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Tackling Common Issues in a Residential Real Estate Transaction

BY STEPHANIE GARCES DONAT

Congratulations! That is the first word I often use to greet clients when they are selling or purchasing a residential property. You, as the attorney, begin working at the commencement of the contract once it is signed by the seller and the buyer. Your goal is to protect your clients' legal interests and rights, and ensure there is clear transfer of the property from seller to buyer.

In this article I will detail the importance of the attorney's role in any real estate transaction, practical tips to prepare for the closing, and how to handle common issues you will encounter.

First, the contract that is generally used in the Chicagoland area is the Multi Board

Continued on next page

Preparing for Adverse Fact Witness Depositions

BY BRUNO R. MARASSO

Introduction

"I only get one opportunity to talk to you, so this is going to take a while."

Whether I am deposing an at-fault driver in a rear-ender, a property manager in a slip-and-fall, or a professional in a malpractice case, I start off most depositions with these words. And it does take a while. The anguish of realizing I missed a question after closing out with, "Thanks, that's all I have," can feel devastating. While I have heard countless lawyers confess to missing something seemingly important in a deposition and then rationalize away what they missed as being immaterial, I never believe them. I don't think they ever really believe themselves. Perhaps this approach is better than my approach of kicking myself endlessly. I don't know. I'm not a mental health expert. But my point is the situation can be avoided.

Like many other negative outcomes in this calling, this one can be prevented by preparation. I will confess what I

Continued on page 3

Tackling Common Issues in a Residential Real Estate Transaction
1

Preparing for Adverse Fact Witness Depositions
1

An Introverted Look
5

The Effect of Hospital Advertisements and Consent Forms on an Apparent Agency Claim in Medical Malpractice
7

Eight Common Mistakes to Avoid When Writing Your Next Appellate Brief
8

***O'Neil*, *Hollywood*, and Their Calls for Legislative Action**
10

This Article 'Relates to' the U.S. Supreme Court's Recent Decision Regarding Specific Jurisdiction
11

Tackling Common Issues in a Residential Real Estate Transaction

CONTINUED FROM PAGE 1

Real Estate Contract 7.0. In Chicago, the Chicago Association of Realtors contract is also commonly used. There are a variety of other contracts used depending on the type of property being purchased and where in Illinois it is being purchased.

Nonetheless, the first thing you want to do is review the contract. Call the client to ensure that the contract that they signed has the terms that they agreed to including the purchase price, closing credits, the earnest money, also known as the "good faith deposit," closing date, and the items of personal property that are being purchased with the property such as the washer, dryer, or light fixtures, just to name a few. This helps avoid misunderstandings with your clients or with the other party.

After that you will want to review the tax bill of the property by visiting the local county treasurer's website where the property is located. It is important to determine if the property has tax exemptions and you will need the Permanent Index Number or "PIN" to do this. Tax exemptions are discounts on taxes that the county gives the homeowner. There are a number of exemptions available to a homeowner and the county's treasurer's online website where the property is located will have an explanation of each exemption. It is always worth explaining to a client, especially, if they are buying a property that has a senior exemption or veteran exemption, they may or may not qualify for these exemptions. This is because when the buyer does not qualify for certain exemptions, their tax bill will increase. It is important to discuss this so the client can plan accordingly for their increased tax bill.

Speaking of taxes, it is equally important to review the local assessor's office website to determine if the property has an increased assessed value which indicates taxes are going to increase, sometimes significantly. Flagging this information for your clients eliminates any misrepresentations on any potential increase in the tax bill. Many clients have never purchased or sold a home before and rely on their attorney to explain the taxes on the property.

The next thing you will do is mark your calendar. For every real estate transaction, attorneys are responsible for monitoring the deadlines in the contract. For instance, you will want to mark the calendar for the attorney review deadline, which is the deadline for the buyer or seller to make modifications to the contract and make inspection requests.

If you represent the buyer purchasing a home with a mortgage, you will need to mark your calendar and monitor the deadline for the buyer's mortgage contingency. Missing these deadlines can have significant legal consequences for your client including waiving their ability to modify the contract or make inspection requests, or barring the buyer from having an opportunity to receive their earnest money back in the event they do not qualify for their mortgage.

Conversely, if you represent the seller, you will monitor the deadlines for if the seller has a home sale contingency, which means the seller has entered another contract to purchase a home that is contingent on the sale of their current home. These deadlines must be tracked and if needed, timely extensions can be sent to opposing counsel, in the event the seller cannot sell the home within the specified time in the contract.

Additionally, the attorney review modification letter should be sent out in a timely fashion. If you cannot meet the deadline, it is imperative to send out an extension of the attorney review period. If you miss a deadline, or have any issues on the attorney review negotiations, never hesitate to call a colleague. Also, calling opposing counsel to give them advanced notice that you will be sending over an extension on the attorney review

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is recommended in the event the deadline was missed so that the other attorney can understand the reason for your extension.

Furthermore, disagreements among the parties during the attorney review period is fairly common. Emotions can run high. As you know, this is one of the biggest financial transaction that many buyers and sellers will engage in.

If you cannot reach an agreement on the modifications, calling the attorney for the other party is always a practical thing to do to talk through the issues. Once you have reached a mutual agreement with the other party pertaining to the attorney review period, it is considered closed. A closed attorney review period is a big part of the transaction and means that neither party can terminate the contract without a legal basis.

Prior to closing, you should also take the time to carefully analyze and interpret the survey of the property. The survey will disclose where the property lines lie, easements, encroachments, building lines, and potential property line disputes. The survey is normally one that has been conducted within the last 6 months.

Another valuable tip is to make a call to the village or the city where the property is located, to inquire if any real estate transfer tax stamp requirements exist. Depending on the city, the transfer stamps are vital to the success of your closing because the title companies may need the village or city transfer stamps in order to finalize the closing. Calling the city or village weeks before the closing is the best method to handle this process as it takes time to understand and comply with any potential requirements. This also avoids closing delays which are a common issue that arises.

A few common additional practice tips include:

1. Do not accept a verbal "clear to close," instead ask for the lender to provide it in writing.
2. Try returning calls within 24 hours to address issues or concerns.
3. Review condo association documents to check for special assessments or upcoming projects that will be costly to a buyer or that the seller must pay off before closing. These documents will also disclose any rules/regulations that might conflict with a buyer's use of the property.
4. Evaluate all documents for closing including the deed, bill of sale, affidavit of title, closing disclosure, and survey. Carefully review the final numbers at closing to verify accuracy and explain it carefully to the client so they understand where their money is going or what money they are receiving.
5. Review the title commitment and require that all liens, homeowner association requirements, and city requirements be cleared.
6. Educate your clients on wire fraud by requiring them to verbally verify the title company's wiring instructions before they wire money for the closing. This will prevent your client falling victim to wire fraud, which is prevalent in real estate transactions.

Furthermore, understanding the anticipated legal issues in any real estate transaction and giving yourself sufficient time to tackle them before closing, will save you the stress. This will also ensure you have a smooth and successful closing. The more prepared you are for your real estate closing, the better the closing will be!■

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Preparing for Adverse Fact Witness Depositions

CONTINUED FROM PAGE 1

propose below is not terribly cerebral or groundbreaking but as I enter my tenth year of practice, I still find it both helpful and enjoyable to hear different approaches and frameworks to doing the things we have to do day in and day out. I once asked a great defense counsel how his day was going and he shrugged, smiled, and said, "Same day, different caption." Sometimes the repetition of all this comforting. Sometimes it's not.

My preferred framework has four steps:

1. Review what you have and compile exhibits.
2. Review the law and determine your case's potential pitfalls.
3. Answer the question: Why am I taking this deposition?
4. Craft an outline.

Review What You Have and Compile Exhibits

By the time you are taking your first deposition in the case, a lot is already done. Review everything in the file carefully, to the point that you know the details and facts like the back of your hand.

You will have completed a pre-litigation investigation and compiled reports, witness statements, photographs, and other documents. There will be basic pleadings comprised of the operative complaint; the defendant's answer and affirmative defenses; the plaintiff's reply, and depending on the case's complexity, counterclaims, cross-claims, and third-party claims for contribution and the respective answers, affirmative defenses, and replies. Reviewing who is admitting and denying what will narrow the issues you need to address in your deposition.

Written discovery should be completed before the depositions. The parties' answers to interrogatories, responses to request for production, and trial witness disclosures will provide you guidance on

what questions or documents you need to follow up on with each witness in your deposition. For every deposition you take, review and keep the witness disclosures handy. Although oftentimes these are stock boilerplate disclosures, they may be helpful to you. You will have to decide.

Before you take your first deposition in the case, it is generally best practice to mark all the exhibits that you intend to use throughout the life of oral discovery and eventually at trial. This requires more thought than simply putting numbered exhibit stickers on documents produced in responses to requests for production. Exhibits to contemplate marking and using in a personal injury case, for example, include:

- Traffic crash report / police report / incident report;
- Opposing party's answers to interrogatories;
- Opposing party's production responses (best if each production item is separated out);
- Photographs, maps, and diagrams retrieved from public sources;
- Photographs, maps, and diagrams you generated; and
- Pleadings (more on this later).

Being overly-inclusive may be beneficial. Once you go through the exercise of marking and introducing the exhibits in your first deposition, the subsequent depositions will proceed more smoothly as you reference what everyone already has seen. It allows for consistency among the depositions. It will make your life easier when responding to motions, preparing for trial, or handling an appeal if you must.

Review the Law and Determine Your Case's Potential Pitfalls

You should have done so already, but if not, now is a great time to ask yourself the following questions based on what you know:

- Which issues are ripe for a 2-619 motion to dismiss?
- Which issues look like they will be heading for a determination on summary judgment?
- What needs to be developed so I can meet (or block my opponent from meeting) the burden of proof at trial?

These are the concepts that will be developed by all parties in the deposition. If the deposition is your notice, you want to address the questions first, framing them in a way that works best for your case in chief.

Start by reviewing the jury instructions. What are the issue instructions for your subject matter? In other words – what do you have to prove? Review the Notes on Use and Comments, and read the cases cited in the Comments as well. Then see how cases recently citing those cases have interpreted them. What do the 23(b) decisions say? In doing this exercise, you will know the way the appellate court is trending, which facts are most important to the justices, and what you need to find out during the deposition to best help your client.

Answer the Question: Why Am I Taking This Witness's Deposition?

Hopefully you are not just issuing deposition notices for every witness disclosed and figuring it out later. If you are deposing a witness in a case, you need identify what your goals are. I recommend writing out versions of the following questions and actually writing out answers to focus your thinking:

- What facts about the occurrence do I anticipate this witness will have?
- What facts or opinions do I anticipate this witness will have that impact the legal issues?
- What facts or opinions does my expert need from this witness to form opinions?
- How will this witness's testimony advance my opponents' goals and how can I neutralize that?
- How will this witness's testimony advance my client's goals and how do I get that information?
- If this is not the right person to ask issue-determinative questions, will this witness know who is?

Craft an Outline

I have seen defense attorneys across the entire spectrum of skill and preparation take competent and thorough depositions with nothing but a blank notepad in front of them. God bless 'em. That's not for me. And if you are in the YLD, it probably is not best for you either.

Even if the facts are pretty much agreed upon and the law governing your case is straightforward, there is still something to gain from putting pen to paper and getting down your thoughts.

Sequencing of introducing exhibits to a witness is important. Sequencing of topics and difficult questions is important. Sequencing of the order in which you take depositions is important. There is no one-size-fits-all approach to how to handle sequencing of any of those things.

Sometimes a case screams for an out-the-gate question of, "So you caused this crash because you glanced at your phone, right?" Other times, you need to build to a tough admission-seeking question. Sometimes you must establish to the witness that you have the records from that day revealing the restaurant was understaffed because many called in sick on New Year's Day, the restaurant was overwhelmed by customers searching for avocado toast and mimosas, and it did not have enough people to check on that sink that had been leaking in the bathroom, letting water pool for hours on end causing your client to slip and fall.

When to ask certain things is not something you want to just wing based on your gut feeling when you are being bombarded with new information.

The record to date will tell you the story. Your knowledge of the law will instruct you on how the opposing attorney is going to have prepared his witness. Your contemplation of this witness as a person involved in the very thing that led to litigation will guide your instincts. Taken together, and in putting pen to paper, you can formulate a plan on which topics to bring up, when to approach each one, and how to form each question.

Eventually, you will reach a point where you can certainly get away with a bullet point list of topics, with only the key issue-determinative questions written out. Until then, write out every question you intend to

ask until you are comfortable crafting brief, dense, impactful questions on-the-spot. And when you get there, please write me an email explaining how to do it.

Here is a list of categories you'll want to cover during the deposition, which you can use to outline your written questions:

Introduction

- Background on witness
- Background on case
- Pre-Occurrence
- Occurrence
- Post-Occurrence
- Conversations

Conclusion

Skill is important. A little luck is helpful. But, ultimately, if you are prepared, you will find yourself honing your craft, building a skill, and, somehow, getting luckier and luckier with the testimony you elicit and the record you create. ■

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An Introverted Look

BY TRENT CAMERON

Looking back to before the pandemic, my social life would likely be considered more nerdy/dorky than many others. Rather than scheduling happy hours with friends, I scheduled evening board game nights. Instead of attending local bar association events, I went to a weekly Dungeons and Dragons game. When I wasn't attending these nightly events in a friend's basement, I could be found in my own home playing board games with my girlfriend, playing computer games, or in the living room reading a book. If you really want to examine my "social" life you'd find that it was mostly made up of long periods of times gazing at colorful pieces of cardboard, rolling dice, and/or imagining myself as other people. I LOVED IT!

Part of the reason I enjoy these activities is that they are thought provoking and I enjoy strategy. Another reason is that I am an introvert. Not a total recluse, never see the light introvert, but an introvert nevertheless. Being an introvert or extrovert is a gradient or sliding scale. Most of my friends are introverts to some extent as well. Certain members of these groups are somewhat talkative while others quiet. While a board game is technically a social interaction, the majority of a board game is played either looking at the board or thinking of strategy in your head. This means that the normal draining effect from social interaction is mitigated allowing for longer social exchanges.

My girlfriend is very much the opposite of me. She is an extrovert. She loves parties, music, cake, talking to people, groups, and all the things that are traditionally considered fun. Just thinking about it is giving me a headache. Generally, we schedule our weekday activities apart, with her attending running groups or book clubs with friends, while I disappear with my friends or by myself. On weekends, we plan adventures together or with friends as a group. Together, our relationship is fantastic, she pulls me out of my shell to interact with people and I help her de-compress/de-stress when she overextends her schedule.

The reason for this self-examination is a series of conversations I had with my girlfriend throughout the pandemic. The first of such happened in June of 2020. At the time of this conversation, my girlfriend and I were in quarantine due to a possible positive contact and mandated to stay inside our home for fourteen days. After the first seven days, my girlfriend was going a little stir crazy with only me to interact with, and I was going a little stir crazy with my girlfriend trying to talk to me while I was trying to be alone. At one point, she made the statement that our quarantine was much easier for me, because I was an introvert. She said the pandemic was easier for me, because I could just be alone and be fine. "Introverts have it easier right now." Her point was that as an extrovert she was unable to reach out for her social needs. I am of course paraphrasing, and my girlfriend and I had a very interesting conversation lasting about 15-20 minutes on the topic. By the end of the conversation, I actually agreed with her, that introverts had an advantage over extroverts. And every few months the conversation would come back and we would talk about it again, each time coming to much the same conclusion.

Now that we are a year into the pandemic there have been multiple medical studies about the effects of the pandemic on the mental state of people, with a basis on social habits. While the general idea has been that introverts have it easier right now, the studies show that may not actually be true. Across all levels of people, there has been a higher level of stress during the pandemic. But introverts are more likely to continue to withdraw within themselves and repress their stressors. This is likely because introverts are less likely to reach out for social interaction with others. In addition, when other people do reach out to introverts for social interaction those introverts are much more likely to make

excuses to skip or outright ignore any social invitations. This leads to even higher levels of mental illness or substance abuse among introvert populations when compared to extrovert populations. I myself saw this in my own friend group as well. When the pandemic hit and everyone was forced into their own homes, a small group of my friends and I found a way to play board games online, but some of our friends extracted themselves from the group. They started to withdraw and became completely depressed. We wouldn't hear from them for weeks or even months.

So, what does being an introvert or playing board games have to do with the practice of law? The legal profession has been plagued with an increased level of mental illness and substance abuse for an untold number of years. This is due to a combination of factors, which includes the nature and stress associated with our type of work. The COVID pandemic hasn't helped that stress and for those of our profession who are struggling with stress, mental illness, or substance abuse, the pandemic has likely increased these stressors. I postulate that if introverts are a group at risk, so too is the legal profession. Perhaps we should take the time to reach out to our bar members. Try to be more aware of each other. Host an after-work gathering by zoom or while social distancing. Or sit down and play a board game (if that is what you like to do).■

Trent Cameron is an assistant state's attorney in the Madison County State's Attorney Office and is the chief of the Child Support Division. He sits on the board of directors of the Illinois Family Support Enforcement Association (IFSEA) and the Illinois Child Support Advisory Committee (CSAC).

The Effect of Hospital Advertisements and Consent Forms on an Apparent Agency Claim in Medical Malpractice

BY BLAIR KELTNER

It is well settled law in Illinois that a hospital may be liable for the negligence of a non-employee physician providing treatment at the hospital, unless the patient knew or should have known that the physician was not an employee of the hospital. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill.2d 511 (1993). To succeed on a claim of apparent agency, a Plaintiff must establish:

1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; 2) where the acts of the agent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and 3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with the ordinary care and prudence.

Id. at 525.

The first two elements of this test establish that where a hospital "holds out" a non-employee physician as its agent, the hospital can be held liable for his or her alleged acts or omissions. Plaintiffs typically point to hospital advertisements, name tags, lab coats, and websites to establish that a hospital held out a Defendant physician as its employee or agent.

Recently, the second district appellate court addressed whether hospital advertising campaigns that welcome a physician to the medical staff create the appearance of an employee-employer relationship, and, if so, whether a consent form is enough to overcome the appearance of such a relationship. *Prutton v. Baumgart et al.*, 2020 IL App (2d) 190346.

In *Prutton*, the Plaintiff alleged medical negligence against an OBGYN during the delivery of an infant. The Plaintiff claimed that the Hospital was liable for the injuries based on a theory of apparent agency. The trial court granted the Hospital's motion for summary judgment holding that the OBGYN was not an apparent agent of the Hospital.

On appeal, the court upheld summary judgment in favor of the Hospital. However, the court also found that if viewed in isolation, the Hospital advertisements, some of which specifically mentioned the physician by name and included her photograph, could create a question of material fact as to whether an employer-employee relationship existed between the doctor and Hospital. The advertisements welcomed the OBGYN to the Hospital staff, mentioned her background, and included the Hospital's name, and in some cases, its logo. The advertisements did not directly state that the OBGYN was an independent contractor, although they stated that she was a private physician affiliated with Northern Illinois Fertility.

Despite the Hospital's advertisements, the court found that the consent forms signed by the Plaintiff prior to her delivery specifically informed the patient of the OBGYN's status as an independent contractor. One consent form signed by the Plaintiff included a section titled "Physician Services," which stated in bold that, "Physicians providing care are independent contractors and are not employees or agents of KCH/VWCH." A second consent form for obstetrical delivery included a subsection that provided, "I understand that physicians who participate in the procedure (for example: surgeon, assistants, anesthesiologist, obstetrician, pathologist, and the like) are independent practitioners and are not employees or agents of Kishwaukee Community Hospital." The Plaintiff initialed and signed the consent form indicating she had reviewed the subsection pertaining to independent contractors. Although the OBGYN was not specifically mentioned in the consent forms, the court held that the consent forms clearly and unambiguously informed the Plaintiff that the physicians at the Hospital were independent contractors.

The second district's decision highlights the factors that a court may consider in determining whether an apparent agency relationship exists between a hospital and physician. Although hospital advertisements of non-employee physicians can create the appearance of agency, an unambiguous consent form that clearly asserts a physician's status as an independent contractor can minimize exposure under an apparent agency theory of liability.■

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Eight Common Mistakes to Avoid When Writing Your Next Appellate Brief

BY PHILLIP G. PALMER, JR.

As a law clerk constantly reviewing appellate briefs, I see it all—the good, the bad, and the ugly. Frankly, that should not come as a surprise considering how seldom some attorneys have the opportunity to handle appeals, especially newer attorneys. Prior to taking my position as a law clerk, I worked in private practice for four years. During that period of time, I would estimate I handled less than ten appeals. Due to the monetary expense and limited probability for success, appeals are not regularly pursued. Therefore, I wanted to share the list below to highlight some of the most common mistakes I regularly see attorneys make when authoring appellate court briefs. Hopefully, after a review of the list below, you can avoid "the bad" and "the ugly," and firmly cement your next appellate brief in "the good."

Not following the rules.

As noted above most attorneys do not write appellate briefs every day, or even on a regular basis for that matter. After you have filed your appeal, you should take time to review the Illinois Supreme Court Rules and your appellate court district's local rules if you are not familiar with them. These will outline all of the important information regarding appellate briefs (the deadlines, the required page lengths, the format and required content, proper citation, etc.). The Supreme Court Rules and local rules can be easily found on the Illinois courts website (www.illinoiscourts.gov). Also, though it is intended to act as a guide for pro-se appellate litigants, there is a helpful guide to the relevant appellate practice rules on the Illinois Legal Aid website called "Guide for Appeals to the Illinois Appellate Court for Self-Represented Litigants" which is published by the Illinois Supreme Court Commission on Access to Justice. (www.illinoislegalaid.org).

Forgetting your audience.

It is crucial that when writing your brief, you keep in mind that you are speaking to a panel of justices and their law clerks. Your brief is not an opening or closing argument to a jury. Thus, the language and tone of the brief should reflect this fact and focus on the analytical aspects of the case. Emotional appeals or arguments will not be nearly as effective as they might be with a juror and often will undermine more technical and analytically strong arguments that are not properly emphasized.

The same is true for the opposite side of the spectrum. Simply because you are speaking to justices and their law clerks, do not assume they are as familiar with the legal issues or technical aspects of your case as you are. Appellate court justices handle all types of cases, so it is impossible for them to be abreast of every new legal development in every area of the law. Make sure you fully articulate your positions and the applicable law in your brief, especially emphasize any new developments which may impact the case. Then thoroughly explain how the relevant law actually applies to the facts in your case. This step can be overlooked because attorneys expect a judge to be able to complete the analysis and reach the same conclusions that the attorney has. While the judge reviewing your case is capable of completing the analysis, a brief is more persuasive if that step is completed and articulated properly in your brief. Further, a full analysis avoids any chance for confusion on the part of the court. Keep in mind this may be the tenth brief the justice has read that day and he or she will greatly appreciate not having to tie together loose ends contained within your brief.

Recycling an old brief.

Unfortunately, many attorneys use previously written briefs as a template for the current brief he or she is drafting. This practice often leads to a myriad of problems. I have personally reviewed briefs where the attorney has failed to change the names of previous clients to the names of the parties actually involved in the current case. This is a dead giveaway that the attorney has directly copied portions of a previous brief and incorporated them into the new brief. It is imperative that you give each brief a clean slate. This allows you to better organize and frame the issues resulting in a piece of writing that is more easily followed and understood. A clean slate also protects you from citing outdated law or relying on overruled precedent because you copied the rules section from a previous brief believing the information to still be accurate without adequately reviewing it.

Additionally, the same can be said for simply resubmitting the briefs, or portions thereof, used at the trial level for the briefs in your appeal. Those briefs rarely focus on the proper issues, or, at the very least, they are not properly framed for the appellate court. As a result, using them runs the risk of your brief failing to clearly articulate the arguments necessary to be successful on appeal.

Failing to properly focus the issues.

This one may seem obvious but it is something regularly seen in appellate briefs. Generally, an appeal only contains one or two legitimate issues or viable arguments. These should be the focus of your brief. This is where having significant experience in appellate practice can really make a difference. Determining which issues are the strongest and which have the greatest probability of success on appeal is not always easy or self-evident. That is why it is important to take the time to deeply consider this aspect of your appeal before you begin drafting your brief. I recommend

speaking to a couple of other attorneys in your firm to see which issues resonate with them the most. If you are all in agreement on which issues those are, you are probably on the right track.

Also, keep in mind that there are different ways in which an attorney can fail to properly focus the issues of his or her case. The first is the most obvious, you include too many issues. Many of which have little merit. Many attorneys include every possible issue or error that occurred at the trial court level. However, this does not usually achieve the goal of bolstering your case. In fact, the opposite occurs because these weak arguments dilute the focus of your brief which ends up weaking the brief as a whole. The second way one can fail to focus an issue is to fail to properly narrow a large issue or fail to tailor the issue in the context of an appeal. Many attorneys bring a case on appeal with an intent to relitigate or retry the case before a new court. It is crucial that when handling an appeal, the attorney remains cognizant that he or she is not before the court to relitigate the merits of the case, but to appeal a particular issue or error that occurred at the trial court level. Arguing the merits of the case or simply making the same arguments presented at the trial court level loses sight of the manner in which appeals are reviewed by the appellate court.

Omitting or misconstruing the facts.

Omitting or misconstruing facts is a sure-fire way to destroy your credibility and can be devastating to your case. There is no doubt that it is important to articulate the facts, whether through organization or emphasis, in a manner that benefits your client's case. However, you cannot only state the facts that support your case. Omitting facts, or misconstruing and exaggerating facts, sends a very clear message to the court: These facts are devastating to my case and if considered by the court probably result in my client losing his or her appeal. Thus, omitting or misconstruing facts not only results in lost credibility, but it also results in the court's attention being drawn to those facts which you were trying to avoid. Based upon my experience, it is always better practice to include facts that the other party is certain to discuss and/or rely upon. You do not have to emphasize those facts, but include them, and then in your analysis explain why those facts should not be the focus of the court and turn the court's attention to the facts that you believe are more relevant to the issue or issues at hand.

Neglecting the standard of review.

The standard of review applicable to an appeal is one of the most important aspects of your case. Unfortunately, I see attorneys gloss over this vital section of their brief regularly. First and foremost, make certain that you have properly stated the standard of review. If there is a dispute as to the which standard is applicable be sure to thoroughly address this issue and provide the court with citations to legal authority supporting your position. Second, do not quickly state the standard of review only to never to speak of the standard again in the brief. Be sure to relate how the standard of review applies to your case and how it allows for the court to grant the relief you are seeking. Last, be certain that the standard of review actually allows the appellate court to take the action you have asked the court to take. Often in appeals the relief that is allowed is limited, so do not lose sight of the limitations the standard of review may place on the court when it is deciding your appeal.

Submitting a brief that is too long.

Before I touch on this mistake, I want to first issue a word of caution. Though this is a common mistake I see in my practice, it is not a license to start submitting briefs that are only a few pages long. A brief that is too short can be a very serious problem. I can recall cases where I reviewed a short brief and felt I gained nothing of value from it or that it left me with more questions than answers. Briefs that are too short are as frustrating (if not, more frustrating) as a brief that is too long. However, here, I want to focus on briefs that are too long because they are much more common than ones that are too short. The most common reason the court gets briefs that are too long is because the brief writer has failed to properly focus the facts of the case, failed to properly focus the issues of the case, or failed to properly organize and edit the brief. Including too many irrelevant facts, cramming every conceivable issue into your brief, or failing to properly organize a brief so that you are repeating information or arguments multiple times is detrimental to your case. These things not only weaken your case, but they also exhaust the reader and lead to less retention of the pertinent information contained in your brief. So, when considering the length of your brief, the rule is to be thorough while also being concise.

Relying too heavily on oral argument.

Many attorneys place too much emphasis on oral argument. In fact, most appeals today are decided without oral argument at all. On occasion, I have reviewed cases where it appears the attorney fails to put their full effort into their brief, likely believing that he or she will have an opportunity to clarify or expand upon a particular issue or fact during oral argument. This is detrimental to the attorney's position in two ways. First, the justices who are reviewing the case read the briefs prior to oral arguments. Therefore, they often have already started forming impressions of the case before you get to utter a word in the courtroom. Second, if you fail to adequately address the relevant issues in your brief or submit a confusing statement of facts, you may have to spend the precious amount of time you are allotted during oral arguments attending to the defects of your brief. This could end up depriving you of an opportunity you otherwise would have had to reiterate your strongest arguments or respond to questions regarding the crucial legal analysis of your case. Therefore, when drafting your brief, be certain to put your full effort into the process, make sure every necessary aspect is included and is written as clearly as possible so that oral arguments can be a time of productive advocacy instead of time spent clarifying information that could have already been effectively conveyed in your brief.■

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O'Neil, *Hollywood*, and Their Calls for Legislative Action

BY DANE C. NELSON

At the beginning of 2020, in the weeks before we learned what Zoom was or how to use it, Illinois' second district appellate court filed the *O'Neil v. Illinois Workers' Compensation Commission* opinion. 2020 IL App (2d) 190427WC. A workers' compensation case, regarding authorization of medical treatment, or lack thereof, and the resulting penalties and attorneys' fees, might not have caught many readers' attention. For workers' compensation practitioners, the case removed a tool from the Petitioner's toolbox. Broadly, the opinion decided whether penalties can be assessed against Respondents for unreasonable delays in the prospective authorization of treatment. *Id.*

Specifically, the court determined whether sections 16 and 19(l) of the Workers' Compensation Act ("the Act") (820 ILCS 305/16, 19(l) (West 2016)) allowed for penalties and attorneys' fees for delays considered unreasonable or vexatious in the authorization of medical treatment. *Id.* ¶ 1. The decision focused on the statutory construction of the relevant sections of the Act. *Id.* ¶ 18. The analysis began by recognizing that the purpose of statutory construction is to give effect to the legislature's intent and, in that pursuit, started with the plain and ordinary meaning of the Act's words. *Id.* ¶ 19. The court, relying on their earlier *Hollywood Casino* decision, noted that authorization does not appear in any of the sections regarding the assessment of penalties. *Id.* ¶ 21 (*quoting Hollywood Casino-Aurora, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (2d) 110426WC, ¶19).

The Hollywood Casino case also focused on whether the Commission could assess penalties and attorneys' fees for similar delays. *Hollywood*, 2012 IL App (2d) 110426WC. The petitioner in *Hollywood* requested penalties under section 19(k) of the Act. (820 ILCS 305/19(k) (West 2016)). *Id.* The opinion likewise revolved around the statutory construction of section 19(k). *Id.* ¶ 13. The court, as indicated above, found that the Act had no language to allow penalties or attorneys' fees to be assessed for unreasonable delays authorization. *Id.* ¶ 19. The court found that the relevant sections of the Act described delays in "payment" and "underpayment" of compensation, not authorization. *Id.* ¶ 15.

The Hollywood Casino decision held the Commission could not assess these penalties and attorneys' fees under sections 19(k) and 16 of the Act. *Id.* ¶ 20. Although coming down on the side of the Respondent, the court stated its awareness that many medical providers decline treatment without first receiving authorization. *Id.* ¶ 19. Awareness aside, the court directly stated, "it is the function of the legislature, not the judiciary to provide a penalty for employers that unreasonably or vexatiously delay or refuse to authorize necessary medical services…." *Id.*

The dissenting Justices Stewart and Holdridge characterized the majority's opinion as narrow and against the intention of the legislature. *Id.* The dissent stated the decision, "allows an employer to completely refuse medical services required by an injured worker and suffer no penalty." *Id.* ¶ 26. Justice Holdridge added in a separate dissent that the Act contains no language that would suggest the legislature did intend authorization to be distinct from the components of payment. *Id* ¶ 34. Justice Stewart felt that the majority denied the reality of authorizing medical treatment in workers' compensation and noted that delaying authorization for medical treatment is, in effect, delaying payment. *Id.* ¶ 23

The *O'Neil* decision heavily cited *Hollywood* and centered on the lack of the word "authorization" in sections 19(l) and 6 of the Act. 2020 IL App (2d) 190427 WC, ¶ 21. The court cited *Hollywood's* dictionary definition of the word "payment" and the reasoning that "authorization" is not included within that definition. *Id.* ¶ 21 (*citing Hollywood* 2012 IL App (2d) 110426WC). The decision held that penalties could not be assessed against an employer's unreasonable delays in the authorization of medical treatment. *Id.* ¶ 24. The court again called to the legislature stating, "while this result may seem harsh to claimant, it is the function of the legislature, not the judiciary, to provide a penalty for employers," that unreasonably delay authorization. *Id.* ¶ 22. The court went on to explain, "[w]hile we are not unsympathetic to claimant's concerns, such issues are best directed to the legislature. We are simply not at liberty to read into the statute any exceptions, limitations, or conditions the legislature did not intend." *Id.* ¶ 25.

In my opinion, *O'Neil* read out a condition the legislature intended. Although still relatively new to workers' compensation, I know practitioners have long used sections 16 and 19(k) and (l) of the Act to prevent Respondents from vexatiously delaying authorization of medical treatment. Without the ability to seek penalties for unreasonable delays in medical authorization, injured workers in Illinois will only wait longer, in pain and potentially exacerbating their conditions, for medical treatment deemed reasonable and necessary.

The dissent in *Hollywood* stated the majority's view was "contrary to the remedial purpose of the Act and the mandate to interpret the Act liberally so as to affect that purpose." 2012 IL App

(2d) 110426WC, ¶ 25 (*quoting Plantation Manufacturing Co. v. Industrial Comm'n,* 294 Ill. App. 3d 705, 710 (2d Dist. 1997)). I believe that was true then and is true now regarding *O'Neil*. Still, the majorities in both *O'Neil* and *Hollywood* recognized that their decisions would allow Respondents to refuse authorization with impunity. Understanding these consequences, they both directly call out to the legislature for clarification.

The Illinois legislature needs to answer.■

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This Article 'Relates to' the U.S. Supreme Court's Recent Decision Regarding Specific Jurisdiction

BY BRYCE PERSICHETTI

On March 25, 2021, the United States Supreme Court issued a decision in a products liability case, *Ford Motor Co. v. Montana Eighth Judicial District*, that may impact specific personal jurisdiction in all types of cases. 592 U. S. __ (2021) (slip opinion). *Ford* involved two personal injury lawsuits filed in Minnesota and Montana relating to car accidents involving Ford vehicles in those states. Slip Op. at 2. Ford admitted that it purposefully availed itself of the forum states, for example, via its extensive marketing and network of dealers. *Id*. at 3, 8. But, Ford argued that there was no specific jurisdiction because the plaintiffs' injuries did not "arise out of" its forum related activities. Specifically, Ford argued that there was no "causal link" between its forum related activities and the plaintiffs' injuries because the vehicles at issue were not purchased, designed, or manufactured in the forum states. *Id*. at 8.

The Court explained that its "most common formulation" of the test for specific jurisdiction is not limited to "arise out of," but instead is "arise out of *or relate to* the defendant's contacts with the forum." *Id*. (emphasis in original). The Court further elaborated that "the back half, after the 'or,' contemplates that some relationships will support jurisdiction without a causal showing." *Id*. The Court applied this language to Ford, and found that Ford's forum related activity "relates to" the car accidents at issue as Ford "had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those states." *Id*. at 12.

While the Court clarified that specific jurisdiction is not limited to strictly causal relationships, its emphasis on the "relates to" aspect may add significant confusion going forward. Justice Alito's concurrence expressed this concern, stating that: "Recognizing 'relate to' as an independent basis for specific jurisdiction risks needless complications. . . . Applying the phrase according to its terms is a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." Slip Op. Alito Concurrence at 4 (quotations omitted). Justice Alito instead suggested a "common-sense" approach based on a "causal" connection "in a broad sense of the concept." *Id*. at 3-4. And Justice Gorsuch similarly expressed concern with the ambiguous meaning of "relates to." Slip Op. Gorsuch Concurrence at 3. ("Where this leaves us is far from clear. For a case to 'relate to' the defendant's forum contacts, the majority says it is enough in an 'affiliation' or 'relationship' or 'connection' exists between them. . . but what does this assortment of nouns *mean*?" (emphasis in original)).

It may be that only situations like the one here, where the defendant's contacts are "systematic" with the forum, satisfy the "relates to" test. The Court stated that "relates to" "does not mean anything goes." *Id*. at 8. And the Court further elaborated that "[i]n the sphere of specific jurisdiction, the phrase 'relate to' incorporates real limits, as it must to adequately protect defendants foreign to a forum." *Id*. at 8-9. Of course, the Court did not provide any specific details regarding those "real limits." And the Court did not exactly clearly explain why it found jurisdiction improper in *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017) but proper in *Ford*. In *Bristol-Myers*, the Court found that California could not exercise jurisdiction over out of state plaintiffs in a class action related to the prescription drug Plavix. In that case, Bristol-Myers sold the same Plavix pills in California as it did to the out of state plaintiffs. In its *Ford* opinion, the Court explained that "[w]e found jurisdiction improper in *Bristol-Myers* because the forum State, and the defendant's activities there, lacked any connection to the plaintiffs' claims." Slip Op. at 16. Yet, the only differences appear to be that in *Ford* the plaintiffs were residents of and were

injured in the forum states. *Id.* at 17 ("Yes, Ford sold the specific products in other States, as *Bristol-Myers Squibb* had. But here, the plaintiffs are residents of the forum States.")

It will be interesting to follow how the seventh circuit and Illinois react to this decision. Illinois's long arm statute permits jurisdiction to the full extent permitted by the Constitution. *See Curry v. Revolution Labs., LLC*, 949 F.3d 385, 393 (7th Cir. 2020). Thus any Supreme Court case on personal jurisdiction is highly relevant in Illinois. *Curry*, which was decided last year omitted the phrase "or relates to" from its stated test for jurisdiction. Curry's test for specific jurisdiction was:

First, the defendant's contacts with the forum state must show that it "purposefully availed [itself] of the privilege of conducting business in the forum state or purposefully directed [its] activities at the state. Second, the plaintiff's alleged injury must have arisen out of the defendant's forum-related activities. And finally, any exercise of personal jurisdiction must comport with traditional notions of fair play and substantial justice.

Id. at 398 (quoting *Lexington Ins. Co. v. Hotai Ins. Co., Ltd.*, 938 F.3d 874, 878 (2019)). Yet, *Curry*, which was a trademark infringement case, later explained that the "proper exercise of specific jurisdiction also requires that the defendant's minimum contacts with the forum state be 'suit-related.'" *Id.* at 400. Yet, another recent seventh circuit case, *J.S.T. Corp. v. Foxconn Interconnect Tech. Ltd.*, 965 F.3d 571 (7th Cir. 2020), explicitly required the type of causal link that Ford argued was necessary. ("For personal jurisdiction to exist, though, there must be a causal relationship between the competitors' dealings in Illinois and the claims that J.S.T. has asserted against them. Because no such causal relationship exists, we affirm the judgment of the district court.") Given this, we may see more varying results as courts try to grapple with the United States Supreme Court's recent decision in *Ford* until the seventh circuit and the Illinois Supreme Court provide further guidance.■