Survey of Ethics Law Cases

Illinois Supreme Court Overrules First District and Finds that Violation of Rule 1.5 (e) of the Illinois Rules of Professional Conduct Due to Failure to Memorialize a Fee Division Between Attorneys and Obtain Clients' Written Consent did not Preclude Attorneys from Recovering Their Fees in *Quantum Meruit*

In *Andrew W. Levenfeld and Associates, Ltd. v. O'Brien*, two attorneys from different firms agreed to represent the same clients in an estate dispute. These attorneys negotiated a contingency representation agreement with the clients that stated in relevant part:

> Clients agree to pay minimum attorneys fees calculable at an hourly rate of $300 per hour for [First Attorney's] or [Second Attorney's] time, $250 per hour for associate attorney time, and $85 per hour for paralegal or paraprofessional time.
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> The total fees to be charged shall be either 15% of the first $10,000,000 and 10% of any additional value of the assets recovered for the clients, or the amount of charges made for time expended, whichever is greater.
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> * * *

The attorney-client agreement also provided that "[a]ny party hereto may terminate this agreement upon reasonable advance notice." However, termination of the attorney-client agreement "will not dispel [Clients'] obligation to pay for all work done prior to the end of the attorney-client relationship."

Although the attorneys had a verbal agreement how they would split the fee among themselves, the client agreement did not state how they would split the fee and the attorneys did not disclose this to the clients during their representation.

Over the course of one year and seven months, the attorneys represented the clients in several jurisdictions, spending in excess of 3,100 hours of attorney and paralegal time. After negotiations with opposing party closed the gap between the parties considerably, the clients terminated the representation and two months later, entered into a settlement that was close to the one negotiated by these attorneys.

After the original attorneys sued to recover attorney fees relying on a theory of *quantum meruit,* the clients moved for summary judgment. They argued, among other things, that their attorney-client agreement violated Rule 1.5(e) of Illinois Rules of Professional Conduct, because the attorneys failed to specify in the agreement how they would divide the expected contingency fee. Therefore, the attorneys were not entitled to collect attorneys' fees.

The original attorneys argued that Rule 1.5(e) is not applicable to a claim in *quantum meruit* and that a violation of Rule 1.5(e) does not warrant a nondisciplinary remedy such as barring recovery for the reasonable value of legal services they provided to the clients.

Rule 1.5(e) provides:

> A division of a fee between lawyers who are not in the same firm may be made only if:
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> (1) the division is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
> (3) the total fee is reasonable.

Ill. R. Prof'l Conduct (2010) R. 1.5(e).

The trial court denied the motion for summary judgment, finding that the violation of Rule 1.5(e) was not egregious and did not prejudice the clients. The trial court ruled that the attorneys were entitled to an award in *quantum meruit* for $1,692,390.60. It calculated the award by using the formula in the contingency fee client agreement "15% of the first $10,000,000 and 10% of any additional value of the assets recovered for the clients". The court then added expenses and subtracted the $500,000 fee paid to the subsequent attorneys.

> [W]hen determining whether an attorney is entitled to recover for its services in *quantum meruit*, Illinois courts recognize a distinction between an attorney-client agreement that is unenforceable because it contains an illegal term or fails to include a legally required term, versus one that is void as against public policy because the subject of the agreement is prohibited by law.

In calculating the amount of the fee, the circuit court noted that, although the attorney-client agreement was unenforceable due to the clients' termination notice, and despite the violation of Rule 1.5(e), the contingency fee structure contained therein could serve as a basis for calculating the amount of the award.

On appeal by the clients, the First District found the trial court erred by awarding a *quantum meruit* award amount equal to a negotiated contingency fee in a contract that violated Rule 1.5(e). The First District ruled that strict compliance with Rule 1.5 is mandatory and, therefore, the attorney-client agreement was void *ab initio*.

The First District remanded the case to the trial court to determine an appropriate attorney fee based on the reasonable value of attorneys' services without relying on the formula in a contingency fee provision that violated Rule 1.5(e).

The Illinois Supreme court, however, overruled the First District. The Supreme Court explained that, when determining whether an attorney is entitled to recover for its services in *quantum meruit*, Illinois courts recognize a distinction between an attorney-client agreement that is unenforceable because it contains an illegal term or fails to include a legally required term, versus one that is void as against public policy because the subject of the agreement is prohibited by law.

The Supreme Court found that the agreement in this case was merely unenforceable and not void as against public policy.

The Court reasoned that the purpose of Rule 1.5's disclosure requirement for fee-sharing arrangements was to preserve a client's right to be represented by an attorney of his or her choosing. The Court noted that, in this case, the clients were aware that the attorneys would jointly represent them and that both would be fully responsible for their case. In fact, both of these attorneys and their respective firms were named in the attorney-client agreement.

The Supreme Court further wrote that while Rule 1.5(e) requires written disclosure to the clients, it does not require provisions addressing the existence of a fee-splitting agreement or how the fees are to be divided to be included in the attorney-client agreement itself.

The Court also found that, while Rule 1.5(e) indicates that failure to abide by these requirements renders a fee splitting agreement unenforceable, it does not indicate that any related attorney client agreement is likewise unenforceable. For these reasons, the Illinois Supreme Court found that the attorney-client agreement in this case was valid on its face and the attorneys' failure to enter into a fee-splitting agreement in compliance with Rule 1.5(e) did not render the attorney-client agreement void ab initio as violative of public policy but, rather, rendered the agreement unenforceable, making quantum meruit recovery a matter of the circuit court's discretion.

The Illinois Supreme Court affirmed the circuit court's determination of the amount of the award and reversed the First District on this point.

Andrew W. Levenfeld and Associates, Ltd. v. O'Brien, 2024 IL 129599.

First District Finds that the Former Prosecutor Could Not Assert Attorney-Client Privilege Over His Communications with Attorney in the Prosecutor's Office Because the Privilege Belongs to the Prosecutor's Office, Not to the Prosecutor Personally

In *People v. Truenko and Horvat*, a criminal defendant was tried twice in the 1980's and tried a third time in 2020. During the second trial, the State introduced testimony of a jailhouse informant who claimed defendant confessed to the crime. This same testimony was also introduced by the prosecution during the third trial. By then, the jailhouse informant had left the United States and proved so elusive that he was presumed dead. During the third trial, the court deemed the jailhouse informant unavailable and, over defense's objection, read his prior testimony into evidence.

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Defense attorneys sought to subpoena the file of the lead prosecutor from the second trial and compel him to testify as a witness. They argued that the documents in the prosecutor's file could be exculpatory because they could cast doubt on the propriety of the lead prosecutor's dealings with the informant during the second trial and undermine the credibility of the jailhouse informant.

The prosecutor's office assigned one of its attorneys to respond to the subpoena for the former lead prosecutor's file. That lawyer conferred with the former lead prosecutor about responding to the subpoena and participated with other attorneys in a witness preparation session over Zoom before the former lead prosecutor took the stand to testify as a witness during the third trial.

During the examination by defense counsel, the former lead prosecutor revealed for the first time that, although the jailhouse informant was presumed dead, he knew that the informant was alive, continued to stay in touch with him, was the godfather to his daughter, and received an e-mail from the informant a few days earlier.

The case against the defendant in the third trial was dismissed with prejudice, and the prosecutor's office fired the lead prosecutor from the second trial and brought criminal charges against him. The State contended that the former lead prosecutor failed to disclose his relationship with the informant and withheld information about informant's whereabouts from the defense despite knowing that the informant could not be located by the defense and that his credibility was at issue in the trial.

During the trial of the former lead prosecutor, the State sought to introduce testimony from the attorney who assisted in responding to the file subpoena to establish that they discussed the issue of the jailhouse informant with the former lead prosecutor. The trial court found that, at a certain point, an attorney-client privilege arose between the attorney working on the response to the subpoena and the former lead prosecutor. The trial court found that from the former lead prosecutor's perspective at the time, it reasonably appeared that the attorney working on the response to the subpoena represented him in connection with the witness subpoena and excluded from evidence certain communications between them. The State filed this interlocutory appeal of this decision.

The First District overruled the trial court finding that, even if the attorney working on the response to the subpoena represented the former lead prosecutor in connection with the subpoena, that representation was limited, as a matter of law, to the former lead prosecutor's official capacity.

The First District noted that, pursuant to 55 ILCS 5/3-9005(a)(4), an assistant state attorney could only represent the former lead prosecutor in that former lead prosecutor's official capacity.

The appellate court reasoned that the key question was not whether the communications in questions were privileged, but who held that privilege—who was the client? Relying in part on comments to Ill. R. Prof'l Conduct R. 1.13, it decided that the privilege belonged to the prosecutor's office, not the former lead prosecutor personally. The prosecutor's office had affirmatively waived the privilege.

The First District further wrote that the former lead prosecutor was not entitled to a personal lawyer at taxpayer expense under 55 ILCS 5/3-9005(a)(4). The court believed that, as a government official conducting public business, the former lead prosecutor was entitled to an official lawyer, one whose ultimate obligation was to serve the public interest and uphold the law. The court empathized that by limiting assistant state attorneys to official-capacity representation, with a privilege that runs to and is controlled by the relevant government entity, this statute helps ensure that assistant state attorneys, as government lawyers, serve the interests of the public, not the personal interests of individual officials.

People v. Truenko and Horvat, 2024 IL App (1st) 232333.

First District Finds Crime-Fraud Exception to the Attorney-Client Privilege Inapplicable in a Defamation Case

In *McDonald v. Wagenmaker*, after a church fired its pastor and the pastor initiated arbitration, the church hired a law firm to look into its corporate structure and finances. The law firm sent a summary report of its preliminary findings to the board of the church. This summary was critical of the former pastor and accused him, inter alia, of misusing the church's financial resources for improper financial benefit.

The church posted on its website the summary along with a letter from accountants hired by the law firm summarizing the findings of the forensic analysis of the purported financial irregularities. On the same day, two of the church elders read a statement to the congregation summarizing the report from the law firm. The church also posted on its website the findings of its investigation and its reasons for terminating the pastor nine months earlier.

In response, the pastor sued the law firm and accountants. The pastor alleged that the statement by the elders to the congregation included intentionally false and salacious details not included in the published versions of the report from the law firm and the letter from the accountants. He also alleged that the law firm helped draft the statement on the church's website. He alleged that the law firm and the accountants conspired to defame him to help the church gain an advantage in the arbitration.

During discovery, the pastor subpoenaed the law firm as well as another law firm that represented the church during the arbitration, seeking communications among them, the church and the accountants. The law firms moved to quash the subpoenas and declined to produce certain communications, claiming attorney-client privilege. The pastor filed a motion to compel, arguing, in part, that the crime-fraud exception to the attorney-client privilege applied.

After finding the crime-fraud exception could apply, the trial court addressed "whether plaintiff has made a showing sufficient to justify an in-camera inspection of certain documents." The court did not hold an evidentiary hearing but found that the pastor met his burden based on his pleadings. After reviewing the communications in camera, the trial court concluded that the attorney-client privilege had been waived.

The judge found that the law firms obtained permission from the accountants to publish materials that were required to be kept confidential during the initial engagement of the accountants. The court also determined that the lawyers provided the church with advice on a way to potentially avoid liability for defamation, not by avoiding defamation, but by looking to an ecclesiastical privilege that would have excused what otherwise would have been wrongful.

The trial court granted the motion by the law firms for a "friendly" order of contempt and the law firms appealed. The Illinois Appellate Court First District reversed the trial court. It found that the court erred in ordering in-camera review because it relied solely on the pastor's allegations and did not conduct an evidentiary hearing. Additionally, the First District addressed the question of whether the crime-fraud exception was applicable. The appellate court noted that the pastor alleged that the church and its attorneys conducted a public smear campaign to publicize false and defamatory information about him to his former congregation and the wider Evangelical Christian community and that the church's attorneys delayed responding to his arbitration demand until after the publication of the defamatory statements to gain an advantage in the arbitration.

The First District reasoned that, even if the pastor's allegations were true, the law firm's conduct was not fraudulent or akin to fraud, as it was not intended to induce the pastor to act, nor did the pastor rely on the truth of the statements. The appellate court stressed that the pastor alleged traditional defamation claims, not fraud, and presented no evidence showing that the church sought advice from its attorneys with the intent to defame him.

The First District believed that extending the crime-fraud exception to claims like the pastor's would risk deterring clients from seeking legal advice, chilling lawyers from giving advice, and eroding the attorney-client privilege's protection of legitimate communications.

McDonald v. Wagenmaker, 2024 IL App (1st) 230089.

Seventh Circuit Affirms Sanctions Against a Lawyer for Allegedly Assaulting Opposing Counsel during a Deposition and Misleading the Court About it, but Vacates Sanctions Against that Lawyer's Co-Counsels

In *Vega v. Chicago Board of Education*, three separate attorneys represented the plaintiffs. Two of them deposed one of the witnesses in the case. During this multi-hour deposition, the defendants' attorney raised constant and numerous objections.

After the deposition concluded, one of the attorneys for the plaintiffs swore at the defendants' attorney and asked her what her problem was. The defendants' attorney reentered the room and asked the court reporter to go back on the record. The plaintiffs' attorney responded, "No, this is personal," and moved in the defendants' attorney's direction.

The defendants' attorney claimed that, after this, the plaintiffs' attorney physically assaulted her by pushing her out of the room. The plaintiffs' attorney contended that she was simply trying to leave the room and made "unintentional contact" with the defendants' attorney on her way out. The defendants' attorney called the police, pressed charges against the plaintiffs' attorney, filed a complaint with the Illinois Attorney Registration and Disciplinary Commission, and brought the incident to the attention of the district court in the underlying case characterizing the plaintiffs' attorney's conduct as "criminal assault and battery."

The district court gave the plaintiffs' counsel an opportunity to respond to the allegation in a future brief with respect to a motion to compel the deposition of a different witness. The plaintiffs' attorney took the opportunity to accuse the defendants' attorney of violating the rules of professional conduct and biasing the court by presenting the assault allegation, but did not directly address the defendants' attorney's allegations of what happened during the deposition.

During another hearing a few months later, the court asked about the status of the ARDC and police investigations into the incident, prohibited the plaintiffs' and defendants' attorneys in question from

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participating in further depositions in the case, and scheduled an evidentiary hearing about the alleged assault.

Although the plaintiffs' attorney in question initially expressed her intention to testify at the hearing, she retained counsel who later explained to the court that she would not testify. The court did hear the testimony of the other attorney for the plaintiffs who was in the room, the defendants' attorney, the deponent, and the court reporter.

Once all the evidence had been presented, the court informed the parties that they would be allowed to present any additional information in post-hearing briefs. In her post hearing brief, the defendants' attorney deferred to the court on "the appropriate sanctions for [the plaintiffs' attorneys] conduct and misrepresentations," but requested "the attorney's fees and costs incurred as the direct result of [the plaintiffs' attorney's] conduct." The plaintiffs' attorney submitted a brief in support of the discovery sanctions against the defendants' attorney and the defendants, but did not respond to the plaintiffs' attorneys' request for sanctions.

The court found that "[the plaintiffs' attorney] swore at [the defendants' attorney] and then intentionally pushed her with force sufficient to knock her backwards." It also found the plaintiffs' attorney's description of the contact as "unintentional" to be false and vexatious.

As a sanction for her verbal and physical attack on the defendants' attorney, the court prohibited the plaintiffs' attorney from participating as an attorney in the case and found that "Plaintiffs' counsel must reimburse Defendants for the reasonable attorney fees and costs they incurred in litigating the incident." The court overruled the plaintiffs' counsel's arguments that they did not have adequate notice of the sanctions, the sanctions were not warranted, and the court should have abstained from issuing the sanctions given the ongoing ARDC investigation.

On appeal, the Seventh Circuit Court of Appeals found that the plaintiffs' attorney accused of assault had sufficient notice of the potential sanctions against her and the court did not abuse its discretion in issuing the sanctions against her under the circumstances. The appellate court relied on the fact that the district court found that the plaintiffs' attorney engaged in bad faith when she lied to the court about how the alleged assault transpired. It stressed that the court found that "the only reason the court and the parties engaged in the exercise of getting to the bottom of what happened after the deposition was plaintiffs' counsels' representations" about what happened. The appellate court agreed with the district court that the plaintiffs' attorney must have known that her representations were false because she was a direct participant in the confrontation.

The Seventh Circuit also found that the district court did not need to hold off on its sanctions during the ARDC's investigation because the district court's sanction for the plaintiffs' attorney's conduct in the federal case would have no effect (let alone an adverse effect) on the ARDC's decision of whether and how to discipline the plaintiffs' attorney. The Seventh Circuit held that the mere fact that the district court and the ARDC could run parallel investigations and each impose sanctions for the attorney's behavior is not enough to require abstention of the court.

The order of the district court, however, entered sanctions against "Plaintiffs' counsel". Besides the attorney accused of assault, two other attorneys represented the plaintiffs. The Seventh Circuit vacated the sanctions against the other two attorneys. The Seventh Circuit reasoned that the actions of the two other attorneys were the subject of no hearing; defendants did not seek sanctions against them; and they had no chance to respond to or defend themselves against sanctions. The appellate court found that these two attorneys had no notice that they were at risk of being sanctioned or the reason they might be sanctioned and the sanction order itself could not provide the requisite notice. The Seventh Circuit further believed that the sanction order stated no basis for sanctioning these two attorneys.

Vega v. Chicago Board of Education, 109 F. 4th 948 (7th Cir. 2024).

Fourth District Finds that Defense Counsel had a *Per Se* Conflict of Interest Due to Simultaneous Involvement of the Same Prosecutor's Office and Judge in Both Defense Counsel's and Defense Counsel's Client's Cases

In *People v. Harris*, an attorney representing a criminal defendant accused of first degree murder had herself already pled guilty to a felony forgery charge brought by the same prosecutor's office involved with prosecuting her client. The judge who presided over the client's trial was the same judge who had accepted the attorney's plea in her own case and sentenced her to a two-year term of second-chance probation, which the attorney was still serving under this judge's direct supervision while representing the client.

After the jury found the defendant guilty, this defense attorney moved for a new trial. Six days after the judge indicated that he was required to grant the defendant a new trial, the prosecutor's office filed a petition to revoke the defense attorney's probation.

The defense attorney filed a motion to substitute the judge for cause prior to the second trial. Another judge received assignment to consider the motion. The attorney then amended the motion, disclosing that the prosecutor's office had filed a petition to revoke her probation. The lawyer stated in the motion that, at best, this development compromised her relationship in this particular court, and that her ability to fully represent her client seemed compromised. She filed a motion to withdraw. After the judge stated that he did not have the authority to consider the attorney's motion to withdraw, the attorney withdrew the motion to substitute the judge.

After being convicted at the second trial, the defendant appealed, arguing, *inter alia*, that defense counsel provided ineffective assistance.

The Illinois Appellate Court Fourth District found that the defense attorney had a *per se* conflict of interest in this case because the same prosecutor's office was attempting to revoke her second-chance felony probation while simultaneously prosecuting her client. The appellate court further believed that the record did not reflect that the client was ever admonished regarding the existence and significance of the conflict and, as a result, the record did not reflect that the client made a knowing waiver of her attorney's per se conflict of interest.

The Fourth District believed that a reasonable explanation for the attorney's withdrawal of the motion to substitute the judge in her client's case for cause was that, after the State filed the petition to revoke her probation, she thought proceeding on the motion could negatively impact her own personal situation in the revocation proceedings.

The Fourth District further noted that, when the case was transferred back to the trial judge, the attorney asked to withdraw, but did not inform the judge that she was on probation, that he would likely be presiding over the probation revocation proceedings in her own criminal case, and that if he revoked her probation, he would be resentencing her on a felony charge.

The appellate court further determined that it was difficult to find an explanation for defense counsel's failure to take several actions on defendant's behalf during the sentencing hearing, except for a possible personal desire to neither anger nor aggravate the prosecutor's office or the judge.

The appellate court stressed that it is important for attorneys and trial courts not to be reluctant about addressing potential conflicts at the earliest opportunity. When a potential conflict is disclosed, the trial court then has the opportunity to admonish the defendant of the potential conflict and the significance of the potential conflict. The defendant can then either make a knowing waiver of his right to conflict-free counsel or use a different attorney. Early identification of conflicts fosters transparency in the judicial system, increases the public's confidence in the legal system, and preserves judicial resources.

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People v. Harris, 2024 IL App (4th) 230269.

Seventh Circuit, Due to Lack of Standing, Lets Stand Sanction against Attorney for Directly Contacting Parties Represented by Counsel and Knowingly Making False Statement to the Court

In *Mullen v. Butler*, the district court approved a class action notice and advised the class members that they could opt out by a deadline a few months later. Neither the parties nor their attorneys could communicate with putative class members.

Defendants then proceeded to contact prospective class members urging them to opt out of the class. Defendants communicated with prospective class members at least ten times. Defendants' employee also e-mailed prospective class members both through a mass e-mail and individual e-mail to specific class members. In response to one of the class members writing that he decided to opt out, the defendants' employee replied to him thanking him for the show of support. The defendants' employee then forwarded his mass email to class members and forwarded his communications with this specific class member to defendants' attorney as part of a longer email string.

After the plaintiff and the class counsel notified the district court that they suspected the defendants were improperly communicating with the class members and encouraging them to opt out, the court held a status hearing. During this hearing, the court asked the attorney for defendants if defendants were communicating with the class members "in a way other than the only way that it's

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appropriate to do that, which is through the notice." The attorney for defendants responded with unequivocal denial. She represented that defendants received inquiries from class members and responded that they could not talk about it.

Despite this response, both the defendants and their attorney continued to communicate with class members about the suit. Defendant's office administrator emailed two class members with instructions for opting out of the class. One of the defendants responded to a class member's inquiry about opting out. After receiving what appeared to be a forwarded email conversation about opting out of the class, the attorney for defendants directly contacted a class member involved in the exchange.

After the plaintiff submitted to the court copies of defendants' e-mails and text messages with the class members regarding opting out of the suit, including an e-mail forwarded to the defendants' attorney, the court held another status hearing. At the hearing the court asked the attorney for defendants if she wanted to amend her statement during the first hearing that defendants did not discuss the lawsuit with the class members. The defendants' attorney then acknowledged her receipt of a copy of defendants' employee's mass email to class members, and conceded the email was an inappropriate communication. The attorney explained her contrary statement at the first hearing by asserting that she had received that mass email as part of an email conversation with more than one message and that she "did not see" the improper message.

The plaintiff moved for sanctions against both defendants and their counsel for improperly interfering with the class notice process.

The district court entered monetary sanctions against defendants. The court also ruled that defendants' attorney's direct email to a class member violated ABA MODEL RULE OF PROFESSIONAL CONDUCT Rule 4.2, which prohibits attorneys from directly contacting parties they know are represented by counsel. The court also found that this attorney's statement to the court at the first status hearing violated ABA MODEL RULE OF PROFESSIONAL CONDUCT Rule 3.3, which prohibits attorneys from knowingly making false statements to the court.

The court believed that this attorney's characterization of the defendants' statements to class members contained a significant falsehood. It further found that the attorney "took deliberate action to avoid confirming a high probability of wrongdoing" which "amounts to willful blindness" that was "quite serious" and "prejudiced the class." Taking into account the attorney's "relative lack of practice experience," the district court imposed a non-monetary sanction. The court reprimanded that attorney for her false statement to the court and directed her to complete twice the required amount of professional responsibility hours for her next continuing legal education cycle imposed by the state bar.

Defendants appealed sanctions both against them and their attorney to the Seventh Circuit Court of Appeals. On appeal, defendants contended that sanctions against their attorney were not appropriate because she acted in good faith, and she did not knowingly or intentionally violate the rules of ethics.

The Seventh Circuit, however, held that it did not have jurisdiction to address this issue because the defendants, and not the attorney herself, appealed the sanctions. The Seventh Circuit followed the Seventh Circuit case law that a party cannot appeal a sanction against the party's attorney and let the sanctions against the attorney stand.

Mullen v. Butler, 91 F.4th 1243 (7th Cir. 2024).

First District Finds that Defendant's Trial Counsel was Ineffective for Failing to Move to Suppress Client's Arrest

In *People v. Page*, the police officer, while monitoring a remote police observation device camera, observed the defendant four miles away placing an object into his jacket pocket. Although the object appeared for a split second, the police officer believed it to be a firearm magazine. According to this officer, when he and two other policemen arrived to investigate, the defendant was standing next to two cars and threw something into one of the cars before attempting to flee on foot. Police could not determine what the defendant threw into the car. An officer recovered a firearm from the front passenger seat of the other car. Police did not recover the keys to that car and the officer did not observe the defendant drive that car. The defendant had two prior felony convictions.

The only witness for the prosecution at trial was the police officer who observed the defendant place the suspicious object into the jacket pocket and who later recovered the gun from the car. The defense rested without presenting any witnesses or evidence.

Before ruling, the trial judge requested a replay of portions of the remote camera through which the police officer first spotted the defendant and videos from the police body cameras. The prosecution also introduced into evidence the photograph from the remote camera that allegedly showed a gun magazine protruding from the defendant's jacket when the officer spotted him on the camera.

Although the police officer who testified that the object in the photo was the handle or magazine portion of the firearm, the trial judge stated in his ruling that he could not tell from the photo what the object was and it could possibly be keys in the defendant's

While the appellate court did not determine if the motion to suppress would have been successful, it did find that a motion to suppress had a reasonable probability of success, and trial counsel should have pursued it. The First District also took note of the fact that during the trial, defense counsel's opening statement was four sentences. It found that defense counsel was ineffective.

hands. The court, however, believed that in the video, defendant's hands moved in a manner in which one's hands would move when you're racking a firearm.

The trial court found the defendant guilty of being an armed habitual criminal. On appeal, the State argued that the police officer had probable cause to arrest the defendent and search the car (where the gun was found) after the officer observed, via remote camera, the defendent put the extended gun magazine into his jacket.

The Illinois Appellate Court First District, however, disagreed. The appellate court noted that the trial judge after watching the footage could not tell what the defendant had in his pocket, but, instead, concluded that defendant's conduct in the footage was consistent with someone possessing a firearm. The appellate court further noticed that possession of a firearm and large capacity magazine was legal in the jurisdiction. The First District observed that the police officer would have needed to be familiar with the defendant's criminal history (which he was not) to have suspected that the defendant's possession of the firearm was illegal.

While the appellate court did not determine if the motion to suppress would have been successful, it did find that a motion to suppress had a reasonable probability of success, and trial counsel should have pursued it. The First District also took note of the fact that during the trial, defense counsel's opening statement was four sentences. It found that defense counsel was ineffective.

People v. Page, 2024 IL App (1st) 220830.

Fourth District Rejects Defendants Claims that Defense Counsel was Ineffective and Finds Counsel's Actions were a Matter of Sound Trial Strategy

In *People v. Thornton*, the defendant appealed his conviction for first degree murder, arguing among other things, that the trial court erred in not appointing him a new counsel, despite what defendant claimed was ineffective assistance by his attorney.

Defendant claimed four separate acts or omission of his counsel constituted ineffective assistance. He claimed that counsel's failure to call his cousin as an alibi witness was one such act. However, defendant's counsel asserted to the trial court that he met with the witness and the witness['] recollection was weak and problematic and that the witness had a felony conviction. Counsel stated that it was a strategy decision not to call him. The trial court also noted that the case against defendant was largely circumstantial and defendant's counsel calling this witness would have distracted from defendant's stronger defenses.

Defendant further claimed that his counsel's second omission was failure to contact a confidential witness who, according to discovery documents, allegedly heard somebody other than defendant admitting to killing the victim. Defendant's counsel, however, stated to the trial court that this was a tactical decision as he did not want to get into "into a battle of the [confidential sources]." He wanted to make the State's confidential source look bad. He stated he did not want to assert to the trier of fact that they should not believe the State's confidential source but they should believe the defendant's confidential source's hearsay statement.

The third omission the defendant claimed was the failure to address a letter from one of the witnesses against the defendant. The letter allegedly stated that the witness lied about the defendant, knew the defendant was innocent, and that the witness was on drugs at the time he gave the statement to the police. Defendant's counsel, however, stated to the trial court that the letter was not an affidavit and based upon his experience this type of evidence would not have been effective and would have distracted from defendant's theory and strategy.

The defendant claimed that the last omission of his counsel was that counsel allegedly failed to adopt his pro se filings that contained affidavits from two witnesses, who averred they heard two witnesses against the defendant say that the defendant was innocent. The trial court, however, represented that defendant's counsel actually filed detailed post-trial motions which addressed the legal issues in which

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counsel believed had a legal basis. The trial court found that the matters raised in defendant's pro se filings were either addressed by counsel or legally immaterial.

The trial court found that all four alleged omissions pertained to defense counsel's sound trial strategy and did not amount to ineffective assistance. The Illinois Appellate Court Fourth District agreed and affirmed the decision of the trial court.

People v. Thornton, 2024 IL App (4th) 220798.

Seventh Circuit Holds that a Non-Lawyer Cannot Represent a Limited Liability Company

In *AsymaDesign LLC v. CBK & Assocs. Mgmt., Inc.*, a landlord evicted from its location at the mall a limited liability company operating a virtual reality ride after that company stopped paying rent. The limited liability company subsequently dissolved.

Almost four years later, the former owner of the limited liability company filed a discrimination suit against the landlord for not allowing the company extra time to pay rent. The district court dismissed the suit because the limited liability company, and not its owner, held the lease and was the real party in interest. The former owner of the limited liability company then filed an amended complaint adding the limited liability company as a plaintiff. The district court dismissed the amended complaint because the limited liability company had not even begun to litigate until five years after its dissolution, exceeding the benchmark allowed by Illinois law.

The limited liability company appealed. It was the sole appellant named in the appeal. The only person who signed the notice of appeal was the former owner of the corporation, who was not a lawyer. The landlord objected to the lack of an attorney's signature on the notice of the appeal.

The only argument the limited liability company offered in response was that, under Illinois corporate law, any person may represent a corporation.

The Seventh Circuit first noted that, as a non-lawyer, the former owner of the limited liability company could not represent the limited liability company or anyone other than himself. The Seventh Circuit relied on Fed. R. Civ. P. 11(a) which states "Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented."

The appellate court found three problems with the only response of the limited liability company on this point. First, an LLC is not a corporation (separate statutes apply to LLCs and corporations); second, the Illinois statutory reference did not supersede the norm that a member of the bar is needed to represent a corporation in court; and third, in the opinion of the court dispositive, federal rules govern the procedure for litigation in federal court.

> The Seventh Circuit Court of Appeals declared that it was publishing this opinion not just to make what it believed to be obvious points but also to urge all lawyers to read and follow Seventh Circuit's Practitioner's Handbook for Appeals (2020 ed.)

The Seventh Circuit Court of Appeals declared that it was publishing this opinion not just to make what it believed to be obvious points but also to urge all lawyers to read and follow Seventh Circuit's Practitioner's Handbook for Appeals (2020 ed.), which is available on the court's web site at https://www.ca7.uscourts.gov/rules-procedures/Handbook.pdf.

AsymaDesign LLC v. CBK & Assocs. Mgmt., Inc., 103 F.4th 1257 (7th Cir. 2024).

Northern District of Illinois Finds that Defendants' Investigation of the Plaintiff was Protected by Attorney-Client Privilege and that Defendants Did Not Waive the Privilege

In *Guster-Hines v. McDonald's USA, LLC*, two plaintiffs sued defendants for discriminatory practices against them. Defendants, with the consent of plaintiffs, placed both plaintiffs on paid leave of absence. Defendants hired outside counsel to investigate the legal risks associated with both plaintiffs.

Defendants claimed an attorney-client privilege with respect to the investigation into both plaintiffs. However, defendants intentionally waived the privilege over the investigation into one plaintiff, yet continued to assert it over the investigation into the second plaintiff. Defendants produced to plaintiffs a non-privileged memorandum authored by the attorney conducting the investigation of the second plaintiff summarizing some of the conclusion of the investigation.

The memo recommended that, if the second plaintiff returns to the office, she should "be placed in a non-operator facing role." The memo also stated that the second plaintiff was a good leader and that her return would not have a significantly negative impact on the employee morale and work environment. The investigation into the first plaintiff concluded that her return to the office would cause a tremendous disruption and create legal risks for defendants. Defendants terminated the first plaintiff after the investigation.

Plaintiffs objected to the decision of the magistrate judge to deny their motion to override the defendants' assertion of attorney-client privilege over the investigation of the second plaintiff, to allow plaintiffs to depose the attorney conducting the investigation and to obtain that attorney's handwritten notes.

Plaintiffs argued to the district court that the investigation of the second plaintiff was not privileged because it was undertaken for business purposes rather than to provide legal advice. They further claimed that, even if the investigation was privileged, defendants waived that privilege by both producing the memo summarizing the investigation of the second plaintiff and by allowing discovery about the investigation of the first plaintiff. They also argued that the fairness doctrine compelled the court to allow discovery regarding the entirety of the investigation of the second plaintiff.

Plaintiffs argued that the investigation of the second plaintiff could not have been for a legal purpose and thus must have been for a business purpose because defendants failed to identify a specific and concrete legal risk that preceded the investigation. The district court, however, rejected that argument, relying on the authority that attorney-client privilege protects confidential communications between a lawyer and her client "[w]here legal advice *of any kind* is sought . . . from a professional legal advisor in [her] capacity as such." [emphasis in the original].

The district court also found that production of the memo summarizing the investigation did not amount to a waiver of the privilege because the parties agreed that the memo was not privileged and was not prepared for the purposes of providing legal advice.

The district court then rejected the plaintiffs' argument that disclosure of the investigation of the first plaintiff waived the privilege of the investigation of the second plaintiff because it was a "joint investigation."

Plaintiffs stressed that defendants' attorney conducted investigations into both plaintiffs, interviewed many of the same individuals for both investigations at the same time, and took notes regarding both plaintiffs in the same notepad.

The district court, however, found that defendant's attorney was separately investigating legal risks related to "*each* [p]laintiff." [emphasis in the original]. The court noted that the lawyer investigated both plaintiffs, prepared separate reports regarding both plaintiffs, and ultimately concluded that different actions were appropriate for each plaintiff. The court found that defendants were not selectively waiving privilege over discrete aspects of one investigation. The court concluded that the fact that both investigations were headed by the same person who took notes in the same notepad did not transform two distinct investigations into distinct individuals with distinct findings and outcomes into one joint investigation.

Finally, the court rejected plaintiffs' arguments based on the fairness doctrine because, in the opinion of the court, plaintiffs failed to explain how waiving privilege over the investigation of the first plaintiff, but not over the investigation of the second plaintiff, was in any way unfair.

The district court found that the magistrate judge did not clearly err in finding that the investigation of the second plaintiff was protected by attorney client privilege.

Guster-Hines v. McDonald's USA, LLC, 2024 WL 4476155 (N.D. Ill. 2024).

About the Author

Alex Belotserkovsky is an associate attorney at *HeplerBroom LLC*. He focuses his practice on trials involving complex litigation matters, including asbestos cases and toxic tort issues. Mr. Belotserkovsky earned his J.D. from Washington University School of Law in 2001. He has coached two Washington University Undergraduate Mock Trial Teams to nationals.