

THE GAVEL

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The Gavel

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President's Message

Honorable Patrick E. McGann

Dear Colleagues:

This will be the last time I will be speaking to you from this vantage point. That once seemingly distant, unspoken goal of every one of my predecessors is just over the horizon. Soon, I will be just another former President of the Illinois Judges Association. I wish that I could speak with each and every one of you and personally thank you for entrusting me with this office. Hopefully, during my term, I have advanced the cause of the judiciary in at least some small way. I also want to thank the officers and committee chairs and co-chairs for their help in my endeavors. I would be remiss if I failed to acknowledge the contribution of our Executive Secretary, Kathy McEnroe, a more patient and efficient aide I have yet to meet. Finally, this Association made a great decision a few years ago to retain Chris Ruys. She has been diligent in working to promote the interests of our members. Her boundless energy and enthusiasm is addictive.

Last December, I introduced my theme for the year as "Judges: Protectors and Problem Solvers." I believe this is the most concise description of the role we play in our society. We stand as the silent sentinels making certain that the Rule of Law is enforced. Each day in courtrooms across this State, men and women

make certain that this contract that binds this increasingly diverse society together is fulfilled. The forums over which we preside have also become the crucible where solutions to society's latest dilemmas are forged. Increasingly, our courts are called upon to resolve issues that once were the domain of our families, schools and religious institutions. These are tasks which we have embraced and worked hard to complete.



Unfortunately, all too often our accomplishments go unnoticed or worse unappreciated. Increasingly, public attention is drawn not to success but failure. My primary goal this year has been to promote an understanding among our members that each of us must become ambassadors for the judiciary. We must take the time to tell the stories of our successes. We must come forward and correct erroneous or mis-informed reports of our work. In other words, we must be unceasing in our efforts to build public confidence in the work of the judiciary.

This year, the Association has produced and distributed five, with plans for a sixth, editions of Judicial Perspective, our half hour cable television program. They have been distributed around the State. One edition introduced Chief Justice Moses Harrison II to the people of Illinois. He explained the workings of the Illinois Supreme Court to the television

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OUR INCOMING PRESIDENT: JUDGE STEPHEN C. MATHERS

By Judge John W. Countryman

Stephen C. Mathers has been nominated for the position of President of the Illinois Judges Association during the 2000-2001 term and will take the helm of the organization in December.

Mathers has been a Judge for 20 years and still enjoys every opportunity to be on the bench and decide cases. "I thoroughly enjoy the variety of cases over which I have had the opportunity to preside. Sometimes it is difficult to find the time to keep up on the different areas of the law, and so I envy the Judges in Cook County their divisional structure. But overall, I very much like hearing, in my present assignment, criminal felonies, law motions, and some family law."

Residing in Knox County, where his office windows overlook the campus of Knox College, Mathers has been the Supervising Judge for ten years in that largest county of the Ninth Judicial Circuit. "It's often a pain dealing with administrative matters--personnel problems, attending County Board Committee meetings at night, scheduling--but after this many years, I've begun to take the hassles in stride," Mathers said with his typical good humor. One major administrative accomplishment for Mathers in recent years has been the creation of two new courtrooms in the 120 year old Courthouse building and the planned renovation of three others.

Mathers attended Northwestern University and the University of Illinois College of Law, with the three year period between those schools being his service in U.S. Army Military Intelligence, including one year spent in Vietnam where he was awarded a Bronze star.

Starting his legal career as an Assistant State's Attorney in Kane County, Mathers went on to establish a general practice and partnership as Peel, Henning, Mathers, Bell & McKee.

He was appointed an Associate Judge in 1978 and won circuit-wide contested primary and general elections in 1980 to become a Circuit Judge.

Judge Mathers has been active in several law-related organizations and activities. He has served on the Family Law Section Counsel and the Assembly of the Illinois State Bar Association. His teaching and lecturing experiences have been for, among others, the Illinois Institute for Continuing Legal Education, the I.S.B.A. LawEd Series, and the Illinois Judicial Conference.



Steve has been a member of several Illinois Supreme Court Committees, including the Committee on Judicial Conduct and the Illinois Board of Admissions to the Bar. Most recently,

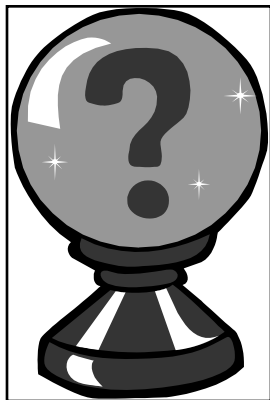
he served on the Task Force on Professional Practice in the Illinois Justice System, created by the General Assembly in 1999. Additionally, he has been selected as a delegate, since 1998, to the National Conference of State Trial Judges of the American Bar Association.

An officer in the Illinois Judges Association since 1995, he previously served on the Board of Directors, beginning in 1993. He was one of chairs of the I.J.A. Membership Committee for four years, the last of which (1995) resulted in the largest percentage increase in membership, both in Cook County and outside Cook, in recent years. No doubt he was able to grow the membership by using his keen wit and conveying his sense of compassion. Despite all of his accolades, which are too numerous to fully list here, Steve remains extraordinarily humble. On behalf of the organization, we thank him in advance for his time and wish him good luck.

Small Claims and the Corporation: A Small Conundrum for the Trial Judge

By Bob Keenan,
Wabash County Resident Circuit Judge

While it is not a problem of major proportion for most Illinois judges, small claim cases involving corporations can present a confusing issue. I refer specifically to those small claim cases brought on behalf of a corporation by a corporate officer or employee.



Many small businesses are organized as corporations despite their having only one or a small number of shareholders.

Consequently, many of these shareholders consider themselves to be the "owners" of the business, with the corporation being only a tax convenience or an evil necessary solely to avoid personal liability.

In this writer's experience, the same attitude also may be found in resident managers of businesses which are parts of a much larger corporation. One example which comes to mind is a local branch of a national furniture chain, but which shall here remain otherwise unidentified. What is the problem, you ask? There is an apparent conflict between the Code of Civil Procedure and the Supreme Court Rules. Section 2-416 of the Civil Practice Law (now 735 ILCS 5/2-416), which was effective January 1, 1984, provides apparent statutory authority for

[a] corporation [to] prosecute as plaintiff or defend as defendant any small claims proceeding in any court of this State through any officer, director, manager, department manager or supervisor of the corporation, as though such corporation

were appearing in its proper person.

Of course, a corporation lacks the physical attributes which are necessary to appear "in its proper person," as that term has traditionally been used.

In an apparent response to this statute, the Illinois Supreme Court adopted its Rule 282(b), 134 Ill. 2d R. 282(b), effective August 1, 1987. This rule provides that a corporation may not appear as "claimant, assignee, subrogee or counter-claimant in a small claims proceeding, unless represented by counsel." The rule does, however, allow a corporation to defend, "through any officer, director [or] manager," a small claims case in which not more than \$1,500.00 is at issue.

The dilemma which faces trial

judges in Illinois is whether to follow the rule or the statute. And, to make matters even worse, two districts of the Appellate Court have taken opposite positions on the matter.

In *Woerner v. Seneca Petroleum, Inc.*, 175 Ill. App. 3d 329 (3d Dist. 1988), the Appellate Court ruled that the General Assembly "preempted the question of pro se representation of corporations by enacting section 2-416 almost four years prior to the Supreme Court's adoption of Rule 282." *Woerner v. Seneca Petroleum, Inc.*, 175 Ill. App. 3d at 331. In essence, the Third District held that the Supreme Court exceeded its authority in adopting Rule 282(b).

This left trial courts in a quandary. Should we follow a statute, a Supreme Court Rule or the decision of a high-
See SMALL CLAIMS Cont'd on Page 5



A discussion on "raising the bar" on judicial elections highlighted "Judicial Perspective," a half-hour program presented by the Illinois Judges Association (IJA) on Chicago Access Cable TV which aired on Thursday, October 26, on Channel 21 and on Sunday, October 29 on Channel 19. Above, helping plan the show are some of the members of an alliance of bar associations involved in improving the ways judges are elected and retained. They are Hon. Patrick E. McGann (third from right), IJA president and host of the show; and (from left) Mauricio Araujo, Puerto Rican Bar Association; Patrice Ball-Reed, Black Women Lawyers Association; Leonard Murray, Illinois State Bar Association; Rena M. Van Tyne, Asian American Bar Association; Hon. Anne Jorgensen, Illinois Judges Association; and Steven F. Pflaum, Chicago Bar Association.

Did You Know . . . by Lainie Berger & a host of statewide correspondents

DID YOU KNOW

This column will appear in every issue of The Gavel and will be devoted to promotions, new assignments, appointments, retirements, achievements and, well, just plain gossip. For the intellectuals among us, please see the substantive law articles. For the rest, please send all items of interest to me or any of our correspondents. As co-editor, I reserve the right to comment on the achievements of my pals and those in superior positions to me.

Cook County's Corner

I was excited to see a friend from the Women's Bar Foundation Board, **Mary Anne Mason**, appointed to fill a vacancy. Mary Anne was in private practice at Kevin M. Forde, Ltd, is a past member of the Executive Board of the Chicago Bar Association and is a welcome addition to the bench.

In the Northern District of Illinois, **Joan Humphrey Lefkow** was inducted as a District Court Judge, being the first woman and second person ever to have held the positions of magistrate judge, bankruptcy judge and district judge. Given the lifetime tenure of the position, odds are she'll never break new ground by also serving on the circuit court bench.

Retired Presiding Judge, **Sheila Murphy**, was installed as president of LAP, the Lawyer's Assistance Program, which provides interventions and counseling for lawyers and judges who are impaired by alcohol or drugs. Everyone knows that Sheila actually has no idea of what it really means to retire . . . of course, she's perfect for the position having been an instigator in starting a drug court while on the bench.

Judge **Thomas Hett** who had a long career as a judge in the criminal courts retired in March.

Justice **Robert Chapman Buckley** was selected to fill the vacancy on the Illinois Courts Commission.

Congratulations to Judge **Walter Williams** on being installed as president of the Illinois Judicial Council.

He follows in the steps of Judge **Raymond Funderburk**.

And . . . we anxiously await more news from Judge **Stuart Nudelman**. Last we heard, he was traveling to the Middle East to teach the Palestinians about how to implement a judicial system when they become independent. Here's hoping the newest events in the Middle East do not hamper the project.

Around the State

The Law Bulletin reports that a panel of Lake County judges announced their strategic plan for the future of the court system that includes integrating computers used by the various county's agencies and making the courthouse more "user-friendly". The plan makes full use of new technology and deals with more mundane items such as the numbering of courtrooms. Of particular note was a goal of blocking out time for judges to write decisions, prepare for trial and study the law. Clearly, Lake County thinks big.

Outgoing Chief Judge **Henry "Skip" Tonigan III** shepherded the committee and new Chief Judge **Jane Waller** will work on implementing the goals.

Bloomington attorney **Kevin Fitzgerald** was appointed an Associate Judge in the 11th Circuit, while the 12th Circuit named former Will County assistant public defender **Cathy Wintersteen Block** an Associate Judge.

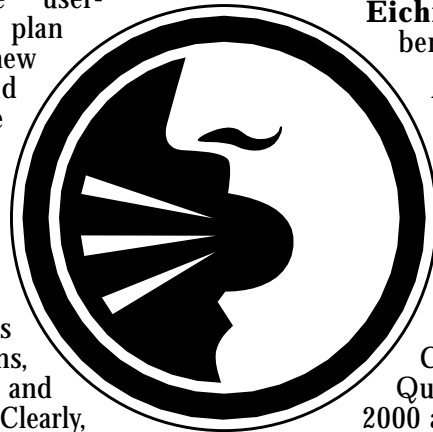
Ted Hamer was named to a replace retiring Judge **Clarke Barnes** in the 14th Circuit; in 1998 Hamer lost the Republican primary for that seat to Judge Barnes by 267 votes. Hamer is currently the State's Attorney in Henry County, having succeeded Judge **Larry Vandersnick** (one of our correspondents) as State's Attorney in 1994. Many new Associate Judges have been named. The 3rd Circuit has selected

Thomas W. Chapman, Nelson F. Metz, and Ralph J. Mendelsohn, while the 12th Circuit has selected **Robert J. Baron**. The 16th Circuit picked **Leonard J. Wojtecki, Stephen Sullivan** and **Allen M. Anderson** for the post. Sullivan and Wojtecki had been in private practice in Batavia and Aurora, respectively before their selection.

In the 6th Circuit, **Katherine McCarthy** has been elevated from Associate to Circuit Judge.

Recalled Associate Judges **Paul Noland** and **Duanne G. Walter** have again retired from the 18th Circuit. **Jerry L. Patton** has retired in the 6th Circuit, while **Barry E. Puklin** and **Roger W. Eichmeier** have left the bench in the 16th Circuit.

Associate Judge **Paul A. Kolodziej** is retiring after 26 years on the bench. He was appointed in 1974 and served in Adams County. A retirement ceremony in his honor will be held at the Adams County Courthouse in Quincy on December 15, 2000 at 11:00 a.m.



IN MEMORIAM

We will miss these judges who died recently . . . Judge **Thomas Feehan** of the 12th Judicial Circuit. Judge Feehan was a past president of the Will County Bar Association. We extend our heartfelt condolences to Cook County's Judge **Jim Jorzak** on the loss of his father, retired judge **Richard Jorzak**. Judge Jorzak ordered the home of John Wayne Gacy razed while presiding judge of Housing Court and is a former presiding judge of Domestic Relations. Our condolences also go out to Cook County's Judge **Stephen Yates** on the loss of his father, Congressman Sidney Yates, who served in the House for 24 years and was best known for his work as a staunch ally of the arts.

JRS Corner

Most Frequently Asked Questions

By Rudy Kink

When is the best time of the year to retire?

If you are able to retire at anytime during a year, you will surely want to postpone your retirement date until after July 1, the effective date of the Cost of Living Adjustment (COLA). To take advantage of the COLA, you may retire anytime on or after July 2 and use your new salary for pension purposes.

If you are planning on working until the latter part of the year, you may want to continue to work until December 31, so your retirement benefit will begin on January 1. If you retire at that time, you will be entitled to your first three percent increase the next January 1.

I was an assistant state's attorney before I became a judge. How do I establish that service in the Judges' Retirement System (JRS)?

There are no provisions in the JRS to establish service for time spent as an assistant state's attorney. You can transfer and convert that service, however, provided 1) the service is still credited in a retirement system covered under the Reciprocal Act, and 2) you were in service on or before September 5, 1975.

If you were *the* state's attorney or *the* public defender and did not contribute to a retirement system, you may establish a maximum of eight years of service in JRS, but you must have at least six years of service as a judge and make the proper contributions required by the JRS.

May I purchase service in JRS for the time I served on active duty in the military?

You may purchase up to two years of military service credit in JRS, so long as

News from Judicial Selection and Retention Committee

By Richard Goldenhersh

The mandate of the Judicial Selection and Retention Committee is to monitor and advise the Executive Committee, Board and Membership on any developments, legislative or otherwise, in the area of judicial selection and retention. While both the Illinois State Bar Association and the Chicago Bar Association have filed bills in the General Assembly concerning appointed selection and a modified committee retention of judges, the proposals do not seem anywhere near passage.

Since the last report of this Committee in *The Gavel*, President Patrick McGann has appointed Ray Jagielski and Richard Goldenhersh, the Chairs of the Committee, to serve



with him on the Task Force and Judicial Elections Committee. The Judicial Advisory Council of Cook County sponsors the Task Force. It is a multi-bar association enterprise to disseminate information on the appropriate ethical conduct of candidates for judicial office. This includes dissemination of Rule 67

and advisory ethical opinions on complying with that rule, as well as other materials available nationwide concerning the ethical conduct of judicial elections. The Task Force has held a public meeting, made its existence and objectives available to the media, and made itself available to render advisory opinions for any candidate who has a question about the ethical consequences of an action in the upcoming election.

SMALL CLAIMS *Cont'd from Page 3*

er court which we are bound to recognize in the absence of a contrary ruling in our own district?

Then along came *Real Estate Buyer's Agents, Inc. v. Foster*, 234 Ill. App. 3d 257 (2d Dist. 1992). In this case, the Appellate Court held that the Supreme Court Rule takes precedence in the event of a conflict with a statute if the subject matter is within the Supreme Court's authority.

As matters now stand, we have 735

ILCS 5/2-416, Supreme Court Rule 282(b), a decision of the Appellate Court which invalidates the Rule and a decision from another district of the same Appellate Court which declines to follow *Woerner* and approves the Supreme Court's adoption of Rule 282(b).

Alas, what is a trial judge to do? Personally, when my Supreme Court says jump, I do, although I'm not sure if that would be my attitude if my circuit were in the Third District.

you served on active duty for two years or longer. If you served in the reserves, you may purchase service for time spent on active duty in the reserves, which includes time spent in required summer camps. You may not use weekend or nightly drills as

active duty time.

Currently, it is extremely expensive to purchase this service, but we are hoping that the fall legislative session will produce a "window" period to allow the purchase without paying the costly employer contributions.

Bring Back the Gavel!

By Larry Vandersnick

Remember "Miracle on 34th Street?"

Kris Kringle is on trial. He says he's Santa Claus. The State of New York says he's not. "Call your next witness," orders the judge. The courtroom doors open. Postal workers enter carrying large bags of mail filled with 15,000 letters addressed to "Santa Claus." As they open the bags onto the judge's bench, the courtroom explodes in chaos. The judge reaches for his gavel and pounds the wooden mallet until order is restored in the courtroom.

Yes, the judge's gavel has played an important role in other courtroom classics as well. Remember 'Anatomy of a Murder' and "Witness for the

Prosecution?" These courtroom movies portrayed a judge dressed in a black robe, elevated behind the judicial bench, with gavel in hand.

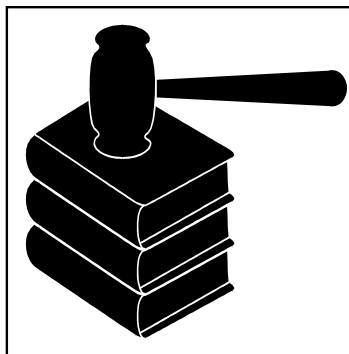
Even today's television shows portray judges using gavels. Just watch "Ali McBeal" or "The Practice." With gavel in hand these TV judges seem to satisfy the public's expectations for modern day justice.

What's missing in the real world courtroom of today?

The gavel, of course! You see, judges still wear black robes; they still sit behind elevated benches; but gavels are no longer a part of a judge's tools of trade.

Let me offer an example. In 1998, a young appointed judge was running for election in Rock Island County, Illinois. She was filming a campaign ad. The producer told her to bring a gavel but she didn't have one. So she tried to borrow it. To her surprise, she couldn't find one. Not one judge in the county had a gavel!

Essentially, the same fact holds true for all 22 Circuit Courts in Illinois. In a recent survey, which I conducted, the results showed that 100 percent of all judges in these courts wear robes on the bench, See *GAVEL* on Page 7



PRESIDENT Cont'd from Page 1

audience. Another program focused on "Drug Courts" and their innovative approach to breaking the cycle between crime and drug addiction. Two programs featured some of our colleagues and Bar leaders discussing the Retention process and its importance to the voter. Each of these shows was well received. I want to thank the participants for taking the time to join me. A special thanks to our Chief Justice who not only was a gracious guest, but also a strong supporter of these efforts to reach out to the community.

I am extremely proud of our collaboration with the Illinois Supreme Court in creating the Illinois Judiciary Speakers Bureau. Chief Justice Harrison has been instrumental in developing and promoting this program. I urge each of our members to volunteer to be a speaker by sending me a short note or email.

Your Association has also been extremely active in promoting ethical conduct by candidates for judicial office. This State is on the threshold of losing one of its most important institutions, an independent judiciary. In states such as Texas, interest groups are boasting of their ability to secure, by contributions, a

compliant judiciary. In Ohio, it is estimated over 12 million dollars will be spent to elect on Supreme Court Justice. In Florida and Georgia candidates for judicial office have been elected while conducting campaigns misrepresenting the work of their opponent. In a recent survey, 81% of Americans believe judicial decisions are affected by campaign contributions. The National Conference of Chief Justices will meet in Chicago in December to discuss the issue. We must continue to work with the organized bar on this issue. I also believe we must initiate dialogue with our political and community leaders to address these issues and create solutions.

Do not confuse this warning as a veiled call for an appointed judiciary. Nothing could be farther from my mind. The Illinois Judges Association is officially neutral on this issue. Personally, I have witnessed our judiciary become enriched by the diversity created by the current election process. An elected judiciary is an honored tradition across this country. Whether the system for selecting judges in Illinois should change is a political issue best left to the legislature and electorate. Our role must be to work to improve the current system so that men and women of experience, scholarship,

integrity and independence become our judges.

Stepping off my soapbox, I want to urge you to help us by allowing us to communicate with you online. This will reduce our costs and increase our efficiency. So please send us your email address and let us know if we can communicate with you electronically.

During this past year, we have undertaken efforts to use our webpage to better communicate with our members and the people we serve as judges. I acknowledge we could do more. Dave Youck and his committee are a valuable resource which we must continue to develop in the years to come.

All good things must come to an end, and so must this column. I have not thanked everyone who has helped me this past year and for this I apologize. It is not that I am ungrateful, the list would be too long. I count each of you as a friend and will do my best to demonstrate my gratitude in the years to come. I have thought about some snappy way to end this page and can only think of a line which I will attribute, probably incorrectly, to Arsenic and Old Lace. "When you think of me... be kind."

GAVEL Cont'd from Page 6

98 percent conduct court while seated behind an elevated bench, but only 2 percent use a gavel.

Is the public being deceived? Are judges being hypocritical?

Perhaps so. Most everything associated with judges bears a gavel on it. It's like the judge's coat of arms as shown in these examples:

1) Judicial Campaigns.

When was the last time you saw a piece of campaign literature or ad without a gavel? When I ran for election in 1994, my campaign button displayed a large gavel with the words, Elect Vandersnick, Judge. I remember a Supreme Court Justice running for office in 1990 whose campaign brochures and television ads had the Justice perched behind an elevated bench dressed in his black robe with gavel in hand. It must have worked. He won!

2) Law Magazines and Books.

ATLA (Association Trial Lawyers of America) publishes a monthly magazine called the "Law Reporter." Part of their mission statement is to "seek justice for all" and their insignia imprinted on the front cover bears the picture of a gavel with the words, "ATLA: For the People."

The Illinois Judges Association is an organization of 960 current and retired judges in Illinois. Published semi-annually is a newsletter called "The Gavel" with, of course, a picture of a gavel on its cover.

3) Judicial Awards.

Have you ever seen a judge retire who didn't receive a plaque or other memento without a gavel on it? Of course not!

Remember the conclusion of the Clinton impeachment proceedings on February 12, 1999. The gavel was present there, too. In appreciation of Chief Justice William Rehnquist's role in the impeachment trial, Senate Majority Leader Trent Lott presented the Chief Justice with a golden gavel embedded on a plaque.

Yes, the gavel seems to be every-

where except in the place it should be -- in the courtroom.

Is there a law requiring the use of the gavel?

There is not. Judges are not guilty of violating any law or rule on proper courtroom decorum when it comes to the use of the gavel. The same holds true of black robes and elevated benches. Yet judges wear the black robes and seldom question their use. And most judges sit behind an elevated bench. When I was researching this article, I was surprised to find little information on the use of the gavel in the courtroom. The only mention I could find was in a 1969 book entitled "The State Trial Judge's Book." With a picture of a gavel affixed to the book cover, Appendix 3, under "Common Courtroom Practices," states:

"...(b) the robe is the traditional symbol of the trial judge. It should be worn out of respect for the office regardless of personal feelings. A gavel is appropriate, but should be used sparingly."

It's part of our history

The English judicial system provided our forefathers with the common law of England, as well as that country's courtroom decorum, which included gavels, robes and elevated benches. Our courtrooms, in keeping with this tradition, have evolved into halls deep with reverence for justice. Public dramas of a high order occur there on a daily basis. Black robed judges, with gavels in hand, sit on elevated benches in buildings of rich dark woods and polished carvings. This scenario generated respect for the law and for the judges who upheld it.

Is there a need?

I think so. The public expects it and judges should, when they can, fulfill the public's expectations. Let me offer two examples.

Back in 1996, a retired Rock Island County, Illinois judge, Judge Jay Hanson, was performing a mock trial on the film "Miracle on 34th Street." He played the part of old Judge Henry

Harper. After the trial was completed, a little girl came up to him and had only one question, "Where's your gavel?" You see, the Judge had on his black robe, but he never used a gavel. The little girl was confused and disappointed.

As a judge in the 14th Illinois Circuit, I preside over many jury trials. After the jury reaches their verdict, I go back to the jury room and ask the jurors if they have any questions. On three separate occasions, the jurors have asked, "Where's your gavel?"

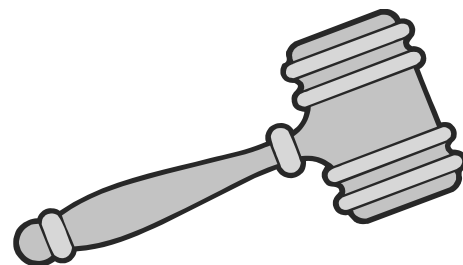
Yes, the public, young and old, attach American justice to our history of ornate old courtrooms with black robed judges dispensing justice behind elevated benches with gavel in hand.

Today that aura of yesteryear is gone, and so is the public's respect for the law and for those who uphold those laws. When justice is dispensed in a Judge Wapner or Judge Judy fashion, and courtrooms look like somebody's garage, it's difficult to persuade the public that what goes on in our courts is worthy of respect and compliance. Will bringing back the gavel restore the public respect? Probably not, but bringing back a part of judicial tradition is a step in the right direction.

Symbols of Justice

Gavels may not seem to play an important part in courtroom proceedings today. Their use may not be deemed important, but then neither is a long, black robe that looks like a primitive woman's garment. Yet all judges, male or female, wear the robes as a symbol of justice. The same might be said about gavels.

A black robe and a wooden gavel go hand in hand. A judge without a gavel is like a policeman without a badge, like a referee without a whistle. Something's missing when you see a judge in a robe but with no gavel. Let's bring back the gavel !!!!!!!



Illinois Judges Association

December 7 - 8 - 9, 2000
Sheraton Chicago Hotel & Towers
301 North Water Street, Chicago



AGENDA

Thursday, December 7, 2000

- 4:00 p.m.: Registration, Chicago Promenade, Ballroom Level
5:00 p.m.: Reception, Chicago Promenade East, Ballroom Level

Friday, December 8, 2000

- 6:45 a.m.: Run for Justice with Justice Seymour Simon, Continental breakfast provided
9:00 a.m.: Registration, Chicago Promenade, Ballroom Level
10:00 a.m.: Morning Session, Chicago Ballroom 7
Opening Remarks: Hon. Michele F. Lowrance,
Co-Chair, Convention Committee, Illinois Judges Association
10:15 to "What's New"
11:45 a.m.: A legislative and case law update and analysis of the practical impact of these changes. Experts will discuss developments in the following areas:
♦ Domestic Relations
♦ Juvenile Law
♦ Criminal Law and Procedure
♦ Disability and Guardianship
♦ Environmental Issues
12:00 Noon: Luncheon - Chicago Ballrooms 8 and 9
Keynote Address: The Honorable Blanche M. Manning,
United States District Court for the Northern District of Illinois
2:00 p.m. Afternoon Session, Chicago Ballroom 8
A Joint Illinois Judges Association and Illinois State Bar Association Program
Human Genetics: A team convened by the Einstein Institute for Science, Health & the Courts (EINSHAC) will provide a riveting, interactive three-hour tour through the revolution in human genetic discovery. These developments could create over the next decade a host of cases of first impression for the Illinois' trial and appellate courts. Following a briefing on the state of the science using a visual glossary, the session will turn to case scenarios. Issues discussed will include issues of employee and insurance company screening, voluntariness, and confidentiality and privacy.

29th Annual Convention

Friday, December 8, 2000 (Cont'd)

2:00 p.m. Afternoon Session, Chicago Ballroom 8 (Cont'd)

Basic Concepts of Genetics

Dr. Linda K. Ashworth, Lawrence Livermore National Laboratory

Genetic Susceptibility Disease Predisposition

Dr. Catherine Knight, Loyola School of Medicine

Ethical, Legal and Social Implications of Genetic Information

Dr. Robert F. Murray, Jr., Professor of Medicine and Genetics,
Howard University College of Medicine

Human Cloning

Dr. Franklin M. Zweig, Director of the Einstein Institute for
Science, Health and the Courts.

Hon. Michael B. Getty

Retired, Circuit Court of Cook County

Case Scenarios

- ♦ Airline Pilot tests positive for genetic predisposition to alcoholism
- ♦ A couple unable to have additional children wishes to use the human cloning service of an IVF Clinic...the statutory liability and ethical issues

5:00 p.m. Adjournment

Saturday, December 9, 2000

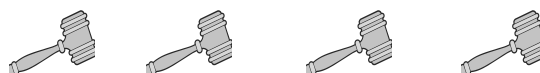
9:00 a.m.: Morning Session, Chicago Ballroom 8

Business Meeting - Installation of Hon. Stephen C. Mathers
President, Illinois Judges Association
Election of Officers

9:30 a.m.: Joint Program of the Illinois Judges Association and the Illinois State
Bar Association

Attorney Conduct in the Courtroom: A candid look at attorney
conduct in the courtroom. A panel of lawyers, judges, media
representatives and disciplinary officials draw the line between
zealous advocacy and attorney misconduct.

11:45 a.m. Adjournment



**Hotel reservations can be made by calling the Sheraton at 312.464.1000
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Enforcing Supreme Court Rule 213(g) Consistent with Common Sense and Justice: Addressing the "Hypertechnical" Motion

By Barbara A. McDonald

Trial judges frequently address motions to bar or strike opinion testimony based upon a failure to comply with the disclosure requirements of Supreme Court Rule 213(g). In my experience, many of these motions are "hypertechnical." I have coined the term "hypertechnical" to describe motions presented by parties who are in no way surprised by the opinion testimony they seek to bar, but who are trying to take advantage of their opponents' failure to strictly comply with Rule 213(g). Often, the impetus for such motions is certain language in some (although only a minority) of the cases decided under Rule 213(g). These cases state: that the rule "establishes more exacting standards regarding disclosure" than its predecessor rule, Rule 220; and that "trial courts should be more reluctant under Rule 213 than they were under Rule 220 (1) to permit parties to deviate from the strict disclosure requirements, or (2) not to impose severe sanctions when such deviations occur." The first case to include such language was *Department of Transportation v. Crull*, 294 Ill. App. 3d 531, 538-39, 690 N.E.2d 143 (4th Dist.1998). Some or all of this language was adopted by the courts in *Adami v. Belmonte*, 302 Ill. App. 3d 17, 24, 704 N.E.2d 708 (1st Dist. 1998), *Warrender v. Millsop*, 304 Ill. App. 3d 260, 268, 710 N.E.2d 512 (2nd Dist. 1999), *McMath v. Katholi*, 304 Ill. App. 3d 369, 378, 711 N.E.2d 1135 (4th Dist.1999), *rev'd on other grounds*, 191 Ill. 2d 251, 730 N.E.2d 1 (2000), *See v. Ingalls Memorial Hosp.*, 311 Ill. App. 3d 7, 22, 724 N.E.2d 115 (1st Dist. 1999), and *Copeland v. Stebco Product Corp.*, 2000 Ill. App. LEXIS 787 (1st Dist. September 29, 2000).

Curiously, nothing in Rule 213(g)

itself suggests that it sets forth stricter standards for disclosure than Rule 220. The major difference is that Rule 213(g) covers all opinion witnesses, not just expert witnesses who are retained to give opinions at trial. The information that must be disclosed is identical. As for the consequences of non-compliance, Rule 220 expressly stated that failure to comply with its requirements "will" result in disqualification of the expert as a witness; whereas the text of Rule 213(g) says nothing about what will happen if the rule is not followed. The committee comments to Rule 213(g) state that no new or additional opinions will be allowed "unless the interests of justice require otherwise."

The hypertechnical motion is presented by a party who knew the witness was going to give opinions and had sufficient information regarding the opinions to prepare for trial, but was not given all of the information required by Rule 213(g) or was not given all of it in the form of a formal answer to an interrogatory. The movant is using Rule 213(g) as a sword to bar relevant evidence instead of as the shield it was intended to be to protect a party from surprise opinion testimony at trial. Sometimes the movant does not even claim surprise, but will argue based on *Crull* and its progeny that surprise is not the issue. But the appellate court has never said that surprise is not the issue; and the Rule 213(g) committee comments make clear that the purpose of the rule is to ensure that parties are not surprised at trial by undisclosed opinion testimony.

Because I preside over the smaller personal injury cases, one kind of Rule 213(g) disclosure I often see that prompts such a motion simply advises the defendant that the

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plaintiff's treating physician will testify regarding his treatment, diagnosis and prognosis, causation and the reasonableness of his bills. The defendant will argue that the response contains only the subject matter of the opinions and no actual opinions or bases. This is true. But if the defendant has copies of the medical records (which they usually do), and the records are not extensive (which the defendant usually does), and they clearly set forth the diagnosis and prognosis, then how are the opinions on these topics a surprise to the defendant? As to causation and the reasonableness of the bills, the opinions, although not set forth in the answer or the records, are self-evident. When you are dealing with soft tissue injuries to the neck and back, as I usually am, you know from this brief disclosure that the doctor will opine that the accident caused the injuries and that he charged the usual and customary rate for the services rendered at the time and place in question. What else would he say on these topics? On causation, he can only say the accident caused the injuries or it did not; and since the plaintiff is calling him, it is easy to guess which opinion he will have. Moreover, if he said the accident did not cause the injuries, the defendant would be surprised but he certainly would not be prejudiced. Similarly,

on the subject of the reasonableness of his charges -- either they are reasonable or they are not. If he says they are reasonable, there is no surprise; if he says they are not reasonable, there is no prejudice. As for the bases for the doctor's opinions, common sense tells one that he will base them on his examination of the plaintiff, the history given by the plaintiff and his medical training and experience. If he is limited to discussing his findings on exam and the details of the history as clearly set forth in his records, and is not allowed to elaborate on his experience, how can the defendant be surprised.

Obviously, in more complicated cases, such as medical malpractice and products liability cases, for example, much more detail would be necessary in the interrogatory answers, both as to opinions and bases. Nevertheless, the more complicated cases have their version of the hyper-technical Rule 213(g) motion, such as when a party tries to restrict an expert's ability to discuss clearly disclosed opinions in more detail. It only makes sense that some flexibility must be allowed for elaboration and logical corollaries, and even case law using the stricter standard language acknowledges this. *See, e.g., Seef, supra.* Some responsibility rests with the opposing party to discover all the details and implications of a clearly disclosed opinion, lest experts

be relegated to reading their pretrial disclosures verbatim when they take the stand at trial. Determining what constitutes pure elaboration and what is a logical corollary may give rise to a legitimate difference of opinion. But this difficulty should not cause us to shy away from exercising our best judgment to distinguish cases in which the purpose of Rule 213(g) has been violated from those in which an attorney is simply trying to bar unfavorable testimony that does not surprise or unfairly prejudice him.

Some judges may fear that anything short of a "zero tolerance" approach to Rule 213(g) disclosure will lead us down a slippery slope to repeating Rule 220's difficult history. *McMath*, 304 Ill. App. 3d at 383. The truth is that Rule 220's problems stemmed primarily from the fact that it applied only to experts retained to give opinions at trial, thus leaving a gaping loophole for surprise opinion testimony from treating physicians and other non-retained experts. This problem with the scope of Rule 220 led to many exceptions developing, which was problematic not so much because of the nature of the exceptions but because of the way some courts applied them. Any rule regarding disclosure of opinion testimony must have some built-in flexibility if it is to be fair. As indicated above, nothing in the language of

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Rule 213(g) or the comments to it requires the severe sanction of barring testimony for every violation, technical or otherwise.

Moreover, despite the language of *Crull* and its progeny, the facts of those cases do not support granting a motion to bar when there is no surprise or unfair prejudice. Both *Crull* and *McMath*, *supra*, involved the admission of undisclosed opinions that truly surprised the other party because they were different than the opinions disclosed in discovery on the same topics. In *Crull*, an eminent domain case, the defendants' expert opined during discovery that the damage to the remainder caused by the taking was \$125,011 as determined by the cost to cure method. When he attempted to give this opinion at trial, the plaintiff successfully barred it on the ground that relying on the cost to cure method in an eminent domain case is legally impermissible. The expert was then allowed to give the undisclosed opinion that the damage to the remainder was \$190,000 using a permissible method. The plaintiff objected, but the trial court allowed the opinion, reasoning that the plaintiff should

have raised an objection prior to trial to the initial method used. The First District held that the opinion using the new method should have been barred, explaining that the plaintiff had no obligation to point out deficiencies in the defendants' case prior to trial.

The plaintiff in *McMath*, a medical malpractice case, sought to bar the defendant from giving any expert testimony solely on the ground that the defendant had not been identified as an opinion witness, although he had been questioned at his deposition about his opinions. The plaintiff mistakenly advised the court that Rule 220 was the applicable rule. The court therefore denied the motion since a defendant professional did not have to disclose himself as an expert witness under Rule 220. When the defendant took the stand, he gave opinions that were substantially different than the opinions given in his deposition about the cause of the plaintiff's decedent's death. The plaintiff, however, never objected in the trial court on that basis. The appellate court applied Rule 213(g) and found both that it was error to allow the defendant's opinion testimony when he had not been identified as an opinion witness,

and that the error was reversible because the trial testimony differed from the disclosed opinions.

As the dissent in *McMath* suggested, the motion to bar was hypertechnical because one would expect a defendant professional to testify at trial to opinions disclosed in discovery. But true surprise and unfair prejudice occurred when the defendant took the stand and gave substantially different opinions. Thus, a motion to strike clearly would not have been hypertechnical. The dissent soundly criticized a "zero tolerance" policy on Rule 213(g) disclosure (304 Ill. App. 3d at 383), but seemed either unconcerned or unconvinced that the opinions given were substantially different than those disclosed. Yet the opinions, quoted in the majority opinion, were clearly inconsistent. Thus, the reversal was justified by the defendant's unfair conduct, despite a waiver argument, because striking the testimony probably would not have cured the prejudice. *McMath* went up to the Supreme Court, but that court did not address Rule 213(g). Instead, the Supreme Court reinstated the verdict finding that the Rule 213(g) issue was waived because the plaintiff misled the court into applying Rule 220.

Copeland v. Stebco Products Corp., *supra*, also involved trial testimony by an expert that contradicted his deposition testimony. At his deposition, the plaintiff's expert opined that the defendant's portable luggage carrier, with which plaintiff claimed she had injured her eye, had been defectively designed. The defendant established at the deposition both that the expert had not determined whether the accident could have happened the way the plaintiff claimed it did and that he did not plan to do any further work. At trial, however, the expert stated that he had done additional tests after his deposition, which confirmed the feasibility of the plaintiff's version of the accident. Obviously, this unfairly prejudiced the defendant whose theory was that the accident could not have happened in the manner claimed. The plaintiff argued

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Criticism Response Team

By Philip B. Benefiel, Co-Chair

The Criticism Response Team is charged with developing and maintaining a policy to outline the parameters and procedures for responding to unjust public criticism of the judiciary. The recommendation to respond is guided by the nature, quantity, truth and context of the criticism. The team considers all resources of the IJA, including retired judges, in planning a response.

This year, IJA President Patrick McGann appointed Judge Dennis Burke and me to co-chair the Criticism Response Team. To date,

we have had only one matter referred to us. That matter involved a strong criticism of a judge's decision in a local newspaper column. I prepared a letter to the editor of the newspaper responding to the criticism. The proposed letter was submitted to the members of the Response Team, IJA President McGann and the judge involved for their suggestions and approval before sending it to the newspaper. The letter was printed, and the judge expressed appreciation for the support of our Team.

We encourage IJA members to contact the Response Team should the need arise.



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that the expert's opinion remained the same, but the court correctly noted that Rule 213(g) requires disclosure of the bases of the opinion. In contrast to the situations I am addressing, the bases at issue in *Copeland* were not self-evident. Moreover, the surprise of a new basis being added at trial was compounded by the fact that the opposing counsel had eliminated such a basis at the expert's deposition.

Seef, supra, also does not serve as authority for hypertechnical motions. *Seef* was a medical malpractice case. The appellate court reviewed numerous objections to determine whether the opinions and bases at issue had been disclosed. Notably, the court stated that elaborating on an opinion does not automatically violate Rule 213(g), but reversed finding that some of the testimony allowed concerned new reasons for the expert's opinion, not logical corollaries. *Adami, supra*, also involved true surprise and unfair prejudice. The expert in question had been retained by one defendant and had been critical of a codefendant at his deposition. The plaintiff disclosed for the first time two weeks before trial that he intended to call that expert in his case. Obviously, the codefendant was aware of the opinions. But he had determined that the party who retained the expert would not call him. He assumed, therefore, that he did not need to be prepared to counter the unfavorable testimony. When the plaintiff made his disclosure, it was too late for the codefendant to retain an expert to rebut that testimony. The appellate court affirmed the exclusion of the witness because of this unfair prejudice.

Finally, *Warrender, supra*, not only does not support hypertechnical motions, it supports denying such motions. The defendant in *Warrender* disclosed an expert 11 days before trial. Initially, the trial court barred the expert; but later reversed its ruling because the defendant argued that he first learned the opinions of the plaintiff's treating physicians at

their depositions taken 12 and 18 days before trial. The appellate court rejected this rationale for allowing the expert to testify, finding the plaintiff had provided sufficient information to the defendant about the treating physicians long before trial in the form of medical records, a report of one, a letter and pretrial memoranda. According to the appellate court, these "communications" satisfied the requirements of Rule 213(g), despite the absence of formal interrogatory answers.

Thus, the *Warrender* Court reversed, finding it was error to admit the defendant's expert's testimony. Not only were the opinions first disclosed close to trial; but after the trial court initially barred the defendant's expert, the plaintiff incurred the expense of videotaped evidence depositions in which he relied on the court's ruling in not addressing the issue raised by the defendant's expert. Notably, in reaching its conclusion that the defendant's expert should have been barred, the court reiterated the *Crull* language but immediately followed it with a list of factors to be considered by a trial court in deciding whether undisclosed testimony opinion should be barred. The factors listed are: surprise; the prejudicial effect of the testimony; the nature of the testimony; the diligence of the adverse party; whether the objection is timely; and the good faith of the party calling the witness. Applying this analysis would certainly result in the denial of any hypertechnical motion. The First District used the same analysis in *Sobczak v. Flaska*, 302 Ill. App. 3d 916, 706 N.E.2d 990 (1st Dist. 1999), and affirmed the admission of undisclosed opinions. None of the other Rule 213(g) cases used this analysis, however.

Warrender is significant for two reasons. First, the court saw no inconsistency between the *Crull* strict standard language and using a six-factor test to determine the appropriateness of barring opinion testimony. Second, *Warrender* provides authority for the proposition that a party cannot put on blinders when making a

Rule 213(g) objection and focus solely on deficiencies in a Rule 213(g) interrogatory answer, or even the absence of an interrogatory answer, when the information was provided in some other form. Thus, a judge can rely on *Warrender* to deny motions such as those seeking to bar a treating doctor's opinions when the defendant was advised that the doctor would give opinions on certain subjects, the details of which were clearly set forth in medical records in the defendant's possession. Defendants often base such motions on a strained construction of the appellate court's decision in *Parker v. Ill. Masonic W. Barr Pavilion*, 299 Ill. App. 3d 495, 701 N.E.2d 190 (1st Dist.1998), a nursing home negligence case. The plaintiff in *Parker* disclosed that the plaintiff's current treating physician would testify about his treatment and that his opinions were "consistent with his records." At trial, the expert opined that those providing rehabilitation care to the plaintiff at the nursing home violated the standard of care, an opinion that was not in (nor even related to the content of) his records. There is simply no comparison between advising one's opponent that a doctor will testify to an opinion clearly set forth in his records, and the vague statement that his opinions will be consistent with his records.

Thus, *Crull* and its progeny, despite their strict language, do not support, much less mandate, granting hypertechnical motions. Moreover, I am not aware of any Rule 213(g) case that approved of granting, or disapproved of denying, what I view as a hypertechnical motion. For judges hesitant to overlook deviations from Rule 213(g) solely because the purpose of the rule has not been violated, waiver is another legitimate basis for denying certain hypertechnical motions. If the motion is based on allegedly inadequate disclosure that was apparent when the disclosure was received, the movant can be deemed to have waived the objection because he did not advise his opponent promptly that he needed more

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information to prepare for trial. The party should first make the deficiency known informally pursuant to Supreme Court Rule 201(k) and then follow up with a motion to compel, if necessary. Although the initial burden of complying with discovery is on the party responding, the issuing party cannot simply sit back when he sees deficiencies and wait until trial to complain about them. When a party does this, it strongly suggests that he had no interest in obtaining complete disclosure, but only wanted to bar harmful testimony.

Contrary to the belief of some attorneys, *Crull* does not support the position that a party can never waive a Rule 213(g) objection. In *Crull*, the court was merely saying that a party does not have to alert his opponent that a disclosed opinion is substantively inadmissible. That is entirely different than an objection that the opponent has not provided sufficient information regarding an opinion for the objecting party to prepare for trial. In fact, in *Adami, supra*, the court noted that the movant had filed the motion to bar a week after learn-

ing of the Rule 213(g) problem, and therefore the objection was "not so untimely as to have resulted in waiver." 302 Ill. App. 3d at 23. This certainly indicates that Rule 213(g) objections can be waived. Additionally, *Warrender* and *Sobczak* include the timeliness of the objection as a factor to be considered when deciding whether testimony should be barred.

Obviously, it would be preferable for parties to scrupulously follow the dictates of Rule 213(g), providing all the requested information in sufficient detail. But the reality is that they do not always do so; and when the opinions are complex, it is a practical impossibility to disclose every detail or corollary that may come up at trial. While we want to encourage compliance with the rules, our overriding goal should be to ensure that a case is tried on the merits because that obviously promotes justice. We should not allow our fear of revisiting Rule 220's troubled history to cause us to exclude relevant testimony based on purely technical deficiencies in Rule 213(g) disclosures. If a party can demonstrate that a violation has caused genuine surprise and

deprived him of the opportunity to adequately prepare his case, then the party committing the violation must suffer the consequences. But if there is no surprise and thus no unfair prejudice, the interests of justice require denying a motion to bar or strike opinion testimony.

Retired Judges & Electronic Media

By Bill Madden, Chair

Your IJA Retired Judges Committee presently consists of 32 retired judges and two active judges. (The membership list is available online at <http://ija.org/commreti.htm>.) Twenty of the members of our IJA Retired Judges Committee are accessible by e-mail. I am proud of our retired judges' record of using the economically responsible e-mail method of communicating about Illinois Judges Association business. I will

Recall of Retired Judges

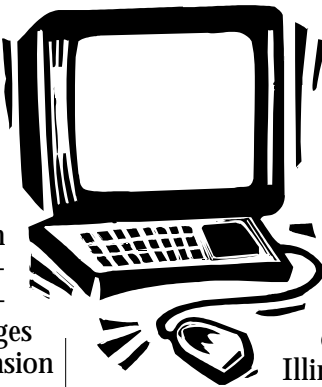
By Bill Madden, Chair

Sickness, unavoidable scheduling conflicts, conflicts of interest or unexpected, temporary workload emergencies may cause a Chief Circuit Judge or the Presiding Judge of an Appellate District to petition the Supreme Court either to temporarily assign an active judge from another court or to recall a retired judge to sit for a short period of time. The assignment of an active judge from another circuit or district can cause disruptive manpower shortages in that other circuit or district.

Recalling retired judges can also be a problem, because (traditionally) the Supreme Court has required a recalled, retired judge to forego his or her pen-

sion benefits for the period of the recall. Most retired judges would be ready, willing and able to pitch in and come to the aid of their colleagues when an emergency situation arises. But most retired judges are not willing to forego their pension benefits for a short period of temporary recall.

Your Retired Judges Committee, through our IJA Board of Directors, has urged the Supreme Court to consider exercising the statutory authority it has to temporarily recall a retired judge to short-term active duty, without requiring the judge to relinquish his or her right to receive the retirement annuity for the period of recall. (See 40 ILCS 5/18-127(b) and (c).)



continue to encourage the members of our committee who are not yet e-mail compliant to become so at their earliest possible opportunity. In addition, I urge the chair of each committee of the Illinois Judges Association to survey their committee membership to determine how many committee members are accessible by e-mail and how many have access to the Internet. Our goal should be to have every active/retired Illinois judge/justice accessible by e-mail. Doing so would not only improve communications; it would also significantly reduce the amount of money the IJA must spend to communicate with its members.

www.ija.org

A publication of The Illinois Judges Association David A. Youck, Chairman: dayouck@prairienet.org

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The goal of the Gavel is to provide practical and useful information, on activities of the association, its judges and the circuits through which each of our state judges, active and retired, have an interest. It also seeks to bring all of our judges together by providing a vehicle for communication. In every issue, we hope to include information that will be useful in everyday work.

As the new editors, we invite the submission of unsolicited articles, essays and book reviews. Letters to the editor, intended for publication, are also welcome.

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