THE GAVEL

A Publication of the Illinois Judges Association

Summer, 2001 Volume 23, Issue 6

The Gavel

Inside This Issue

The Gavel
Illinois Judges Association
321 S. Plymouth Court
Chicago, Illinois 60604
Phone: 312.431.1283
Toll-free: 888.431.1283

Check out our Web site at:
www.ija.org

President's Message

Honorable Stephen Mathers

Although I've previously indicated that I will use this space to inform IJA members of newer issues and programs, it is necessary to relate some history in order to place in perspective IJA Associate Judge Initiatives. It is only natural that our Association has listened to, and spawned programs for, that significant portion of our membership which is comprised of Associate Judges (just as we have looked for and initiated programs to benefit judges already retired as the number of our retired judge membership has grown). We're a professional association, but part of the task of leadership in any organization is to provide concrete assistance, often in the form of remuneration, for members.

In a policy determination last year, under then-President Pat McGann, the IJA initiated--and successfully sold to the Compensation Review Board--the concept of beginning to "catch up" Associate Judge salaries to those of Circuit Judges. Thus the Board's Report included the provision that Associate Judge salaries be set at not less than 94 per cent of Circuit Judge salaries. The Report's adoption would have resulted in Associate Judges receiving the largest pay increase of all levels of the Judiciary.

This past February, I had the opportunity to discuss with our Chief Justice a "tandem" proposal that had been approved by the IJA Executive Committee in January. Putting together concepts considered during the years of Presidents McGann and Tim Slavin, the IJA proposed 1) an amendment to S. Ct. Rule 39 that would allow the position of Associate Judge to remain vacant, until the election, when an Associate Judge took a Circuit Judge appointment with the intention of being a candidate for that position, and 2) staffing the courtroom of that former Associate Judge by the recalling of Retired Judges for approximately three months at a time on a per diem salary that would neither interrupt nor affect pension rights and benefits. Though Chief Justice Harrison and the other Justices were extremely courteous and prompt, the Court ultimately felt the appropriate action was to decline our suggested amendment.

Having discussed two innovative proposals adopted by your Executive Committee and/or Board of Directors which nonetheless resulted in no substantive changes, I feel compelled to mention the annual reminder we each receive of a continuingly successful IJA initiative: the "cost of living" increase which is effective every July 1. Eleven years ago, after the General Assembly rejected a Compensation Review Board Report, the IJA initiated a Bill to add certainty and consistency to the feast-or-famine norm of increasing judicial compensation. The magnitude of that success is reflected in National Center for State Courts statistics. In a report published this Spring (before the July 1, 2001 increase), the NCSC indicates that Illinois Circuit Judges are the third highest

see ***PRESIDENT*** *Cont'd on Page 18*

IJA 2001 COMMITTEES

ASSOCIATE JUDGES
Gloria G. Coco, Co-Chair
Kimberly L. Dahlen, Co-Chair

BENEFITS AND PENSION
Richard A. Kavitt, Co-Chair
Patrick K. Leston, Co-Chair

BUDGET AND FINANCE
James M. Wexstten, Co-Chair
Jesse G. Reyes, Co-Chair

CONVENTION
Mary Ellen Coghlan, Co-Chair
Michele F. Lowrance, Co-Chair

COURT FACILITIES
Fred A. Geiger, Co-Chair
J. Patrick Morse, Co-Chair

CRITICISM RESPONSE
Dennis J. Burke, Co-Chair
Philip B. Benefiel, Co-Chair

ELECTRONIC MEDIA
David A. Youck, Co-Chair
Joseph G. Kazmierski, Jr., Co-Chair

GAVEL
Helaine Berger, Co-Chair
Rita M. Novak, Co-Chair

GOVERNMENT AFFAIRS
Michael R. Galasso, Co-Chair
Timothy C. Evans, Co-Chair

JUDICIAL DISCIPLINE
Dennis K. Cashman, Co-Chair

JUDICIAL SELECTION AND RETENTION
Raymond L. Jagielski, Co-Chair
Richard P. Goldenhersh, Co-Chair

LIAISON
Patrick E. McGann, Co-Chair
Ann Jorgensen, Co-Chair

LONG RANGE PLANNING
Gino L. DeVito

MEMBERSHIP
Vanessa A. Hopkins, Co-Chair
Annette A. Eckert, Co-Chair

PUBLIC RELATIONS
Ann Jorgensen, Chair

RETIRED JUDGES
William J. Madden, Co-Chair
Seymour Simon, Co-Chair

SPEAKERS
Stuart A. Nudelman, Chair
John O. Steele, Vice Chair

Passing the Torch

A year ago when then-President Pat McGann asked us to assume the job of editing *The Gavel*, we were hardly prepared for the generous contributions of so many members of the IJA. The correspondents from around the state-Judges Robert Keenan, Stephen Peters, Kathy Bradshaw Elliott, Larry Vandersnick, Hollis Webster, Susan Tungate, Mark Joy, Mark Drummond, Ron Pirrello, Nancy Arnold, Barbara Gilleran Johnson and Tom Riggs-as well as the Administrative Office of the Illinois Courts, supplied juicy tidbits for Lainie's "Did You Know" column. Many judges freely offered articles dealing with a host of timely developments in the law and topics of interest to IJA members. Others responded without hesitation to our urgings by producing in short order well written and informative pieces. Judge Barbara McDonald lent her considerable editorial skills whenever we enlisted her help. Rudy Kink from the JRS unfailingly supplied useful updates about retirement and insurance benefits. And Kathy McEnroe made sure that *The Gavel* had a professional appearance and was distributed on time. We are grateful to each and every one of our contributors.

photo courtesy of Stephen Anderson, ISBA

Rita Novak & Helaine Berger

We owe Judge Pat McGann, our first "boss" and consummate "judicial educator," a special thanks for giving us the opportunity to serve the IJA and to work with so many talented judges throughout the state. We are also grateful to Judge Steve Mathers for his vote of confidence in us by asking us to continue our work in his term.

As the old saying goes, however, all good things must end. When we put this issue to bed, we will be signing off as your editors. Lainie will continue to scope out the state in search of material for "Did You Know," which she will continue to write. So keep those cards, letters and emails coming in. Rita expects to reverse roles by writing for *The Gavel* and subjecting her work to someone else's red pen.

We leave this job, knowing that *The Gavel* will be in good hands. Judges Grace Dickler and Dan Gillespie will assume the role of co-editors. We wish them the very best, and we are confident that they will have the same generous support that you have offered us.

Correspondents for *The Gavel*

Robert M. Keenan, Jr.; 2nd Circuit

Mark M. Joy; 4th Circuit

Stephen H. Peters; 6th Circuit

Mark A. Drummond; 8th Circuit

Larry S. Vandersnick; 14th Circuit

Ron Pirrello; 17th Circuit

Hollis Webster; 18th Circuit

Tom Riggs; 18th Circuit

Susan S. Tungate; 21st Circuit

Kathy Bradshaw Elliot; 21st Circuit

Nancy Arnold; Cook County

Barbara McDonald; Cook County

Barbara Gilleran Johnson; 19th Circuit

Rudy Kink; State Retirement Board

The Latest Word on Judicial Conduct

by **Judge Alexander P. White**

In a recent issue of the Judicial Conduct Reporter, Vol. 22, No. 4, Winter 2001, a publication of the American Judicature Society, several articles were included which should be of interest to judges.

The first article entitled "Thirteen Judges Removed in 2000" began with a statement that between 1980 and 1998, 266 judges have been removed nationwide as a result of disciplinary proceedings. The article reviewed year 2000 removal cases from Arkansas, Florida, Iowa, Kentucky, Louisiana, Nevada, five from New York and two from Pennsylvania. The offenses in the thirteen cases included client representation while a judge, hostile conduct toward attorneys, parties, court personnel and fellow judges, abuse of contempt power, ex parte conversations, failure to remit court funds, making racial remarks, physical abuse, and a personal relationship with a law clerk.

The second article entitled "The Judicial Ethics Expert Witness" by Marla N. Greenstein, Executive Director of the Alaska Commission on Judicial Conduct, and Steven Scheckman, Special Counsel for the Judiciary Committee of Louisiana, reviews the relatively new concept of "ethics experts" in the area of judicial discipline. The position taken by the authors is that the job of determining ethics violations should be delegated to an expert witness. The authors state:

> Most Judicial Conduct Commissions limit witness testimony to factual testimony, disallowing the use of "ethics experts" to address whether the charged conduct constitutes a disciplinable ethical violation. Judicial conduct organizations often have the difficult job of determining ethical issues of first impression in their states, or perhaps, nationally. That important job should not be delegated to an expert witness in a proceeding. No legal scholar or judge familiar with the customs of a judicial community possesses unique knowledge of ethical standards that is more reliable than the independent decision-making of the members of the judicial conduct organization. By relying on their own expertise as representatives of the public and legal community, rather than the opinions of experts, a Judicial Conduct Commission fulfills its official public responsibility to formulate the appropriate ethical standards for their states.

The article also examines the process of qualifying the ethics expert and the use of Daubert/Kumho Tire "gatekeeper" motions by an opponent. The scope of the experts' testimony is also discussed in respect to opinions regarding Codes of Judicial Conduct and judicial conduct custom and practice.

The third article entitled "Disclosure to Bar Authorities: Exceptions to Confidentiality," examines those states which have adopted an exception to

See ***CONDUCT*** *Cont'd on Page 4*

On the Retirement of Justice Benjamin K. Miller

By **Judge Mark A. Drummond**

"Well done, your honor. Well done." Those were the closing words in the lead editorial in *The Chicago Tribune* on Wednesday, January 17, 2001. What was the occasion for an "under the masthead" editorial about a judge? The retirement from the Illinois Supreme Court of Justice Benjamin K. Miller.

The *Tribune* editorial acclaimed, "Ben Miller is not a household name in Illinois, probably because all he has done for the last 16 years is serve on the state's highest court with absolute probity and distinction. * * * [B]y and large he earned his reputation as a consistent, fair and honest member of the court-just the kind of conduct that doesn't get headlines."

Born in Springfield, Illinois, Justice Miller earned his B.A. from Southern Illinois University in 1958. He received his J.D. from Vanderbilt University and was admitted to practice in Illinois in 1961. Justice Miller worked as an associate and then made partner at a Springfield law firm. He formed his own firm in 1970.

Justice Miller's military service includes the U.S. Army Reserve, U.S. Army Intelligence School from 1961 to 1964 and the U.S. Navy Reserve from 1964 to 1967, receiving an honorable discharge as Lt. J.G.

James Boswell, in his biography of Samuel Johnson, quotes from Plutarch: "Nor is it always in the most distinguished achievements that men's virtues or vices may be best discerned; but very often an action of small note, a short saying, or a jest, shall distinguish a person's real character more than the greatest sieges, or the most important battles."

Justice Miller's "actions of small note" and service to others began early on. It was in the days of private practice that Justice Miller came in touch with a group of people that desperately needed help. Justice Miller says, "They were women who had been abused, many had children and most had no income, no means of support." Justice Miller began representing those women for free. He handled divorces when needed and secured support for the women and their children. He helped with the Sojourn Shelter & Services, one of the first shelters for battered women. He served on that group's board of directors

See ***MILLER*** *Cont'd on Page 4*

MILLER *Cont'd from Page 2*

and did the real estate work when a second shelter was needed.

"People weren't recognizing the problem for years," recalls Justice Miller. His interest in preventing domestic violence and helping the victims of it did not end when he took the bench. "He helped make things happen; he worked behind the scenes never wanting to take the credit," says Janice DiGirolamo, Director of the Illinois Family Violence Coordinating Council. When he became Chief Justice, he played a key role in creating the Illinois Family Violence Coordinating Council. He sent a team from Illinois to California for the National Conference on Domestic Violence and the Courts. These efforts helped create and support many local violence prevention efforts. Since then, local coordinating councils have been established covering 91 of Illinois' 102 counties, including Cook County. "This would not have been possible at the local level without his help," DiGirolamo stresses.

"Justice Miller will be greatly missed by the Court," noted Chief Justice Moses Harrison, adding, "He is an outstanding jurist, but most of all, we will miss him as a friend and a mentor." This combination of judicial excellence coupled with his collegiality are the traits that his colleagues best remember.

In 1992, Justice Mary Ann McMorrow became the first woman to hold the position of Justice on the Illinois Supreme Court. Recalling her first visit to Springfield in her new position, Justice McMorrow remembered: "Ben Miller met me at the airport and then took me to lunch. As a new justice with two others we had drawn lots for the little rooms which sit above the Court. Ben talked with me about the Court and what to expect and then helped me pick the best room for me. I will never forget that personal, kind touch. I have always said that besides being a very good lawyer, Ben Miller is just a very kind man."

Even those who have disagreed with Justice Miller have echoed this sentiment. "He really is one of the best judges on the court," Justice Charles E. Freemen observed when quoted in the *Springfield State Journal Register* editorial "Justice Miller a consummate pro". Justice Freeman continued: "He and I don't agree on some things, but you know where he stands, and he will always give you the opportunity to dissuade him. He is a judge who will give an ear to the opposition, and if he feels it's important and right, he'll change."

Justice Miller's judicial career touched every level in the Illinois Court system. He was appointed as a Circuit Court Judge for the 7th Circuit in 1976 and was elected to that position in 1978. He served as presiding judge in the criminal felony division from 1976 to 1980, and in 1981 was elected chief judge of the 7th Circuit. In 1982, he was elected to the Illinois Appellate Court, Fourth District, and in 1984, was elected to the Supreme Court.

While on the Supreme Court, Justice Miller participated in more than 2,000 cases in which full opinions were issued. He authored 487 opinions. He took part in more than 20,000 cases involving requests for review by the Court and was involved in the disciplinary matters of more than 1,300 lawyers.

Although a string cite of Justice Miller's work on boards, committees and commissions is too long to recount in detail, some of his most significant achievements during his tenure as Chief Justice are:

-Convening a conference on The Future And The Courts of Illinois.
-Expanding the judicial performance evaluations statewide
-Adding non-lawyers to hearing board panels of the ARDC
-Transforming the constitutionally mandated Judicial Conference
-Laying the groundwork for the Comprehensive Judicial Education Plan, which has been hailed as a national model
-Reorganizing the bar admission process in Illinois
-Amending the Code of Judicial Conduct
-Establishing the Special Commission on the Administration of Justice

His involvement in improving the

See ***MILLER*** *Cont'd on Page 6*

CONDUCT *Cont'd from Page 2*

the requirement of confidentiality by allowing or requiring a Judicial Conduct Commission to disclose otherwise confidential information to attorney disciplinary authorities. The twelve states are: Arizona, Arkansas, California, Colorado, Georgia, Iowa, Kansas, Kentucky, Louisiana, Michigan, Virginia and Wisconsin. In most, the exception is within the discretion of the Commission. In four states, the information is revealed only if the subject is a judge or former judge. In six states, the Commission can disclose information to authorities investigating an application to the bar. Thus, judges and attorneys have a responsibility of reporting misconduct but, as the article explains, the information may be disclosed by the Judicial Conduct Commission.

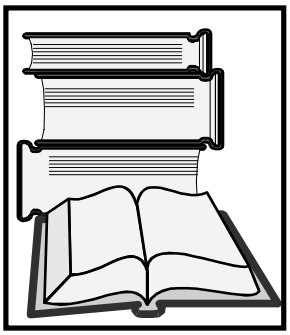
The final article entitled "Real Estate Investments: Appearing Before Administrative Agencies" deals with the ethics of a judge appearing before a zoning board in respect to zoning and land use issues involving his own residence or investment property or properties in his neighborhood. In general, the only prohibition involves an appearance in respect to investment property. Caution is advised, however, when the appearance is intended to lend the prestige of the office to advance his interests.

I highly recommend reading not only this particular issue but also other issues of the Judicial Conduct Reporter.

Judge Alexander White may be reached at 2503 Richard Daley Center, Chicago, IL 60602.

For Whom the Liberty Bell Last Tolled

By **Judge Dan Gillespie**
Book Review of *John Marshall, Definer of a Nation*, Jean Edward Smith, Henry Holt & Co., New York, 1996.



When Nina Totenberg, the National Public Radio reporter who covers the United States Supreme Court, was asked recently to name the best judge ever to serve on the Court, she responded, as one might well expect, "John Marshall." She added that for those who wanted to learn more about him, the best biography is one recently written by Jean Edward Smith, *John Marshall, Definer of a Nation.*

Mr. Smith, a political science professor at the University of Toronto, has produced a scholarly biography of John Marshall, which is well worth reading. In addition to examining the character of our nation's greatest Chief Justice, this biography also provides valuable insights into the lives of the leading political figures of the day with whom Marshall interacted, including George Washington, Thomas Jefferson, John Adams and Andrew Jackson.

Prior to serving as Chief Justice, John Marshall enjoyed an extraordinary career. He served as an officer in the Virginia militia during the Revolutionary War and fought under George Washington at Valley Forge. He became a successful and sought-after lawyer and served as an international envoy, United States Congressman and Secretary of State. John Marshall was a gifted wordsmith. Speaking on the floor of the House of Representatives, on learning of the death of George Washington, he eulogized Washington with the now famous phrase: "George Washington: first in war, first in peace, first in the hearts of his countrymen." Before being elected to Congress, John Marshall served in the Virginia House of Delegates, along with Patrick Henry, John Tyler and James Monroe.

Jean Smith renders a fascinating account of Marshall's negotiations with Talleyrand when President John Adams sent him to Paris in 1798 to negotiate peaceful relations for the United States with the new revolutionary French government. Talleyrand sent three successive intermediaries to convey his request for a bribe, demanding a *douceur*, or sweetener, of fifty thousand pounds, prior to meaningful negotiations. Marshall and his fellow envoys, Elbridge Gerry and Charles Cotesworth Pinckney adamantly refused, on principle. When the news of this incident was published in America, the intermediaries were referred to as X, Y and Z, which is how this became known as the XYZ Affair. John Marshall's national reputation for integrity was established.

Professor Smith focuses on the leading cases from each term of the Marshall Court. This approach allows the reader to observe the evolution of the young republic, for the manner in which the Marshall Court applied the Constitution determined how the state and federal governments could govern and determined which of the powers belonged to each when their laws would overlap or conflict, as they often did. The author discusses two major decisions of the Marshall Court, *Marbury v. Madison* and *Gibbons v. Ogden*, with such detail

See ***LIBERTY*** *Cont'd on Page 8*

MILLER *Cont'd from Page 4*

judicial system in Illinois also took place on the local level. He was the first male to join the Central Illinois Women's Bar Association and the first member of the Women's Bar Association of Illinois to serve on the Supreme Court. Justice McMorrow, a past president of the Women's Bar Association of Illinois, emphasized, "He just wasn't a member of those organizations in name only. He went to the meetings and participated."

Many who have spent time with him remember Justice Miller's collegiality coupled with his sense of humor. "Ben said to me, 'I have three things I need to tell you,'" Justice Rita B. Garman recalls with a laugh, "He said, 'First, I want you to know I will be retiring on January 28th, second, I plan on sailing from Florida to South America and hope to be there by August 1st and, finally, I am recommending that you be appointed to take my place on the Supreme Court.'!" Justice Garman observed that she was honored to be asked to take Justice Miller's place on the Court, stressing, "He set a very high standard of professionalism and was really at the forefront of new ideas."

"President Kennedy once remarked that change is the law of life, and those who look only to the past or present are certain to miss the future," Justice Miller reflected on his retirement. "Our system of law represents the finest aspects of American history and American culture. Our devotion to fairness and justice, our belief in freedom and liberty, and our commitment to personal equality---these are the core values on which our nation was founded. * * * It has been my privilege-in the past and in the present-in my role as citizen, lawyer and judge, to help translate these ideals into concrete terms through the matters that come before me as a member of society, the legal profession, and the Supreme Court of Illinois. I will continue in those efforts, but now it's time to move on to new adventures in the law and other areas that have long held an interest for me."

It is the legal and academic world of bioethics that holds Justice Miller's interest. Since 1974, he has been an adjunct professor at the SIU School of Medicine, Department of Medical Humanities. According to Justice Miller, his interest in bioethics has not waned upon retirement. "This area is where law, philosophy and medicine intersect," Justice Miller explains. "The work being done on the Human Genome Project is revolutionary, and as a part of their mandate the legal, ethical and social issues must be explored. I am interested in taking part in that."

Outside of legal issues, Justice Miller plans on spending more time sailing aboard his 37-foot vessel, *Adventure*. *The Gavel* was able to catch up with Justice Miller when he landed in Florida after sailing, diving and exploring around some islands near the Bahamas known as the Abaco Islands. He reports that he still checks up on what is going on in Illinois and receives the advance sheets via the Internet. His future plans are to spend August and September in the south of France. He will be coming back to Illinois in October to avoid hurricane season and then it's back to the *Adventure* in November.

Justice Miller was back in Illinois July 16th . He had been asked to return to his hometown by the the Illinois Family Violence Coordinating Council. The Council had established an annual award for those "who have made an uncommon effort in furthering the work of the Council and of preventing family violence," says Janice DiGirolamo. It is the first year for the award. The first recipient--Justice Miller. The name of the award? The Honorable Benjamin K. Miller Award.

Authors Note: The author would like to thank Joseph R. Tybor, press secretary for the Supreme Court of Illinois, for the liberal use of his work on Justice Miller and Justice Miller's assistant of 15 years, Joan Studach, for her help in assembling source materials and, more importantly, for her assistance in tracking down Justice Miller after his recent voyage.

Justice Benjamin K. Miller is pictured accepting the first Honorable Benjamin K. Miller Award from the Illinois Family Violence Coordinating Council in July of this year.

The Court's Power to Compel Party Litigants in a Divorce Case to Attend Counseling

By The Honorable Moshe Jacobius, Presiding Judge, Domestic Relations Division, Circuit Court of Cook County and **Michelle Lawless**, Domestic Relations Division Law Clerk, Circuit Court of Cook County

I. Introduction

The number of married couples filing for divorce in recent years has sparked voluminous research on the long-term effects divorce has on children. Over one million children are affected by divorce each year. It is also estimated that 70% of all children born in 1980 will spend time in a single-parent household. In Illinois alone, the total number of new divorce cases filed in 1999 was in excess of 59,000. The most recent studies on children of divorce have found that specific "parent factors," such as the level of conflict during the divorce and the amount of time parents spend with children after the divorce can help to facilitate a child's adjustment into the post-divorce lifestyle. The research also suggests that children who experience high levels of parental conflict during and after the divorce will exhibit symptoms such as aggression, depression, low academic achievement and conflict with one or both parents.

The complex emotional toll contested custody cases take on each of the parties, and in turn, the children, is unique in the legal arena. Often times psychological experts are appointed by the court to conduct extensive evaluations on the parties and the children. The parties might also choose to hire their own evaluators to render an opinion. In addition, a Guardian Ad Litem, Attorney for Minor Child or Child Representative could be appointed to protect and advocate for the best interest of the minor child(ren). Coupled with the parties' own lawyers and the court, the number of people delving into and exploring the details and nuances of a family's structure and eventual breakdown can often times lead to a very heated, frustrating battle between the litigants who are fighting for custody of their children.

After the litigation ends, families must begin to construct a new way of life, sometimes under the strain of a breakdown of communication between the mother and father. To help facilitate the process of beginning this new lifestyle and assist the parties and children in dealing with the psychological and emotional toll of the litigation, courts have ordered the parties to attend counseling or therapy in the hope of healing the familial ties which have deteriorated during protracted litigation.

Emerging from this practice is the legal issue of whether the courts have the power to compel party litigants to attend therapy or counseling when the court determines on its own that the parties might substantially benefit from seeing such a professional. This article will focus on the approaches various jurisdictions, including Illinois, have taken with respect to this issue, and the decisions the courts have reached when addressing whether involuntary counseling should be ordered. The discussion of mandatory parental education classes for divorcing parents is a different approach to helping parents deal with their children's experience of divorce and is beyond the scope of this article. This article will focus solely on the court's power to compel the parties to attend counseling with a licensed therapist, counselor, psychiatrist or psychologist.

Included within this topic is the sub-issue of whether a court can order counseling as a condition precedent for awarding a party custody or visitation. The case law is sparse in this area and the answer is unclear. In at least one case, however, a court overruled a counseling order established as a condition precedent to visitation.

II. Illinois Authority: *In re the Marriage of Fields*

The 1996 case of *In re the Marriage of Fields* is the only Illinois case that evaluates the court's role in ordering the parties to attend counseling. In *Fields*, the mother made allegations of sexual abuse against the father, yet the trial court entered a judgment granting the father reasonable visitation without restrictions or required counseling. The mother appealed on the grounds that the trial court had failed to apply the proper standard when it refused to order the father to counseling. The trial court applied the "serious endangerment standard" under Section 607 of the Illinois Marriage and Dissolution of Marriage Act.

In issuing its ruling, the appellate court reversed the lower court relying on the case of *In re the Marriage of Lee* which held a restriction on a noncustodial parent's visitation rights is inappropriate absent a finding of serious endangerment. The *Fields* court found, however, that not every condition which a trial court may place upon a noncustodial parent is a "restriction." Rather, a restriction of visitation is an action that limits, restrains, or confines visitation within bounds. The *Fields* court concluded, "[T]he requiring of a noncustodial parent to participate in counseling is not a restriction on visitation. A counseling requirement in no way limits, restrains, or confines visitation within bounds. Instead, participation in counseling is more 'in the nature of accommodation' by a non-

See ***DIVORCE*** *Cont'd on Page 9*

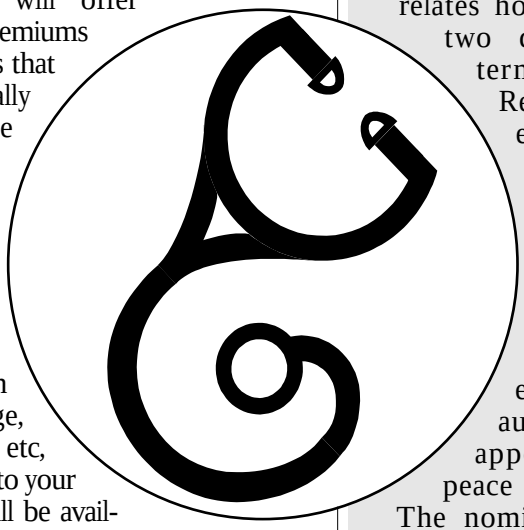
JRS Corner: Insurance Updates

by Rudy Kink

Long-Term Care

Long-term care surfaces in many discussions with financial planners. Currently, the State of Illinois Group Insurance Program covers skilled nursing care, but doesn't cover long-term care when you are unable to care for yourself.

Recently, however, Central Management Services (CMS) has announced that State employees will be offered long-term care coverage through Metropolitan Life beginning September 1, 2001. This coverage will be optional and is not part of the Group Insurance Program. Information from CMS states that it will be offered "to employees, retirees, survivors and their spouses, parents and in-laws." The enrollment period runs from September 1 through October 31, 2001 and is effective beginning December 1, 2001. Active employees won't need medical underwriting if they sign up during the initial enrollment period, but all other eligible participants will. Medical underwriting is a health certificate attesting to the insured's existing medical condition. According to CMS, "the plan will offer attractive premiums and benefits that aren't usually available through individual policies."



Information on coverage, premiums, etc, will be sent to your home or will be available at your office before September 1.

What is HIPAA?

Judges, particularly Cook County judges, should be aware of the advantages offered to them by a federal law enacted in 1997, the Health Insurance Portability and Accountability Act (HIPAA). HIPAA impacts the State's Group Insurance in two significant ways.

1. Medical Underwriting (Health Certificates)

Under the HIPAA, persons who are covered by a health insurance plan in effect after 1997 do not need medical underwriting, that is a health certificate. This means that if you want coverage for your dependents, you won't have to submit a health certificate on their behalf. Keep in mind, however, that HIPAA regulations apply to health care coverage only. Health certificates are still required for optional life, spouse life or child life coverage.

If you want to add coverage for a dependent, there are three times when you may do so:

1. Within 10 days of beginning employment.

2. During the Benefit Choice Enrollment Period.

3. During the special enrollment period when a member acquires a dependent through marriage, birth, adoption, or placement for adoption.

2. Creditable Coverage

The second way in which HIPAA affects judges' insurance benefits involves coverage for pre-existing conditions. Under the HIPAA, employees

*See **JRS** Cont'd on Page 16*

***LIBERTY** Cont'd from Page 5*

and color that we can't help but feel that we were in the gallery when the cases were argued and at the conferences when the justices reached their consensus.

In *Marbury v. Madison*, the author relates how on March 2, 1801, two days before Adams' term would end and Republican President-elect Thomas Jefferson was to take office, the lame-duck Federalist Congress, which was also about to be replaced by a Republican Party majority Congress, enacted legislation authorizing Adams to appoint justices of the peace in the nation's capital. The nominees were confirmed by the Senate on March 3rd.

President Adams signed the commissions, and Secretary of State John Marshall affixed the seal. In the last minute rush of transition they were never delivered. The new president, Thomas Jefferson, discovered them and ordered that they not be sent out until he reviewed them. Jefferson reduced the number and added five substitute choices of his own. Among the original nominees not appointed by Jefferson was William Marbury, a prominent Federalist businessman. Marbury sought a writ of mandamus from the Supreme Court, seeking to compel the new secretary of state, James Madison, to provide Marbury with his undelivered commission. In announcing the opinion of the Court, John Marshall declared that once Adams signed the commission and the secretary of state affixed the seal, Marbury was effectively appointed. Delivery of the commission was not required. Therefore, for Secretary of State Madison to withhold the commission was a denial of a vested legal right. However, Marshall found that in passing the Judiciary Act, which provided for the Supreme Court to sit as a court of original jurisdiction to hear matters such as this writ of mandamus, Congress violated the Constitution. Accordingly, the suit brought by Marbury against Madison was dismissed. In so holding, Marshall established what was then the novel principle of judicial review.

*See **LIBERTY** Cont'd on Page 17*

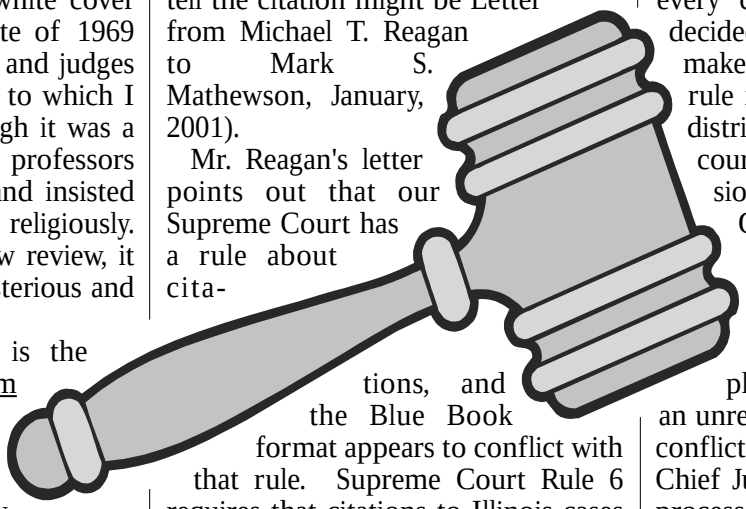
Uniform Citation and the Trial Judge in Illinois

by **Bob Keenan**,
Resident Circuit Judge, Wabash County

One of my most earliest memories of law school is obtaining and using the "bible," or Blue Book, for writing uniform case citations. Actually, my copy of the tome has a white cover and shows a copyright date of 1969 (11th edition). As lawyers and judges will recognize, the booklet to which I refer is not a bible, although it was a document that law school professors interpreted quite literally and insisted that we students follow religiously. For those of us on the law review, it took on an even more mysterious and sacred aura.

The book, of course, is the ubiquitous A Uniform System of Citation, published, at least when I was in law school, by the Harvard Law Review Association. An article and a letter in recent editions of the Illinois Bar Journal point out a couple of interesting aspects of this little volume. They also bring to mind a small favor which the Illinois Supreme Court might do for trial judges.

The article by Maureen B. Collins appeared at page 663 of the November, 2000, issue of the IBJ (under the rules of my book the citation would be Collins, *Bluebook Blues: Changes in the Seventeenth Edition*, 88 Ill. B.J. 663 (2000)). The letter was from Michael T. Reagan of Ottawa, and appeared in the letters to the editor in the January, 2001, issue (as best I can tell the citation might be Letter from Michael T. Reagan to Mark S. Mathewson, January, 2001).



Mr. Reagan's letter points out that our Supreme Court has a rule about citations, and the Blue Book format appears to conflict with that rule. Supreme Court Rule 6 requires that citations to Illinois cases include the official cite; the Blue Book, according to Professor Collins, now lists the regional reporter, Northeast Second (N.E.2d) as the preferred cite. Mr. Reagan also points out that many judges have access only to the official reporters, which certainly is true in the smaller, more rural counties. We who serve in such counties also greatly appreciate Supreme Court Rule 6.

Which brings us to the small favor. The citation form used in their opinions by our supreme and appellate courts does not disclose the district of the appellate court which is being cited. In my white cover version of the Blue Book, Rule 1.3 urges that every citation "indicate what court decided the case." The examples make patent that the intent of the rule is to specify which division or district made the decision if that court has more than a single division or district.

Of course, trial judges in Illinois are required to adhere to the decisions of higher courts. With five appellate districts, this can be a bit complicated, particularly if there is an unresolved conflict among the districts. Former Chief Justice Miller explained how the process works.

In an action for declaratory judgment, an insurer sought a determination of its obligations under a particular provision of an insurance policy. The trial judge found the policy provision to be unambiguous despite a line of authority to the contrary from the appellate court, and declined to follow

See ***CITATION*** *Cont'd on Page 18*

DIVORCE *Cont'd from Page 7*

custodial parent to best serve the interests of the child." In light of this finding, the court concluded the trial court should have used the best interest standard in determining whether to order a noncustodial parent to participate in counseling.

The *Fields* court addressed the proper standard to be used in determining whether a court could order counseling in a visitation context. The proper approach, according to the Court, was a best interest analysis - not a serious endangerment analysis. In deciding the appropriateness of the standard used, the *Fields* court did not directly address whether the trial court had the authority to compel counseling. Instead the court intimated it could compel counseling because by applying a standard it presupposed that counseling could be ordered under some basis. The Court did not address the constitutional dimensions of the issue. Thus, whether this ruling demonstrates the court's belief that it has the power to order a parent to counseling is ambiguous.

III. Foreign Jurisdictions' Approach to Court-Ordered Counseling

A. The Court as a Protector of Familial Relationships

The Superior Court of Pennsylvania in the case of *Lewis v. Lewis* adopted an approach granting the court broad powers. The *Lewis* court ordered the appellant mother and the children to submit to counseling in order to reestablish the relationship between the father and his children. The mother appealed on the grounds the trial court abused its discretion when ordering the "child-centered parent counseling." The appellate court disagreed and held that the lower court had the authority and the responsibility to attempt to save any family relationship which existed. The court stated, "Quite clearly, any semblance of a normal relationship between appellant and appellee is gone. Therefore, the only relationship the court could attempt to preserve or remedy was between parent and child. We see his order not as attaching 'blame' to the appellant, but merely attempting to resolve the tragic circumstances."

See ***DIVORCE*** *Cont'd on Page 10*

DIVORCE *Cont'd from Page 9*

This view, adopted by the Pennsylvania court, that the court has the responsibility to protect familial relationships and can use its judicial authority to compel parties to undergo counseling is not widely accepted by most jurisdictions today. Rather, the majority of jurisdictions which have ruled on the issue opt for a more sophisticated approach that evaluates whether the court has the authority to order a party to attend counseling, going beyond the premise that the court has the responsibility to preserve whatever familial ties exist that are salvageable.

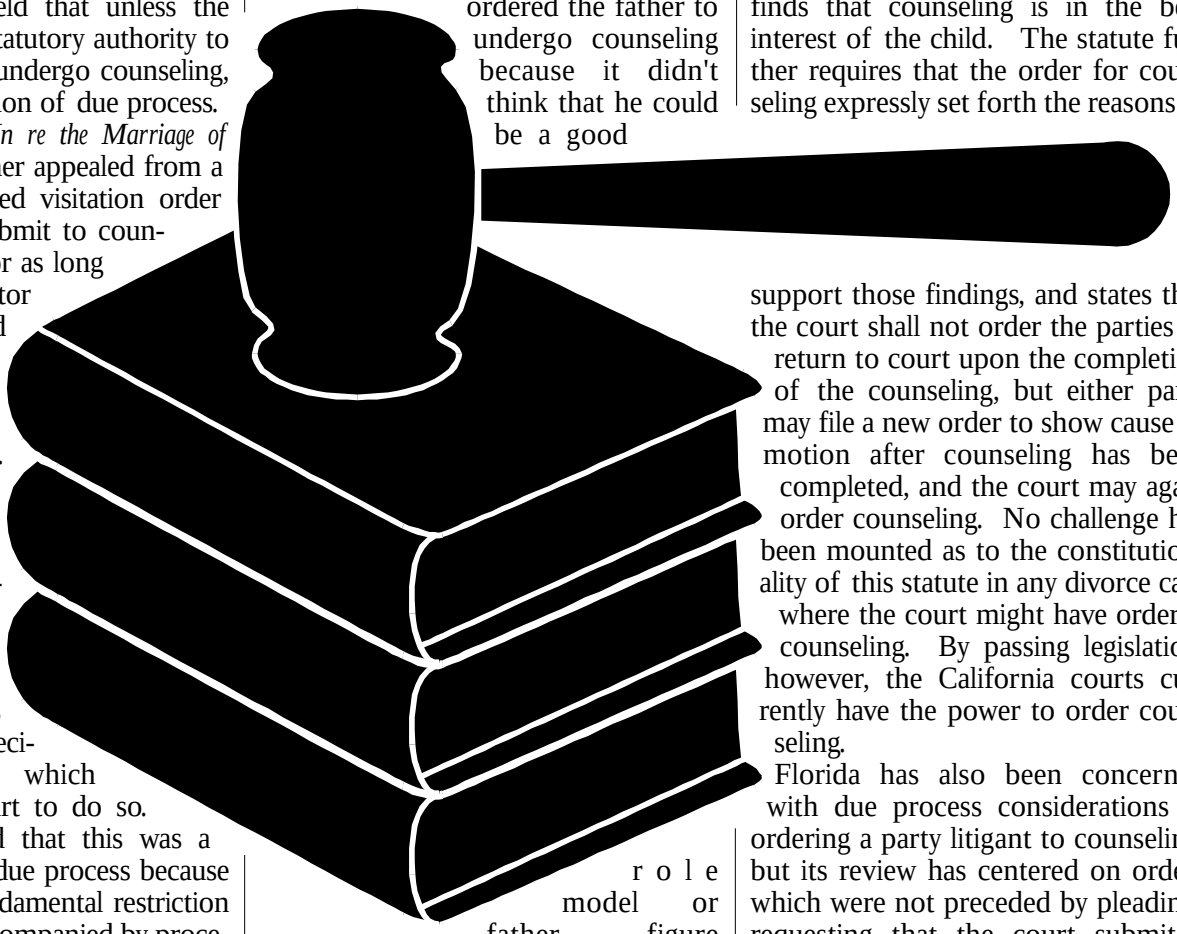
B. The Majority View: Due Process Complications

The majority of jurisdictions do not extend the court's power to allow it to compel litigants to undergo therapy or counseling because of due process complications. The state of California has consistently held that unless the court has express statutory authority to order someone to undergo counseling, the order is a violation of due process.

In the case of *In re the Marriage of Matthews*, the mother appealed from a trial court's modified visitation order requiring her to submit to counseling or therapy for as long as the expert evaluator on the case deemed necessary. Mother was also required to submit the children for counseling. The mother argued the trial court lacked authority to direct her to undergo counseling for an unspecified period of time because there was no statutory or decisional authority which authorized the court to do so. She further argued that this was a direct violation of due process because it constituted a fundamental restriction of her liberty unaccompanied by procedural safeguards.

The appellate court ruled in favor of the mother and agreed there was no precedent which allowed the court to order counseling. The appellate court, however, praised the trial court in its efforts because it was apparent it believed the mother would benefit from psychiatric therapy in that it might help to decrease the animosity between the mother and the father. "Nevertheless, the court's praiseworthy motives furnish no basis for requiring that [Leslie] undergo involuntary psychiatric therapy of an unspecified duration. Such a significant curtailment of [Leslie's] liberty would, at least, require legislative authorization." The court reasoned if such legislation was enacted it would provide for procedural safeguards which were not here accorded to her.

Later in 1985, the California appellate court revisited the same issue in the case of *Camacho v. Camacho* when a trial court conditioned a father's right to visitation on his undergoing involuntary therapy. The trial court had ordered the father to undergo counseling because it didn't think that he could be a good role model or father figure because he was not a responsible person in either his personal or professional life. The appellate court relied on the *Matthews* case and ruled that no matter the court's motivation, without legislative authority, the court does not have the power to compel a party to undergo involuntary psychiatric treatment. "Where, as here, there is nothing in the record to justify subjection of a party to involuntary psychiatric treatment, an order requiring him to undergo such treatment is a direct violation of his due process rights, as it constitutes a fundamental restriction of his liberty unaccompanied by procedural safeguards."



The California legislature responded to the two aforementioned cases and passed Section 3190 of the California Family Code which states that a family court may order counseling for a parent for a period not to exceed one year, provided that the court finds that there is a dispute between the parents or between the parent and child that poses a substantial danger to the best interests of the child, and the court finds that counseling is in the best interest of the child. The statute further requires that the order for counseling expressly set forth the reasons to support those findings, and states that the court shall not order the parties to return to court upon the completion of the counseling, but either party may file a new order to show cause or motion after counseling has been completed, and the court may again order counseling. No challenge has been mounted as to the constitutionality of this statute in any divorce case where the court might have ordered counseling. By passing legislation, however, the California courts currently have the power to order counseling.

Florida has also been concerned with due process considerations in ordering a party litigant to counseling, but its review has centered on orders which were not preceded by pleadings requesting that the court submit a party to counseling. In *Silvers v. Silvers*, the mother sought review of a post-judgment order requiring joint counseling sessions between the mother

See ***DIVORCE*** *Cont'd on Page 11*

DIVORCE *Cont'd from Page 10*
and father and the spouses of each of the since remarried parties. She argued there was no motion pending before the court requesting this, nor was there any express or implied consent that the parties were willing to attend counseling.

The appellate court ruled that trial court had no jurisdiction over the spouses of the party litigants to order them to attend counseling. The court also stated the trial court was in error to impose counseling on the parties in the absence of a motion or other notice and opportunity to be heard on these issues.

In the case of *Winddancer v. Stein*, the Florida appellate court continued in this direction when the mother appealed an order requiring her to undergo weekly counseling. Both parties agreed that counseling for the mother and the child was not sought, litigated or noticed. The court relied on previous Florida authority which held that an order adjudicating issues not presented by the pleadings, noticed to the parties, or litigated denies the parties fundamental due process. The court relied on the *Silvers* opinion and the premise that the parties must be noticed and have an opportunity to be heard with respect to the issue. "Such a violation of due process constitutes a departure from the essential requirements of the law."

Under the Florida courts' rulings, even if one of the parties moves for the other party to be ordered to attend counseling, the due process problem is not solved in the absence of statutory authority. While the issue over notice and an opportunity to be heard on the counseling order has been overcome, the ultimate question still remains: Does the court have authority to order counseling?

If legislation were to be passed authorizing the court to order the parties to attend counseling, the statute would have to provide procedural safeguards in order to ensure the litigant's liberty is protected. The argument could be made that a statute would have to provide for a hearing and create standards that would be clear and explicit when counseling could be ordered. A liberty interest is at stake because counseling involves a person's privacy and the way a person chooses to live his or her life. When there is a potential for a curtailment of liberty there must be clear standards and specific procedures to be followed.

C. Differentiating Between Pre-Judgment and Post-Judgment Counseling

The state of New York is unique because it has passed a statute which allows the courts to direct the parties to attend counseling. In the case of *In the Matter of Larisa F. and Michael S.*, the trial court fashioned a vistiation plan which included therapy sessions. Section 251 of the New York Family Court Act provides the court with discretion to, under proper circumstances, provide for examination or counseling by a physician, psychiatrist or psychologist. The court found that it had no power to compel parties to undergo therapy treatments *before* entering an award for visitation based on New York precedent. "The court can, however, order psychotherapy as a component of a custody order in an appropriate case. Thus, the appellate court upheld the trial court's order and ruled that, "As a component of, and not a condition for, visitation, the court orders all parties to commence therapy with a licensed psychiatrist or psychologist for the purpose of helping to adjust to the visitation of this court." Because New York has promulgated statutory authority which allows judges to order counseling, the due process problems are considerably less than in other jurisdictions.

The Connecticut appellate court visited this issue in the case of *Janik v. Janik*. The mother appealed from an order to undergo a psychological evaluation after the trial court had already made its custody determination. The court looked to the appropriate statute and distinguished between pre-judgment and post-judgment orders. "Nothing in sections 46b-3 and 46b-6 authorizes the court order parties in a custody battle to undergo psychiatric therapy or other counseling post-judgment since those provisions apply to pending family matters." The court ultimately ruled that because the statute only applied to pending matters, specifically for the reason that psychiatric evaluations could be helpful in making custody decisions, the court did not have authority to order such counseling. The court notes that the issue of whether the statute authorizes therapy for the parties while the matter is pending is not up on appeal, and thus the court did not address the issue.

In distinguishing between pre-judgment and post-judgment rulings, the Connecticut court is ultimately saying no statutory authority exists which gives it the power to order the parties to counseling. Although its reasoning is somewhat different, the approach is very similar to that of California under the *Matthews* and *Camacho* cases. The courts in both jurisdictions felt very reluctant to order counseling without express statutory authority to do so for the reasons that due process problems are likely to occur.

IV. Benefits of Counseling

Although the clarity on a court's power to order a litigant to counseling is nebulous, the purposes and benefits of counseling are not. The purpose of court-ordered counseling is to provide the litigants who are in need of professional guidance and advice a place to receive this help. Many litigants do not choose to seek professional help on their own. They also often need an impartial professional with experience in divorce issues to help them through the process.

Families dealing with difficult issues during or after a long, protracted case often need a release. Counseling helps the parties communicate better with each other. They might be able to see situations differently, leading to a better understanding of each other and their children. However, litigants might seem reluctant to attend counseling because either they feel they don't need it, or they are embarrassed over what has happened to their family. Ultimately, therapy and counseling offers judges another alternative when fashioning judgments in difficult custody cases.

V. Conclusion

The number of different approaches courts have taken in addressing this issue illustrates the difficulty judges have deciding custody cases due to the delicate dichotomy between doing what is legally permissible and protecting the best interests of the children and the family rela-

See ***DIVORCE*** *Cont'd on Page 17*

An Overview of the New Illinois Supreme Court Rules Regarding Capital Litigation

by **The Honorable Paul P. Biebel, Jr.**
Presiding Judge, Criminal Division
Circuit Court of Cook County

On March 1, 2001, the Illinois Supreme Court amended Rule 3.8 of the Illinois Rules of Professional Conduct and Supreme Court Rules 411, 412 and 701 and added Rules 43, 416, 417 and 714 (M.R. 3140) to deal with the general administration of death penalty cases and to ensure that capital trials are conducted in a fair manner.

These rules recognize the increasing complexity and demands on both counsel and courts in capital cases. The rules bring about change in several areas: the rules of professional conduct for prosecutors; training for judges; the minimum requirements for attorneys participating in capital cases (through creation of a Capital Litigation Trial Bar); the nature and application of discovery procedures, including a new rule regarding production of DNA evidence; and the administration of capital cases.

Responsibilities of the Prosecutor

A new paragraph (a) was added to Rule 3.8 of the Rules of Professional Conduct, which provides that "[t]he duty of a public prosecutor or other government lawyer is to seek justice, not merely to convict." As the Committee Comments note, "[p]aragraph (a) of rule 3.8 is substantially similar to standard 3-1.2(c) of the American Bar Association (ABA) Standards for Criminal Justice (3d Ed. 1993); however, paragraph (a) of rule 3.8 restates a principle that is far older than the ABA standard." The new paragraph reiterates a concept that has long been well recognized as an integral part of the duties of a good prosecutor, as evidenced by an Illinois Supreme Court decision from more than 75 years ago, wherein the Court reversed a murder conviction, stating "[t]he State's Attorney in his official capacity is the representative of all the people, including the defendant, and it was as much his duty to safeguard the constitutional rights of the defendant as those of any other citizen." *People v. Cochran*, 313 Ill. 508, 526 (1924). (Committee Comments, Rule 3.8(a), M.R. 3140, (March 1, 2001).)

Judicial Training

The Supreme Court's requirement for judicial training in capital cases follows from the finding that reliability and fairness in a capital trial depend upon the skill and knowledge of the trial judge, as well as that of the prosecutor and counsel for the defense. The training requirement for judges complements rules establishing minimum qualifications for defense counsel and prosecutors in capital cases as set forth in Rules 416(d), 701 and 714. (Committee Comments to New Rule 43).

New Supreme Court Rule 43 provides that,

"(A) In order to insure the highest degree of judicial competency during a capital trial and sentencing hearing Capital Litigation Seminars approved by the Supreme Court shall be established for judges that may as part of their designated duties preside over capital litigation. The Capital Litigation Seminars should include, but not be limited to, the judge's role in capital cases, motion practice, current procedures in jury selection, substantive and procedural death penalty case law, confessions, and the admissibility of evidence in the areas of scientific trace materials, genetics, and DNA analysis. Seminars on capital cases shall be held twice a year. [Note: This paragraph was effective March 1, 2001].

(B) Any circuit court judge or associate judge who in his current assignment may be called upon to preside over a capital case shall attend a Capital Litigation Seminar at least once every two years." [Note: This paragraph will be effective March 1, 2002].

On June 29, 2001, the Illinois Supreme Court announced the training schedule for judges and the list of approved seminars for attorneys.

Capital Litigation Trial Bar

New Supreme Court Rule 714 creates a Capital Litigation Trial Bar and restricts participation in capital cases to attorneys who are members. The rule sets forth educational and experiential requirements for two categories of members of the Capital Litigation Trial Bar - lead counsel and co-counsel. To qualify for admission to the Capital Litigation Trial Bar, an attorney must: be a member of the bar in good standing; have substantial familiarity with the ethics, practice, procedure and rules of the trial and reviewing courts of the State of Illinois; have five years experience for lead counsel and three years for co-counsel and be an active trial practitioner; have prior experience in felony jury trials (for lead counsel, eight felony jury trials tried to completion, including two murder trials; for co-counsel, five felony jury trials tried to completion); and either attend 12 hours of training in the preparation of capital cases in courses approved by the Illinois Supreme Court or have "substantial familiarity with and extensive experience in the use of expert witnesses, and forensic and medical evidence including, but not limited to, mental health, pathology and DNA profiling evidence."

The new rules do not require that the Attorney General or State's Attorney be admitted to the Capital Litigation Trial Bar to prosecute capital cases (Rule 701, 714(c)), but their assistants must be members. Only the Supreme Court may waive any of the requirements for an attorney to qualify for admission to this specialized bar. The roll of attorneys admitted to the Capital Litigation Trial Bar will be maintained by the Administrative Office of the Illinois Courts. Consistent with these rules, Rule 416(d) requires the court to appoint, as attorneys for indigent defendants, two qualified attorneys who have been certified as members of the Capital Litigation Trial Bar. If the Public Defender

*See **RULES** Cont'd on Page 13*

RULES *Cont'd from Page 12*

is appointed, the Public Defender is required to assign "two qualified counsel who have been certified as members of the Capital Litigation Trial Bar." In addition, the rules require that "[t]he trial judge shall likewise insure that counsel for the State, unless said counsel is the Attorney General or the duly elected or appointed State's Attorney of the county of venue, is a member of the Capital Litigation Trial Bar."

On Friday, June 29, 2001, the Illinois Supreme Court formed 24 panels to screen attorneys for certification to the Capital Litigation Trial Bar.

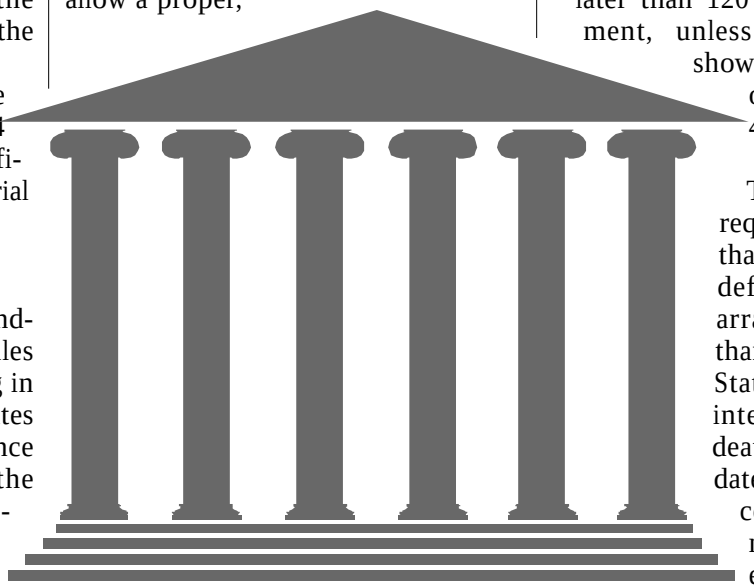
Discovery Changes

Supreme Court Rule 411, as amended, makes criminal discovery rules applicable to the sentencing hearing in a capital case. Rule 412 now obligates the State, when producing evidence that either tends to negate the accused's guilt or reduce the punishment, to make a good faith effort to specifically identify "any material disclosed pursuant to this section based upon the information available to the State at the time the material is disclosed to the defense." The rule also now provides that "[a]t trial, the defendant may not offer evidence or otherwise communicate to the trier of fact the State's identification of any material or information as tending to negate the guilt of the accused or reduce his punishment." (Rule 412(c).)

Perhaps even more significant is the new provision for discovery depositions in capital cases found in Rule 416(e). Unlike civil depositions, the rule requires that the party seeking to take the deposition of a witness must seek leave of court upon a showing of good cause; that the defendant may not be deposed; and that the defendant has no right to be physically present at a discovery deposition.

DNA Evidence

Because of the increasing use of DNA evidence and its complexities, the Supreme Court has also enacted a new rule dealing with DNA evidence. Rule 417(a) requires that the proponent of the DNA evidence, whether prosecution or defense, make all relevant materials available to the adverse party, and sets forth a non-exhaustive list of the kinds of materials that must be produced. Subsection (a) of the rules sets forth its purpose as follows: "This rule is promulgated to produce uniformly sufficient information to allow a proper, well-informed determination of the admissibility of DNA evidence and to insure that such evidence is presented competently and intelligibly. The rule is designed to provide a minimum standard for compliance concerning DNA evidence, and is not intended to limit the production and discovery of material information."



The rule is not limited to death penalty cases but extends to all "felony prosecutions, post-trial and post-conviction proceedings." (Rule 417(b).) The new rule also applies to motions for DNA testing not available at the time of trial to establish actual innocence. (See 725 ILCS 5/116-3).

Administration of Capital Cases

Two significant changes regarding the administration of death penalty cases are included in the new Rules: the requirement that the State provide notice that it intends to seek the death penalty and the provision for case management conferences.

New Supreme Court Rule 416 requires the State to provide notice of its intent to seek the death penalty:

> "The State's Attorney or Attorney General shall provide notice of the State's intention to seek or reject imposition of the death penalty by filing a Notice of Intent to Seek or Decline Death Penalty as soon as practicable. In no event shall the filing of said notice be later than 120 days after arraignment, unless for good cause shown, the court directs otherwise ..." Rule 416(c).

The new rule also requires that, "No later than 120 days after the defendant has been arraigned or no later than 60 days after the State has disclosed its intention to seek the death penalty, whichever date occurs earlier, the court shall hold a case management conference. Counsel who will conduct the trial personally shall attend such conference." Rule 416(f).

At the conference, the court is to confirm that the attorneys are certified as members of the Capital Litigation Trial Bar, confirm that all disclosures required of both sides have been completed, confirm that the State has disclosed all statutory aggravating factors, and either confirm that the disclosures required by Supreme Court Rule 417 (regarding DNA evidence) have been completed or set a date for completion. The additional provisions also empower the court to establish deadlines to insure that the parties are complying with the rules in a timely fashion.

In sum, the new rules and rule amendments should further help ensure the fair and just adjudication of capital cases.

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

Last issue, I remarked: "The past few months have been a gossip columnist's dream, everyone is moving everywhere, four new members joined the Supreme Court," . . . But, for Cook County's judges, the news which was officially announced on June 28th, speculated on for over a year and told to me by a deputy sheriff the day before Sneed knew it, is beyond a gossip columnist's dream . . . it's **the event.** For those of you who don't know *the news*, **Chief Judge Donald O'Connell** is leaving the bench for an as yet unknown greener pasture.

I'm sure I'll know soon where Judge O'Connell is going; for now, I can simply report based on what I've read in the press. The *Tribune* reported that O'Connell has no interest in engaging in crafts such as painting driftwood; his future is more serious, and knowing the Chief, probably intense. I'll engage in rank speculation here with a wild guess or two. O'Connell will become dean of DePaul Law School replacing Dean Teree Foster who is leaving before the end of her contract. Or, he'll join a major law firm with the initials J&B and the Boards of a few major corporations. Or, perhaps he'll hook up with UIC Medical Center managing their medical malpractice litigation.

On a personal and more serious note, the Chief had the confidence to put me on the bench and I'll be forever grateful for the opportunity. Judge O'Connell made a huge impact during his 22 years on the bench and 6 ½ as Chief; from juvenile court to drug court to centralized bond court to an open and working relationship with the bar associations. So, best of luck, Chief.

Of course, that's only ½ of the story. **"Who's next" is the question of the hour.** Well, when O'Connell leaves July 31st, the presiding judge of the probate division, Judge **Henry Budzinski**, may take over. Judge **Budzinski** *may* run for the spot so he can fill out the rest of O'Connell's term, which doesn't expire until next year. Due to age limits imposed by law, Budzinski couldn't run at that point. However, *everyone wants* the job. In contention are IJA's own incoming president, Judge **Stuart Nudelman**, IJA Board Member, Judge **Timothy Evans**, and Judges **Nancy Sidote Salyers** (the only woman), **Anthony Montelione**, **James Flannery**, **Paul Biebel** and **Michael Murphy**. The politics are changing by the minute on this one; by next issue we'll know who got the prize. In the meantime, I've got my popcorn and am ready to watch the show.

Cook County's Corner

Nothing seems newsworthy given the Chief Judge situation. But I'm sure that the newly appointed circuit judges who will have the ability to vote for Chief take exception to that comment. The Supreme Court has appointed *a few good men* to the bench.

Judge **David Erickson** was recalled to the circuit bench as an associate judge by the Illinois Supreme Court after "retiring" to be 1st Assistant at the County State's Attorney's Office. I don't know Dave, but clearly his idea of retirement is completely out of sync with my daydreams of golf, sunshine, travel and most of all . . . no stress except what to have for dinner. **Judge Erickson** spent almost 5 years in his post with State's Attorney Dick Devine.

A past President of the Chicago Council of Lawyers, **James Wascher**, was appointed to the bench; **Judge Wascher** is the first Council president to make it to the bench and the first appointment by **Justice Fitzgerald**. The son and namesake of a deceased judge, **James C. Murray, Jr**., was appointed to the bench by **Justice McMorrow**; Murray was a partner at Katten, Muchin & Zavis at the time of his appointment. Justice McMorrow also appointed another son of a deceased judge, **Richard William "Bill" Austin. Judge Austin** takes the bench after a stellar legal career. He is a past president of the Chicago Bar Association, is retired from Pretzel & Stouffer, and has served on many Supreme Court Committees. Everyone knows that he has and continues to give his all to this association; last year he was awarded IJA's Founder's Award. Here's hoping Bill enjoys his new career. Rounding out the new men is an assistant attorney general, **Darryl Simko**, who was appointed by **Justice Freeman**. Judge Simko had clerked for Freeman.

Eleven new Associate Judges were appointed to the bench: **Lawrence Flood, Gregory Ginex, Colleen Hyland, Patrick Lustig, Luciano "Lou" Panici, Hyman Riebman, Michele Simmons, Terence Smith, and Rena Van Tine**. It is a pleasure to note that **Judge Van Tine** is the first judge of Indian-American descent (Eastern Indian) in Illinois history and to congratulate Larry Flood who is both an old friend and the guy who changes my door from screen to storm in the fall. Joining them were two prior appointees to the bench: **Raymond Myles** and **Richard Stevens** who were unsuccessful in their quest for election.

Congratulations are in order for **Michael Mason**, chief trial attorney for the Federal Defender Program, on being selected as a magistrate for the Northern District of Illinois. His wife is recent appointee, Circuit **Judge Mary Anne Mason**.

Associate **Judge Eugene Campion** retired after 20 years on the bench. He was feted at a reception at the Mercy Home for Boys and Girls near his home courthouse in Maywood. Another large retirement party was had for retiring **Judge Michael Buckley Bolan** at the Irish Heritage Center. He leaves the Criminal Division after 18 years on the bench to practice with Paul Episcope, Ltd. Also retiring was **Judge Sidney Jones, III**, a past-President of the Illinois Judicial

Council. Judge Jones spent many years hearing the high volume trial assignment/motion call for municipal cases and helped reduce the backlog there. Although I thought this assignment would have given him cause to do nothing but enjoy his roller-skating at retirement, he is working with his family's new million dollar marketing business and enjoying it. I can't tell you as much about the plans of another Chancery Division Judge who is retiring this month. **Judge Thomas Durkin** is leaving the bench to do mediation and maybe write a book. As explained, he could tell me the subject of the book, but then he'd have to kill me.

DuPage Doings

The new Associate Judge in the 18th Circuit, **George Sotos**, had the privilege of having Attorney General Jim Ryan give the keynote speech at his installation ceremony. **Judge Sotos** had been Chief of the Civil Division of the DuPage County State's Attorney's Office before moving to the Attorney General's Office in 1995. Another close friend of Ryan's, **Judge Stephen J. Culliton**, administered the oath of office. Since that time, **Judge Culliton** has resigned his judgeship in order to work with Ryan on a "statewide campaign". . . for governor, perhaps?

Laudable in Lake

Charles Weech, president-elect of the McHenry County Bar Association, was selected to be an Associate Judge in the 19th Circuit. Joining him as an Associate Judge in the 19th is **Mitchell Hoffman**. Judge Hoffman had been an assistant state's attorney in Lake County. They take the place of two judges who have been elevated to full circuit status: **Judges Maureen McIntyre** and **Mary Seminara Schostok**, respectively.

Around the State

Kudos to **Chief Justice Moses Harrison II** for recognizing that it was high time a woman served on the 5th District Appellate Court. At his recommendation, the Supreme Court appointed Granite City lawyer, **Melissa A. Chapman Rheinecker**, to the seat of **Justice Charles W. Chapman** who retires August 31st to enter private practice. (The Justice and his replacement are not blood relations.) The future justice has handled complex litigation at her father's firm, Morris B. Chapman & Associates since 1983.

State Representative John W. Turner got the call to fill the seat of **Justice Rita Garman** on the 4th District Appellate Court. A Republican who is the minority spokesman on the Judiciary Committee on Civil Law, **Justice Turner** has had a private practice of law and served as a prosecutor. (I want to know if he has ever met **Judge John D. Turner** of Cook County.)

In the 4th Circuit, **Judge S. Gene Schwarm** began his term as Chief Judge, **Judge Michael Weber's** term ended, and Associate **Judge Harold H. Pennock, III** is retiring. More retirements as of the beginning of July are **Judges Robert A. Barnes** and **E. Michael O'Brien** of the 10th Circuit, Associate **Judge Sheldon Reagan** of the 21st. **William O. Schmidt** of Kankakee was named the new Associate Judge in the 21st while **Carla Alessio Goode** joined the bench as an associate in the 12th Circuit; she is assigned to the Will County Courthouse. The 10th Circuit in Peoria has filled the vacancy created by the retirement of Associate **Judge O'Brien** with **Kevin R. Galley**.

Albert G. Webber, IV of Macon County got the call by the Illinois Supreme Court in the 6h Circuit to fill the vacancy of retiring **Judge James A. Hendrian**. Webber leaves the Decatur law firm of Kehart, Shafter, Webber, and Campbell & Robinson where he concentrated in civil litigation. **Lisa Holder White** was chosen to be the new associate in the 6th, taking the place of retiring Associate Judge **Paul Francis**. She's assigned to the Macon County Courthouse.

Justice **Kilbride** appointed Ottawa attorney Eugene Daugherity to the 13th Judicial Circuit. He had been the managing partner of Myers, Daugherity, Berry, O'Connor & Kusma. Judge Daugherity fills the seat of retired Judge Louis Perona. I believe this was **Justice Kilbride's** first selection for the trial court bench.

The 16th Circuit added **Robert Spence** to the bench. The Deputy Attorney General was appointed by the Illinois Supreme Court to fill-

*See **KNOW** Cont'd on Page 16*

***JRS** Cont'd from Page 8*

must be given credit under their current plan for the amount of time covered under an earlier health plan-both group and individual policies-provided there has not been a break in coverage for 63 days. This credit time is applied toward any pre-existing condition period a plan normally imposes for new members and dependents.

For example, if a plan has a six-month pre-existing provision, and a person had coverage under another health plan for four months, the new plan would have to reduce the pre-existing period from six months to two months (six-month provision minus the four months of creditable coverage under the other plan). The State calculates creditable coverage this way: If an employee has coverage during any days of the month, that month counts as a full month of creditable coverage.

Although the law allows employers to be very specific about what types of insurance constitute "creditable coverage," the State accepts any health coverage as creditable coverage to reduce pre-existing time provisions. Examples would be the Cook County Medical Plan, dependent employment coverage, Medicare/medical, and individual health coverage. Remember, though, your break in coverage must not exceed 63 days.

The benefits of the HIPAA are especially important for those Cook County judges who insure their dependents under Cook County group insurance and not through the State of Illinois group insurance. Take the following example. Let's say the judge has historically opted for health insurance coverage under the Cook County plan. The judge retires, and the Cook County plan is no longer available as a health insurance option. That is, health insurance will be available only under the State of Illinois plan. If any of the judge's covered dependents have medical problems while only under Cook County coverage, the HIPAA will allow them to meet the health certificate requirement or the full pre-existing condition period under the State of Illinois plan, as long as the conditions of the HIPAA outlined above are satisfied. Thus, by eliminating the need for a health certificate, and by reducing the pre-existing condition period by the time covered under a previous plan, the judge's dependents who were insured under the Cook County plan can be brought under the State plan with full coverage.

***KNOW** Cont'd from Page 15*

ing the seat being vacated by **Judge Thomas E. Hogan** who is retiring after 20 years on the bench. **Judge Hogan** currently serves in the Family Division in Kendall County. (I want to know if he has ever met **Judge Thomas L. Hogan** of Cook County? If so, do they look alike?) Selected as an Associate in the 16th is **Robbin Stuckert. Judge Stuckert** was an associate at the firm of Gallagher & Brady. She takes the place of DeKalb County **Judge Kurt Klein** who was appointed a full circuit judge.

In Memoriam

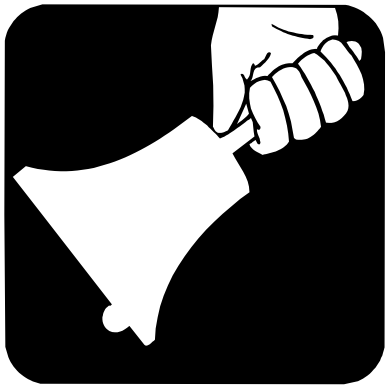
We will miss these judges who died recently . . . **Judge Carl Cipolla**, 78, a retired Cook County Associate Judge, a real sweet fellow, died one year after retiring. **Judge Cipolla** gained notoriety when there was a hostage situation in his traffic courtroom in 1985. . . . **Judge Richard Samuels**, a recalled retired judge served for 33 years, many of them in the Markham Courthouse; he died of bone cancer. And **Associate Judge Richard Dowdle** died of cancer at age 74 after serving for 24 years. Although **Judge Dowdle** may be best known for being the first judge to allow a feeding tube to be disconnected in a right-to-die case, I'll never forget him as he told me that I wasn't charging enough for my work. Little did he know it was my uncle's estate. He was extraordinarily patient in dealing with those who didn't know the field (me again) and was known to have a thorough grasp of the law. . .Another retired Associate Judge, **Charles Leary**, died at 79. He left the bench in 1994, having been assigned to Bridgeview. In addition to his judicial career, **Judge Leary** was a captain in the Naval Reserves and served as a fighter pilot in two wars.

Retired 4th Circuit **Judge Robert Sanders** of Moneaqua died at age 86. He was elected a Shelby County judge in 1946, became a circuit judge in 1964, and retired in 1976.

Last, but not at all least, we mark the passing of a legend, **Judge Abraham Lincoln Marovitz**. I delayed writing this to the end as how could I sum up a life that took the CBA Record an entire issue to eulogize? As I'm sure most have heard, "Judge Abe" of the United States District Court died at age 95. Until the last few months of his life, the senior judge attended one or more dinners/receptions each evening. He had many notable friends such as Frank Sinatra and Tony Bennett. He was proud of his Jewish heritage and was known to take to heart his parents' advice to "do a mitzvah a day". Judge Abe was a good friend of the Daleys and I quote Mayor Richard M. Daley who summed his life up well: "Abe Marovitz was an excellent lawyer and jurist, but many, many people will remember him first as a true friend and a wonderful human being."

LIBERTY *Cont'd from Page 8*

Gibbons v. Ogden, a landmark case that dealt with the power of Congress to regulate commerce, involved a monopoly granted by New York to Robert Fulton to operate steamboats on the state's waterways. Colonel Aaron Ogden operated a ferry service between New York City and New Jersey. At issue was whether states could limit commerce on navigable waterways. The Court heard argument on February 4, 1824, with Daniel Webster arguing successfully on behalf of Robert Fulton for the supremacy of the Commerce Clause. The Court held that Congress's power to regulate interstate commerce was exclusive. This landmark case allowed interstate commerce to flourish and develop into what it is today.



The Constitution was truly a living document to John Marshall. He was present at its birth, having lobbied successfully to have it approved by the Virginia Constitutional Convention. The author observes that "… having fought for this nation and having helped to create it, he would eventually become the Constitution's primary interpreter and defender."

Like a Renaissance man, John Marshall was gifted and skilled in many occupations. A constant profile in courage, the courage of his convictions, his example still serves as a model for judges today. In the course of presiding over the Court for thirty-five years, he defined the extent of the powers of the new federal government. Although Marshall was a Federalist, he still persisted in persuading a majority of the Court to join his opinions, even when a majority of the Court had been appointed by Republican presidents. One is reminded how, in modern times, Justice Brennan was, on occasion, able to cobble five votes together for a majority even as the Court's center was shifting to the right, with the appointment of more conservative justices.

Any one of the careers of John Marshall prior to his being appointed Chief Justice would be enough to cap a full and complete life for anyone. One cannot help but see how much John Marshall benefited in his role as Chief Justice, having held positions in all three branches of government. Jean Edward Smith demonstrates how the manner in which he interpreted and applied the Constitution truly defined his young nation. Was it any wonder that on July 8, 1835, as John Marshall's funeral cortege made its way through the city, Philadelphia's Liberty Bell cracked as it tolled for the last time?

DIVORCE *Cont'd from Page 11*

tionship as a whole. In depth analysis of a court's authority to require the parties to a divorce to undergo counseling remains largely uncharted territory in the courts, but some jurisdictions have tackled the issue and required express statutory authority for court-ordered counseling. The California legislature responded by passing a law that gives the court such power. However, in Illinois, there is neither express statutory authority nor, in light of *Fields*, express prohibition against court-ordered counseling. Because a liberty interest may be at stake, one question that must be addressed at some point is whether a statute authorizing the court to compel the parties to attend counseling is constitutional. Resolution of that issue could, of course, be dispositive.

---

[1]Robert L. Fischer, *Children in Changing Families: Results of a Pilot Study of a Program for Children of Separation and Divorce*, 37 Fam. & Concil. Cts. Rev. 240, 240 (1999).

[2]Marian Bussey, *Impact of Kids First Seminar of Divorcing Parents: A Three-Year Follow-Up*, Journal of Divorce & Remarriage, Dec. 1998, at 129.

[3]1999 Annual Report of the Administrative Office of the Illinois Courts. The 1998 Annual Report indicates 58,274 new divorce cases were filed in Illinois.

[4]Marian Bussey, *Impact of Kids First Seminar of Divorcing Parents: A Three-Year Follow-Up*, Journal of Divorce & Remarriage, Dec. 1998, at 129.

[5]*Camacho v. Camacho* 173 Cal.App.3d 214, 218 Cal.Rptr. 810 (1985).

[6]283 Ill.App.3d 894, 671 N.E.2d 85 (4th Dist. 1996).

[7]Section 607(a) states: "A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral or emotional health."

[8]246 Ill.App.3d 628, 645, 615 N.E.2d 1314, 1326 (1993).

[9]246 Ill.App.3d 628, 645, 615 N.E.2d 1314, 1326 (1993).

[10]283 Ill.App.3d at 906, 671 N.E.2d at 93. See also *In re the Marriage of Tisckos/Stweart*, 161 Ill.App.3d 302, 311, 514 N.E.2d 523, 529 (1987).

[11]271 Pa. Super. 519, 414 A.2d 375 (1979).

[12]271 Pa. Super. at 525

[13]271 Pa. Super. at 525

[14]101 Cal.App.3d 811, 161 Cal. Rptr. 879 (1980).

[15]101 Call.App.3d at 817-818, 161 Cal. Rptr. at 883.

[16]173 Cal.App.3d 214, 218 Cal.Rptr. 810 (1985).

[17]173 Cal.App.3d at 221, 218 Cal.Rptr. at 814.

[18]Cal. Fam. Code Sec. 3190.

[19]504 So.2d 30, 12 Fla.L.Weekly 761 (1987).

[20]765 So. 2d 747, 25 Fla.L.Weekly D 1298 (2000).

[21]See *Moody v. Moody*, 721 So.2d 731, 734 (Fla. 1st Dist. Ct. App. 1998) (reversing an order transferring child custody and canceling husband's requirement to pay child support where the notice for hearing stated that the court would entertain a motion for contempt); *Thomas v. Harris* 634 So.2d 1136, 1136-37 (Fla. 1st Dist. Ct. App. 1994) (reversing change of child custody due to deleterious effects of tobacco smoke on child where notice of hearing specified issue raising question of custody change was poor progress at school).

[22]765 So. 2d at 748.

[23]120 Misc. 2d 907, 466 N.Y.2d 899 (1983).

[24]See *Paris v. Paris*, 95 A.D.2d 857; *Matter of Grado v. Grado*, 44A.D.2d 854.

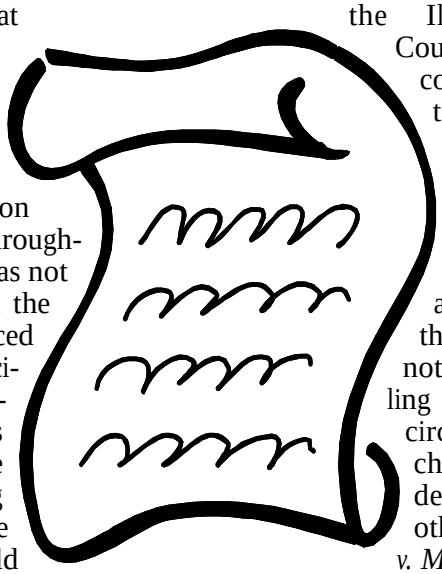
[25]120 Misc. 2d at 915, 466 N.Y.2d at 905.

[26]120 Misc. 2d at 915, 466 N.Y.2d at 905-906.

CITATION *Cont'd from Page 9*

those cases. On appeal, the appellate court also declined to follow the cases, which were not from its district, and affirmed the trial judge. The Illinois Supreme Court held that

> (a) decision of the appellate court, though not binding on other appellate districts, is binding on the circuit courts throughout the State. This was not an instance in which the circuit court was faced with conflicting decisions from the various appellate districts and, by the absence of controlling authority from the home district, would have been free to choose between the decisions of the other districts.



State Farm Fire & Casualty Company v. Yapejian, 152 Ill. 2d 533, 539-40 (1992)(citations omitted).

The principle which Justice Miller elucidated may be summarized as follows: 1) an Illinois circuit court is bound by decisions of any district of the Illinois Appellate Court; 2) if there is a conflict among districts, the circuit court is obliged to follow the decision of its home district; 3) if there is a conflict among districts and the home district has not issued a controlling decision, then the circuit court may choose among the decisions from the other districts. *People v. Morgan*, 307 Ill. App. 3d 707, 716 (4th Dist. 1999); *Hubeny v. Chairse*, 305 Ill. App. 3d 1038, 1045-46 (2d Dist. 1999).

This principle is a direct and logical result of the manner in which the Illinois court system is organized. We have a single appellate court which is divided into separate districts, as opposed to having separate courts in each of the State's districts. Ill. Const. Article VI, section 1, et seq. Consequently, trial judges in Illinois frequently need to be able to identify the district of the Illinois Appellate Court which has rendered a decision upon a particular issue.

However, since the citation format which is used in the higher courts in Illinois does not identify the district from which a decision of the appellate court originates, research projects for trial judges are more complicated. The format which our courts use is not mandated by Supreme Court Rule, but may (or may not) be included in a style manual which the Court has for all appellate level opinions in Illinois.

This lack of identification certainly is not a major problem for trial judges. However, inclusion of the district in the citation would simplify some research projects which circuit and associate judges must do to render appropriate decisions.

PRESIDENT *Cont'd from Page 1*

paid trial court judges in the nation. Associate Judges, if ranked separately, would be the seventh highest paid, thus outpacing the highest ranking trial judges of such comparable states as California, Michigan, Arizona and Pennsylvania.

The Long Range Planning Committee has continued to meet. One concrete example of the progress thus far is the decision to hire a professional association consulting firm to assist the committee. It was essentially determined that the IJA would benefit from the experience of outsiders (who have recently worked on studies for various bar associations) in evaluating resources and their allocation, in assessing formal and informal policies and procedures, and in establishing measures for performance and results while delivering services to judges. We anticipate that this study will be completed in late summer, after which several Planning Committee and Board members will meet in a day-long session to hammer out a final Long Range Report.

In the last issue of The Gavel, I mentioned the reasons supporting the need for public education about the role judges perform daily for the good of all in our communities. This need has been the essential driving force behind the collaboration of the Supreme Court of Illinois and the IJA, which we are calling the Illinois Judicial Speakers Bureau. However, many of you are also aware of, and have assisted with, the Judges In The Classroom program which now-1st V.P. Stuart Nudelman has spearheaded for several years. I'm very pleased to inform you that Stuart, together with our experienced Public Relations Consultant, Chris Ruys, have had successful discussions with the Illinois State Board of Education about how to more effectively, and much more extensively, place judges in front of our State's youth to discuss the importance of our work. Plans are underway for programs during this upcoming school year.

Finally, I want to take advantage of the fact that there is no better forum than this one to sincerely thank our retiring The Gavel editors, Helaine Berger and Rita Novak, for their hard work and great success while publishing the last several Gavel editions. The expanded size, greater use of visual effects, inclusion of substantive legal articles, and "Did You Know..." column are but a few of their accomplishments. My thanks as well to those of you who have been generous with your compliments to them about this fresher, more comprehensive, approach to keeping IJA members informed.....I also want to welcome Grace Dickler and Dan Gillespie as the new editors, and to thank them here for shouldering this difficult task. They have already secured the continuation of the column by Lainie Berger and her infamous "host of statewide correspondents", so we know they are already on the right track.

www.ija.org

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

ija.org has all the information you need about The Illinois Judges Association and a whole lot more! Have YOU tried the internet? If not, you're missing out on a whole lot, including:

The Latest Appellate & Supreme Court Decisions
Complete Information About the IJA

Search Engines	Law Links
Public Information	Retirement Information
1999 IJA Yearbook	Court Boundaries
Judges Seminars	Internet Resources
Judge's Specialty Areas	Insurance & Investing
The Gavel, Current & Past Issues	Investments
Online Member Applications	Travel Information

Available 24 hours a day 7 days a week!

email - fast, cheap, convenient & FREE OF CHARGE!

New IJA Member Application

Judge Name: _____ Position: _____
Judicial Circuit: _____ Appellate District: _____
Home Street Address: _____ PO Box: _____
City: _____ State: _____ Zip: _____
Office Street Address: _____ PO Box: _____
City: _____ State _____ Zip _____
Office Phone: _____ Fax: _____ Home: _____
Please use my ❑ HOME or ❑ OFFICE address.
email Address: _____
State Senator's Name & District #: _____ State Rep.'s Name & District #: _____
On which committees would you like to serve? _____

Please submit your membership fee ($150 for active judges and $75 for retired judges annually) with this application to:

Illinois Judges Association
321 South Plymouth Court
Chicago, IL 60604

S a v e t h e D a t e

IJA 30th Annual Convention

Thursday, December 13 through Saturday, December 15, 2001

at the Sheraton Chicago Hotel and Towers, 301 N. Water Street