A LAWYER MUST ALSO MAINTAIN ALL FINANCIAL RECORDS RELATED TO THE LAWYER'S PRACTICE FOR NOT LESS THAN SEVEN YEARS. FOR OTHER MATERIALS, IF APPROPRIATE STEPS ARE TAKEN TO RETURN OR PRESERVE ACTUAL CLIENT PROPERTY OR ITEMS WITH INTRINSIC VALUE, THEN IT IS GENERALLY PERMISSIBLE FOR A LEGAL SERVICES PROGRAM TO DISPOSE OF ROUTINE CASE FILE MATERIALS FIVE YEARS AFTER CASE CLOSING. OTHER CONSIDERATIONS, SUCH AS ADMINISTRATIVE EXPENSE AND THE SIX-YEAR ILLINOIS STATUTE OF REPOSE, SUGGEST A GENERAL RETENTION PERIOD FOR MOST LAWYERS OF AT LEAST SEVEN YEARS. ANY METHOD OF DISPOSAL MUST PROTECT THE CONFIDENTIALITY OF CLIENT INFORMATION.

ADVISORY OPINION 12-06 (EMPHASIS ADDED.)

In summary, we need to keep our client lists forever. Because we can scan paper and memory is relatively cheap, it also makes good sense to keep bank statements for the operating account and the trust fund account forever. The biggest remaining question is whether to keep client files for longer than seven years as well. I know for me, the idea of creating a digital copy of the file and shredding the paper file after seven years sounds great, but I have to compare the cost of the time the employee spends scanning with the cost of off-site storage. Ed Finkel, the author of *Are You Getting File Retention Right* suggests that scanning and shredding is the way to go and that in the future, the rules will be modified to require us to keep our files indefinitely. I know that it would be liberating to reduce the physical files in my office, and that is a benefit needs to be quantified and added to the calculation balancing the cost of off-site storage with an employee's time spent scanning. I welcome your comments.

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Civil Trial Call

Case Number: 16LA233

Plaintiff: First Midwest Trust, et al

Defendant: Guy Spinelli, et al

Plaintiff's Attorney: Paul Kreig

Defendant's Attorney: Zanck, Coen, Wright & Saladin

Judge: Kevin G. Costello

Dates: May 10—May 12, 2021

Verdict: Plaintiff

Net Total Verdict: $237,746.86

Case Number: 19LA91

Plaintiff: Susan Giese, et al

Defendant: Globalcare SC, et al

Plaintiff's Attorney: Kralovec, Jambois & Schwartz

Defendant's Attorney: Stamos & Trucco

Judge: Kevin G. Costello

Dates: August 16—August 24 2021

Verdict: Plaintiff

Net Total Verdict: $1,200,000.00

Last Demand: Unknown

Last Offer: Unknown

Case Number: 18LA226

Plaintiff: Kimberly Rentner

Defendant: Daniel Camic

Plaintiff's Attorney: Steven Greeley – Franks, Gerkin, Ponitz & Greeley

Defendant's Attorney: Paul Brady—Cozzi & Zapf

Judge: Kevin G. Costello

Dates: August 2—August 3, 2021

Verdict: Defendant

Last Demand: Unknown

Last Offer: None

McHenry County Bar Association

Welcomes our newest members....

Lillian Gonzalez

Gonzalez Legal Group

James Newman

McHenry County State's Attorney's Office

Vaclavek Hartman Vaclavek, PC, and **Law Office of Michael C. Poper, PC, of Counsel**, are pleased to announce that we have moved office locations from Barrington. Our new location is:

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Making a Difference in Legislation and Litigation

By: Attorney Beth Vonau

Section 5/607.6 of the IMDMA has been amended. This amendment took effect immediately upon signature from the Governor. Previously the section provided for rules under which the Court could order counseling under the IMDMA. Subsection (d) provided that nothing in said counseling could be used in litigation. Normally we read a section as a whole. For example the maintenance statute is read as subsection (a) first determine any entitlement to maintenance, then (b) determine duration and amount of maintenance, then the maintenance statute is further fleshed out through subsections c, d, e, and f. We don't apply subsection (d) unless we have made it through (a) and (b). However, in the case of the former 5/607.6 some courts took subsection (d) and read it to apply to all counseling in all cases under the IMDMA - even when that counseling was not court ordered as indicated in subsection (a). The interpretation that subsection (d) should be applied as a stand alone proposition caused significant problems for GAL and attorneys across the state. To add to the confusion, the law was not interpreted the same by judges even within the same appellate district.

With this new Public Act, IRMO Noyes and the Second District opinion which held that no communications from any counseling could be used in litigation has been overwritten. While IRMO Noyes was an unpublished opinion (and prior to Rule 23 being amended) the case was still being cited by judges with the result that information from a therapist was not getting to the Court. This extended to GALs talking to a child's therapist even when the counseling was not court ordered. This holding has frustrated many GALs and attorneys over the years and rewriting the law was the most expedient way to fix it. The new subsection (d) specifically states that counseling is subject to the Mental Health and Developmental Disabilities Confidentiality Act and HIPAA but removes the language that all counseling is confidential and no communications from counseling may be used in any litigation.

I was one of those frustrated attorneys who was forced to deal with the interpretation that the old subsection (d) applied as a stand alone proposition and applied to counseling that was not court ordered where a minor had made a outcry of sexual abuse. I was unable to get testimony from the therapist admitted in family court specifically because of the holding of IRMO Noyes. At that time the State still didn't have enough evidence to bring criminal charges but with a different burden of proof in family court I had hoped to help protect this child from further abuse. (The State has since brought criminal charges of abuse.) In so many ways we often learn more from the losses rather than the wins. I learned my threshold for accepting things as they are and that I could change the system one way or another. When the bill passed the House I texted that mom to let her know I had never forgotten her child and in my own way was still fighting for her. She was overwhelmed and incredibly grateful. I cried the day I was able to text this mom that the bill had been signed into law and was effective immediately.

It was my pleasure to work with Assemblyperson Suzanne Ness on her first piece of legislation. Unbeknownst to me and Assemblyperson Ness, Attorney Michael Strauss along with the lobbying arm of the ISBA had been working with Senator Michael Hastings on getting an identical bill introduced into the Illinois Senate. Once we all learned of each other's efforts we worked together to move the bill through both the House and the Senate. I encourage all of you to look at the laws and to think about what works and what doesn't. As litigation attorneys we often have a very specific knowledge of how all the laws work together. Since no law exists in a vacuum it is our duty to step forward when things are wrong and work to make them right again. Talk to your elected officials. Communicate with them ideas for change. The change in this statute will allow attorneys, GALs, and judges to realize the whole picture so that the court can make decisions that are in the best interests of our children. Together, and from both sides of the aisle, we can make our laws more effective to serve the greater good. We can make a difference in legislation and litigation. The perspective we as practicing attorneys have is unique and all the more reason we need to champion children and community.

The new text of IMDMA 750 ILCS 5/607.6 follows:
Court-ordered Counseling.

(a) The court may order individual counseling for the child, family counseling for one or more of the parties and the child, or parental education for one or more of the parties, if it finds one or more of the following:

Both parents or all parties agree to the order;

The child's physical health is endangered or that the child's emotional development is impaired;

Abuse of allocated parenting time under Section 607.5 has occurred; or

One or both of the parties have violated the allocation judgment with regard to conduct affecting or in the presence of the child.

(b) The court may apportion the costs of counseling between the parties as appropriate.

(c) The remedies provided in this Section are in addition to, and do not diminish or abridge in any way, the court's power to exercise its authority through contempt or other proceedings.

(d) Counseling ordered under this Section is subject to the Mental Health and Developmental Disabilities Confidentiality Act and the federal Health Insurance Portability and Accountability Act of 1996.

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HAPPY RETIREMENT HANK!!

SAVE THE DATE

McHENRY COUNTY BAR ASSOCIATION

HOLIDAY PARTY

THURSDAY, DECEMBER 2, 2021

HICKORY HALL

CRYSTAL LAKE

5:30 pm —9:30 pm

MCBA 44TH ANNUAL GOLF OUTING AUGUST 6, 2021

Haiku Golf

Rain has fled the sun

Links call me with birdie song

Bogie comes instead

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Beats good day at work


McHENRY COUNTY


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Avoiding Scams Targeting Lawyers

By: John Dickson

The scams targeting lawyers are ever changing and constantly growing more sophisticated. While it is impossible to completely protect yourself from being scammed, you can considerably reduce your risk by being able to identify common scam patterns and having good practices that address those common scam patterns.

Common scam patterns.

There are two common patterns of scams targeting lawyers. The first pattern is the Fake Check Scam. The Fake Check Scam involves the attorney receiving a fake check, and the "client" convinces the lawyer to wire the proceeds of that check before the check clears. By the time the check bounces, the wired funds are long gone. Current variations of the Fake Check Scam are:

Attorney as escrow agent. The client hires the attorney to serve as an escrow agent to purchase industrial machinery. Client deposits the purchase price with the lawyer using a fake check, and client instructs the attorney to wire the purchase price to the seller at closing. The deal closes and the wire transfer to the seller is made before the escrow deposit check clears the bank.

The quick settlement. The client hires the attorney on contingency to collect a business account payable. The opposing party, who is in cahoots with the client, quickly settles and delivers a fake check to the attorney. The attorney deposits the check and then wires the client's split of the proceeds to the client before the check clears.

The earnest money deposit. The client deposits earnest money with the attorney using a fake check. When the deal falls through, the client requests that the attorney refund the earnest money deposit by wire transfer before the check has cleared.

The second common scam pattern is the Last Second Wire Instruction Change. This scam usually targets our clients. This scam happens when the email account of someone involved in a real estate transaction (such as you, the lawyer) is hacked or spoofed. As the client is headed to the bank to wire funds, the client receives new wire instructions that tell the client to wire the money to an overseas bank account.

Five tips to avoid scams.

1. Use common sense. I promise you that a European manufacturer of heavy equipment will never pick you out of the Yellow Pages to paper up the sale of a million-dollar dredger. Even if it did, it would not reach out to you with an email generically addressed to "Dear Counsel" (rather than addressed to your name). Real clients do send emails with you as a blind carbon copy (BCC) recipient. Real clients find a way to meet their attorney in person. Real clients can be reached by telephone. Real companies have websites, Facebook pages, and other internet presence. Real companies have business premises that you can see on Google Maps Street View.

2. Be suspicious of easy paydays. The new collections file you took on a contingency basis, for a client you have never met, that settled in a week without much effort, is certainly a scam. You will know for sure that it is a scam when your "client" knows that the check has been delivered before you do and immediately harasses you for his proceeds.

3. Have a firmwide policy for check clearing. The conventional wisdom used to be that a check has cleared **after 3 days for a check drawn on an in-town bank, after 5 days for a check drawn on an in-state bank, and after 10 days for a check drawn on an out-of-state bank. That conventional wisdom is wrong. The U.S. Treasury now advises** that "[i]t may take weeks to discover that a cashier's check is fraudulent." All deposit items including cashier's checks, money orders, and certified checks, have varying times to clear the banking system and be collected. Check with your bank to determine the appropriate wait time before making any disbursement. Call the issuing bank of any suspicious check to validate it. Advise all clients in your engagement letters that you will not disburse client funds until your bank confirms that the deposit has cleared.

4. Do not accept wire transfers into your client trust account, and never wire funds out of your client trust account.

5. Have good practices for your real estate files. Inform your real estate clients in writing that you will never email wire instructions, that all wire instructions should be obtained directly from the title company, that your client should call the title company to verify wire instructions before sending the wire, that new wire instructions that arrive at the last second are certainly fake, and that your client should never wire money to a foreign bank.