FALL SEMINAR 2018

MONDAY, NOVEMBER 12, 2018
9:00 A.M. – 2:00 P.M

CHICAGO-KENT COLLEGE OF LAW
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AGENDA

8:30 - 8:50 a.m.	**Continental Breakfast & Networking**
8:50 - 9:00 a.m.	**Welcome and Introductions** Mona Naser, ILCBA President
9:00 – 10:00 a.m.	**Session One** **Case Law Update – What's New with the FDCPA & Beyond** Stacie E. Barhorst, *Kaplan, Papadakis & Gouornis, PC*
10:00 – 10:45 a.m.	**Session Two** **Understanding Financial Statements** Daniel A. Cotter, *Partner, Latimer LeVay Fyock LLC*
10:45 – 11:00 p.m.	**Break**
11:00 – 12:00 p.m.	**Session Three** **Recognizing, Understanding and Referring a Colleague in Need** Robin Belleau, *Executive Director, Illinois Lawyers' Assistance Program*
12:00 – 1:00 p.m.	**Lunch Presentation** **New Supreme Court Rule 280** Michael L. Starzec, *Partner, Blitt & Gaines PC*
1:00– 1:15 p.m.	**Break**
1:15 – 2:15 p.m.	**Session Four** **Hot Topics in Evictions and a View from the Bench** Robert Kahn, *Partner, Sanford Kahn, LLP* The Honorable Martin Moltz, *Associate Judge, Municipal Department for the Circuit Court of Cook County*

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SPEAKER BIOS

Stacie E. Barhorst, Kaplan, Papadakis & Gouornis, PC

Stacie Barhorst is an attorney focusing on litigation. For fourteen years, Ms. Barhorst has defended claims in federal and state courts brought under the FDCPA, FCRA, TILA and state consumer protection statutes. She is also an experienced appellate litigator, having represented clients in no less than 40 appeals in Illinois and Ohio. Stacie Barhorst frequently speaks to attorneys regarding the FDCPA and other issues relevant to the defense of debt collectors, including presentations to the Illinois Creditors Bar Association, the Association of Credit and Collection Professionals, and the Illinois Institute of Continuing Legal Education. Stacie is a member of the ISBA, the Illinois Creditors Bar Association, ACA, and the Ohio State Bar Association.

Robin Belleau, Executive Director, Illinois Lawyers' Assistance Program

Robin Belleau received her Juris Doctor with honors, from Northern Illinois University College of Law in 1995 and a Master's Degree in Counseling with honors from Northern Illinois University in 2006.

She practiced law for eight years before becoming and Licensed Clinical Professional Counselor. During her tenure in the law she was a DuPage County Senior Assistant Public Defender, a Kane Country State's Attorney, and then entered into private practice where she practiced criminal defense, real estate, & family law.

She has previously worked for Advocate Medical Group in Des Plaines, the F.A.I.R. Program, and most recently in the private practice with Todd & Lewis-Todd. She is experienced in conducting group and individual counseling, performing assessments, and providing case management services.

SPEAKER BIOS

Daniel A. Cotter, Partner, Latimer LeVay Fyock LLC

Daniel A. Cotter is a Partner at Latimer LeVay Fyock LLC. Dan focuses his practices in a variety of areas of corporate law and litigation, including insurance law, complex business disputes and counseling, employment law, corporate transactions, corporate governance and compliance, and cybersecurity and privacy law. His clients benefit from his diverse professional experience, which – in addition to his years serving as trusted outside counsel – includes positions as a corporate accountant and an in-house attorney.

Robert Kahn, Partner, Sanford Kahn, LLP

Robert Kahn is an attorney who has specialized in Landlord/Tenant Law since 1999. He is a graduate of Bradley University as well as Chicago-Kent Law School.

He is an associate of the law firm, Sanford Kahn, Ltd. which consists of seven attorneys all of who specialize in Landlord/Tenant Law. They represent many Property Management firms, Housing Cooperatives and not-for-profit corporations, as their eviction attorneys. Sanford Kahn, Ltd. files over four hundred Forcible Entry and Detainer Actions per month for Commercial, Industrial and Residential Properties and Subsidized Properties in six counties.

Robert has tried several jury trials and gives numerous lectures regarding landlord-tenant law as well as the Chicago Residential Landlord Tenant Ordinance and the Forcible Entry and Detainer statute.

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SPEAKER BIOS

The Honorable Martin Moltz, Associate Judge, Municipal Department for the Circuit Court of Cook County

Judge Martin Moltz started out in 1970 as an Assistant State's Attorney in Cook County where he worked for two and a half years. He then spent 35 years at the State Appellate Prosecutor's Office where he argued 1,700 cases before the Appellate and Supreme Courts and still holds the record for the highest number of cases argued in any reviewing court in the United States. He also served as Deputy Director of the Office, overseeing a large number of cases.

He became a Judge in 2007, and has sat in nearly every courtroom in the First Municipal District. He is currently Judge Wright's utility infielder, traveling to handle matters in various locations throughout the District.

Judge Moltz has served as Vice President of the Illinois Judge's Foundation, Member of the Illinois Judge's Association Executive Committee as well as on its Board of Directors, and Member of the Board of Directors for the Jewish Judge's Association. Judge Moltz served as President of The Decalogue Society of Lawyers, was on the Board of Managers of the Chicago Bar Association, the Board of Directors of the Appellate Lawyer's Association, the Board of Directors of PILI, and was a Member of the ISBA Criminal Justice Section Counsel.

Michael L. Starzec, Partner, Blitt & Gaines PC

Michael L. Starzec graduated from DePaul University's College of Law in 1995 with a Juris Doctorate and was sworn in as a member of the Illinois Bar in November of the same year. Prior to his legal training, he attended Northern Illinois University, receiving Bachelor of Arts degrees in History and Political Science in 1992.

He is a Partner with the law firm of Blitt and Gaines, P.C, having been with the firm since 1996. He is a member of the Federal Bar for the Northern District of Illinois, as well as being licensed to practice in Indiana (2006) and Wisconsin (2010). Professionally, he is Vice-President of the Illinois Creditors Bar Association, a member of NARCA as well as the Commercial Banking, Collections and Bankruptcy Law Section Council of the ISBA

His publication credits include Small Claims Collection, A Smart Guide (IICLE, 2011), The History of Credit in 4,000 Years or Less (Loyola Consumer Law Review, Fall, 2013) and Credit Card Litigation (IICLE, 2013). He co-authored NARCA's amicus brief in the Unifund v. Shah II appeal and argued successfully before the 7th Circuit Court of Appeals in the matter of Jackson v. Blitt and Gaines, P.C. which found wage garnishments were not actions against consumers under the FDCPA. Mr. Starzec has presented for the Illinois State Bar and the Illinois Creditors Bar on the issues relating to creditors rights and the representation of credit card issues and debt buyers.

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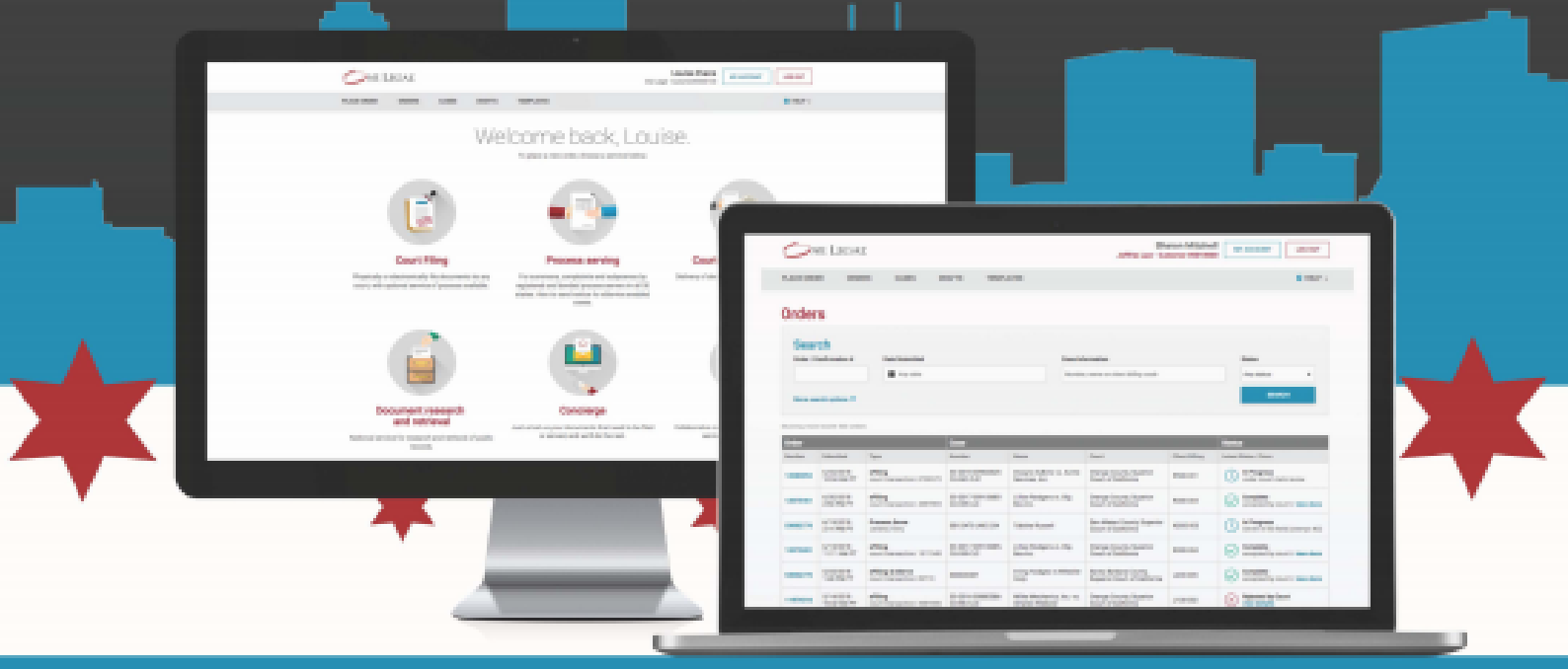

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SESSION ONE

Case Law Update – What's New with the FDCPA and Beyond

Stacie E. Barhorst

Kaplan, Papadakis & Gouornis, PC

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So You Want to Collect a Debt: FDCPA Case Law Update

Presented at the Illinois Creditors Bar Association
Fall Seminar
Chicago, Illinois
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Legal Disclaimer

This information is not intended to be legal advice and may not be used as legal advice. Legal advice must be tailored to the specific circumstances of each case. Every effort has been made to assure that this information is up-to-date as of the date of publication. It is not intended to be a full and exhaustive explanation of the law in any area, nor should it be used to replace the advice of your own legal counsel.

The views and opinions expressed by the presenters are those of the presenters and not those of the Illinois Creditors Bar Association.

You've Been Referred a Debt to Collect!

What do you do next?

A. Prepare a demand letter.

B. Prepare a complaint.

C. Either of the above.

D. Neither of the above.

You've Been Referred a Debt to Collect!

TRICK QUESTION!

The answer is D, neither of the above.

First you want to determine if you're acting as a "debt collector," as defined by 15 U.S.C. § 1692a(6), attempting to collect a consumer "debt," as defined by 15 U.S.C. § 1692a(5).

You Are Probably a Debt Collector

15 U.S.C. §1692a(6)

Attorneys Can be Debt Collectors

Heintz v. Jenkins, 514 U.S. 291 (1995) (holding a lawyer regularly engaged in consumer debt-collection litigation on behalf of creditor client is a debt collector).

Debt Buyers are Still Likely Debt Collectors

Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718 (2017); McKinney v. Cadleway Properties, Inc., 548 F.3d 496 (7th Cir. 2008) (finding a purchaser of a debt in default is a debt collector, even though it owns the debt and is collecting for itself).

Lessors are Only Debt Collectors in Illinois Courts in the 4th District

American Management Consultant, LLC v. Carter, 392 Ill. App. 3d 39, 915 N.E.2d 411 (4th App. Dist. 2009)(holding lessors are required to comply with the FDCPA in their efforts to collect past-due rent); but cf. Gaddy v. Wulf, 2010 WL 1882015 (N.D. Ill. May 11, 2010)(holding that a landlord attempting to collect his own debt is not a debt collector under the FDCPA).

Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718 (2017).

SCOTUS held unanimously that the debt buyer was not a "debt collector" under 15 U.S.C. § 1692a(6). The Act does not distinguish between originators of debts and purchasers of debts. Because the debt buyer collected debt it owed, it was not a debt collector.

SCOTUS did not answer whether the debt buyer could be held to be a "debt collector" under the FDCPA because it (1) it regularly seeks to collect for its own account but also because it regularly acts as a debt collectors for others or (2) because the debt buyer's principal purpose is the collection of debts.

Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718 (2017).

The Court denied the plaintiff summary judgment on whether the debt buyer's "principal purpose" is the collection of debts. McMahon v. LVNV Funding, LLC, 301 F. Supp. 3d 866, 883 (N.D. Ill. 2018) (Alonso, J.).

Granting the plaintiff summary judgment, finding the undisputed facts showed that the debt buyer's "principal purpose" is the collection of debts. Torres v. LVNV Funding, LLC, No. 16 C 6665, 2018 WL 1508535, at *1 (N.D. Ill. Mar. 27, 2018).

You Are Probably a Debt Collector

15 U.S.C. §1692a(6)

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

2 definitions of "debt collector":

- "principal purpose" is collection of debt
- "regularly collects or attempts to collect, directly or indirectly" debt

Schlaf v. Safeguard Property, LLC, 899 F.3d 459 (7th Cir. 2018).

A mortgage field servicing company ("FSC") provided services like lawn maintenance, winterizing properties, and occupancy inspections required by HUD. The FSC went to the plaintiff's property for a HUD occupancy inspection several times and left doorknob hangers each time instructing the occupant(s) to call the mortgage company. The plaintiff sued the FSC, claiming that it was a debt collector who violated the FDCPA, and that the doorknob hangers did not comply with the FDCPA.

The Seventh Circuit interpreted the plain language of 15 U.S.C. § 1692a(6), and held that the FSC did not did not engage in direct or indirect collection of debts, and was therefore not a "debt collector." While the communication (the doorknob hangers left by the FSC) technically arose out of the plaintiff's defaulted debt, they did not demand payment, reference the debt whatsoever (other than to list the mortgage company's name and number, or offer settlement. The doorknob hangers were left in the context of an occupancy inspection and not in the context of a collection letter or notice of default.

Schlaf v. Safeguard Property, LLC, 899 F.3d 459 (7th Cir. 2018).

BUT, the Seventh Circuit also recognized that, given the lack of case law on what constitutes "indirect" debt collection, that concept must be determined on a case-by-case basis.

Skibbe v. U.S. Bank Trust, N.A. for LSF9 Master Participation Trust, 309 F. Supp. 3d 569 (N.D. Ill. 2018).

A mortgage loan already in default was assigned from the originating bank to U.S. Bank. The plaintiffs sued U.S. Bank for violations of the FDCPA. The plaintiffs did not allege the primary purpose of U.S. Bank's business was debt collection and the plaintiff's motion to amend the complaint to make that allegation was denied. Therefore, the court granted U.S. Bank's motion for summary judgment and held it was not a debt collector, citing Santander.

Skibbe v. U.S. Bank Trust, N.A. for LSF9 Master Participation Trust, 309 F. Supp. 3d 569 (N.D. Ill. 2018).

The reason this case is interesting is because it finds that plaintiffs have to plead properly and specifically in order to argue that an entity is a debt collector under the "primary purpose" prong of § 1692a(5).

OK, So I'm a "Debt Collector." Am I Collecting a "Debt?"

15 U.S.C. § 1692a(5)

Question: Is the obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes?

The FDCPA "is limited in its reach 'to those obligations to pay arising from consensual transactions, where parties negotiate or contract for consumer-related goods or services." Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322, 1326 (7th Cir. 1997).

What Kinds of Obligations Are Not Regulated by the FDCPA?

Which of the following obligations are not considered "debts" under 15 U.S.C. § 1692a(5) of the FDCPA?:

A. Debts incurred by an individual in starting a business
B. Governmental fines
C. Escrow funds
D. Tort claims arising out of damage to property
E. All of the above

What Kinds of Debts Are Not Regulated by the FDCPA?

The answer is E, all of the above.

The below cases hold that the obligations at issue were not "debts" under 15 U.S.C. § 1692a(5):

- Commercial Debts: See, e.g., Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, LLC, 214 F.3d 872 (7th Cir. 2000).
- Governmental Fines: Gulley v. Markov & Krasny Associates, P.C., 2011 WL 1630670 (N.D. Ill. Apr. 26, 2011); but see Franklin v. Parking Revenue Recovery Servs., Inc., 832 F.3d 741 (7th Cir. 2016) (holding parking fines issued by a private company pursuant to a contract with a governmental entity were "debts" under 15 U.S.C. § 1692a(5)).
- Tort Damages: See, e.g., Williams v. Allocated Bus. Mgmt., LLC, No. 10 C 1711, 2010 WL 2330371, at *2 (N.D. Ill. June 8, 2010).

Practice Pointers

- When in doubt, comply. Comply with the FDCPA if you have a question as to whether the debt was incurred primarily for personal, family or household uses.

- Complying with the FDCPA does not constitute an admission that the FDCPA applies to the debt. Any claim that you complied with the FDCPA cannot serve to create an FDCPA claim where none exists. See, e.g. Prince v. NCO Financial Services, Inc., 346 F.Supp. 2d 744, 750-51 (E.D. Pa. 2004); Mabe v. G.C. Services, L.P., 1994 WL 6920, at *2 (W.D. Va. Jan 6, 1994).

Now What? I'm Ready to Start Collecting!

Once a debt collector has determined whether they are indeed collecting a consumer debt subject to the FDCPA, they can:

A. Send a demand letter/series of demand letters.

B. Immediately file suit.

C. Neither A nor B.

D. Both A and/or B.

Now What? I'm Ready to Start Collecting!

The answer is D.

You can send a demand letter or you can file suit or you can do both!

HOWEVER

There are pitfalls you must be aware of no matter which route you choose.

OK, I'm Going to Send A Demand Letter. What do I need to know?

When you send your very first demand letter to a consumer you must:

- Give the consumer the validation notice set forth in 15 U.S.C. 1692(g)(a). Use the exact language of that statute!
- Give the full mini-Miranda contained in 15 U.S.C. § 1692(e)(11).
- Decide whether you need to use one of the applicable Seventh Circuit safe harbors.

Seventh Circuit Safe Harbors

Safe Harbor for When Amount of Debt Changes

"As of the date of this letter, you owe $____ [the exact amount due]. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection. For further information, write the undersigned or call 1-800-[phone number]." Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, LLC, 214 F.3d 872, 876 (7th Cir. 2000).

The amount due only includes the amount of the obligation (principal, interest, late charges, other charges) not other penalties that may be imposed by statute (court costs, treble damages, attorneys' fees) unless or until those penalties have been reduced to judgment by the court. Veach v. Sheeks, 316 F.3d 690, 693 (7th Cir. 2000).

Safe Harbor for Filing Suit Within 30 Day Validation Period

"The law does not require me to wait until the end of the thirty-day period before suing you to collect this debt. If, however, you request proof of the debt or the name of the original creditor within the thirty-day period that begins with your receipt of this letter, the law requires me to suspend my efforts (through litigation or otherwise) to collect the debt until I mail the requested information to you." Bartlett v. Heibl, 128 F.3d 497, 501-02 (7th Cir. 1997).

Seventh Circuit Safe Harbors

Safe Harbor for Discounts Offered to Consumers if Paid by a Date Certain

The case provides safe harbor language for settlement offers communicated directly to consumers. The safe harbor applies to letters that state something to the effect of "we would like to offer you a unique opportunity to satisfy your outstanding debt" - - "a settlement of 25% off your current balance. So you only pay $_____ in one payment that must be received no later than ___ from the date of this letter." The safe harbor language that must be included in these kinds of letters is "We are not obligated to renew this offer."

Evory v. RJM Acquisitions Funding, LLC, 505 F.3d 769 (7th Cir. 2007).

Seventh Circuit Safe Harbors

Boucher v. Finance System of Green Bay, 880 F.3d 362 (7th Cir. 2018).

Debt collector sent the consumer a letter using the safe harbor, stating "[b]ecause of interest, late charges, and other charges that may vary from day to day, the amount on the day you pay may be greater." However, Wisconsin law prohibited the debt collector from imposing "late charges and other charges."

The Seventh Circuit held that the collection letter was materially false, misleading, and deceptive in violation of 15 U.S.C. § 1692e, because the letter falsely implied a possible outcome – "late charges and other charges"- that could not occur.

Seventh Circuit Safe Harbors

Boucher v. Finance System of Green Bay, 880 F.3d 362 (7th Cir. 2018).

This case is NOT the end of safe harbors. As the court recognized, the Miller case specifically stated that the information the debt collector furnishes must be accurate. The language of the Miller safe harbor can become misleading or inaccurate in cases like Boucher.

When using any of the Seventh Circuit's safe harbors, don't change the language of the safe harbor, simply delete language – like "late charges and other charges – that do not apply to the situation.

"IN WRITING"

Cadillo v. Stoneleigh Recovery Assocs., LLC, No. CV 17-7472-SDW-SCM, 2017 WL 6550486, at *1 (D.N.J. Dec. 21, 2017).

15 U.S.C. 1692g(a)(3) Text:

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector . . .

Text of Collection Letter:

Unless you notify this office within thirty (30) days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid.

"IN WRITING"

Cadillo v. Stoneleigh Recovery Assocs., LLC, No. CV 17-7472-SDW-SCM, 2017 WL 6550486 (D.N.J. Dec. 21, 2017).

In a number of recent cases, consumer attorneys are arguing that the validation language from the statute—the same language collectors have been using since the FDCPA was enacted in 1977—is now somehow unclear and confusing. Specifically, consumer attorneys argue that the first sentence of the validation notice (relating to disputes), which does not contain an "in writing" requirement, contradicts the second sentence of the notice, which does require a written request from the consumer to receive verification. Unfortunately, two Courts in New Jersey within the past year sided with the consumers in denying debt collectors' motions to dismiss on this issue.

Two similar cases on this issue are pending before the Third Circuit. See Borozan v. Fin. Recovery Servs., Inc., No. CV 17-11542(FLW), 2018 WL 3085217 (D.N.J. June 22, 2018); Ferrulli v. BCA Fin. Servs., Inc., No. 17CV13177KSHCLW, 2018 WL 4693968 (D.N.J. Sept. 28, 2018).

Me, after reading these “in writing” cases.

Communicating With the Consumer: Technology Edition

Lavallee v. Med-1 Solutions, LLC, case no. 1:15-cv-1922 (S.D. Ind. Sept. 29,. 2017).

Debt collector sent the initial § 1692g(a) notice to the consumer via an email address she provided to the hospital to which she was indebted. In order to receive the notice, however, the consumer would have needed to open the email, click a link, then accept the .pdf attached § 1692g(a) notice. The system kept track of whether the recipient actually opened the .pdf or not. The consumer did not open the attachment.

The court held the debt collector violated the FDCPA because it did not "send" the validation notice to the consumer as contemplated by the statute (regular mail). The debt collector also knew that the consumer did not open the attached .pdf from the records kept by the system.

Practice Tips

Your malpractice insurer may have a program offering to review your letters (and possibly other documents) for potential issues. If that's the case, absolutely take advantage of it.

It may also be worth it to have an experienced attorney conduct a compliance review of your letters. Average settlements in the N.D. Ill. hover around $5,000.00. It is likely you can have your letters reviewed for less than that. If that review avoids one lawsuit, it's paid for itself.

Communicating With the Consumer After the Initial Communication

In all subsequent written and oral communications with the consumer, the debt collector must state "this communication is from a debt collector." 15 U.S.C. § 1692e(11).

Communicating With the Consumer After the Initial Communication

True or False?

T/F: You have to state "This communication is from a debt collector" in communications with a consumer's attorney.

T/F: You should put "This communication is from a debt collector" in subsequent communications in non-pleadings like discovery requests.

Communicating With the Consumer's Attorney

- Any written notice sent to a consumer's lawyer must contain the information that would be required by the FDCPA if the notice were sent to the consumer directly. Id. at 773.
- In communications with a consumer's lawyer, a representation by a debt collector that would be unlikely to deceive a competent lawyer, even if he is not a consumer specialist in debt law, should not be actionable under the FDCPA. Id. at 775.
- A false claim of fact is actionable, whether made to the consumer directly or indirectly through his lawyer. Id. at 775.

Evory v. RJM Acquisitions Funding LLC, 505 F.3d 769 (7th Cir. 2007).

Communicating With the Consumer's Attorney

Grajny v. Credit Control, LLC, case no. 18-2719, 2018 WL 4905019 (N.D. Ill. Oct. 9, 2018).

Debt collector sent consumer a letter c/o her bankruptcy attorney. The letter demanded payment of a debt, even though the debt was discharged in bankruptcy, which the bankruptcy attorney clearly knew. Consumer asserted FDCPA violations, because the subject debt had been discharged.

The court dismissed the consumer's FDCPA claims. The standard is whether a competent attorney, even if she is not a specialist in consumer debt law, would be deceived by the letter by requesting payment for a debt that was discharged in bankruptcy. Because the consumer's bankruptcy attorney clearly knew the debt had been discharged, the letter could not violate the FDCPA.

Communicating With the Consumer's Attorney

Holcomb v. Freedman Anselmo Lindberg, 900 F. 3d 990 (7th Cir. 2018).

Consumer's attorney sent debt collector a letter informing the debt collector he represented consumer. Consumer's attorney appeared at two hearings. However, consumer's attorney had not filed an appearance. Debt collector filed a motion for default, and served the motion on the consumer directly. The consumer sued the debt collector for alleged violations of the FDCPA.

The court held that the consumer's attorney was not the "attorney of record," because a lawyer can only become attorney of record only by filing a written appearance or other pleading with the court. Because the consumer's attorney did not file an appearance in the collection action, he was not attorney of record, and Rule 11 required the debt collector to serve the motion directly on the consumer.

The 30 Day Validation Period

What can the debt collector not do during the 30 day period the consumer has to request verification of the debt?

A. The debt collector can continue collection efforts (e.g. filing a lawsuit).

B. The debt collector can send a follow up letter to the consumer offering settlement.

C. The debt collector can send a letter demanding the consumer make a payment by a specific date.

The 30 Day Validation Period

The answer is C.

Assuming no dispute or, if a consumer disputed, verification has already been sent, the debt collector can continue collection efforts (e.g. filing a lawsuit). Durkin v. Equifax Credit Check Services, Inc., 406 F.3d 410 (7th Cir. 2005).

Assuming no dispute or, if a consumer disputed, verification has already been sent, the debt collector can send a follow up letter to the consumer offering settlement. Olson v. Risk Management Alternatives, Inc., 366 F.3d 509 (7th Cir. 2004).

The debt collector cannot send a letter demanding the consumer make a payment by a certain date. Unexplained demands for payment within the 30 day validation period creates confusion by overshadowing the 1692g(a) validation notice. Olson v. Risk Management Alternatives, Inc., 366 F.3d 509 (7th Cir. 2004).

Disputes Within 30 Day Period and Verification
15 U.S.C. §1692g(b)

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

Communicating With the Consumer

Disputes Within 30 Day Period and Verification

15 U.S.C. §1692g(b)

- "[V]erification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed; the debt collector is not required to keep detailed files of the alleged debt." Chaudhry v. Gallerizzo, 174 F.3d 394, 406 (9th Cir. 1999). "There is no concomitant obligation to forward copies of bills or other detailed evidence of the debt." Id., 174 F.3d at 406.
- A debt collector has no duty to independently investigate the validity of the debt upon assignment of the debt by the creditor. Randolph v. IMBS, Inc., 368 F.3d 726, 729 (7th Cir. 2004) (debt collectors have no duty to independently verify "'information that may be in creditors' files -- for example, that debt has been paid or was bogus to start with").
- However, reliance on the creditor's representations must be reasonable. McC0llough v. Johnson, Rodenburg & Jauinger, LLC, 637 F.3d 939, 948-49 (9th Cir. 2011).
- "A consumer cannot circumvent the [FDCPA's] procedural device to dispute the validity of a debt by filing an action pursuant to §1692e on the sole basis that the debt is invalid." Carpenter v. RJM Acquisitions, LLC, 2011 WL 214838, at *3 (D. Minn. May 31, 2011).

Communicating With the Consumer

Cease and Desist Requests – 15 U.S.C. §1692c(c)

(c) **Ceasing communication** If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except—

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) **"Consumer" defined** For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

Communicating With the Consumer

Cease and Desist Requests – 15 U.S.C. §1692c(c)

Tinsley v. Integrity Financial Partners, Inc., 634 F.3d 416 (7th Cir. 2011).

- Debt collector's communication with consumer's lawyer after consumer stated he refused to pay and asked debt collector to cease and desist communications did not violate 15 U.S.C. §1692c(c). Id. at 416.
- Consumer argued that FDCPA's definition of communication as "the conveying of information regarding a debt directly or indirectly to any person through any medium" meant that anything a debt collector says to a debtor's lawyer is an indirect communication to a debtor. Id. at 417.
- Court held that §1692c as a whole permits debt collectors to communicate freely with consumers' lawyers. Id. 419; see also id. at pp. 417-19.
- Must still comply with Evory v. RJM Acquisitions Funding, LLC, 505 F.3d 769 (7th Cir. 2007) and provide consumer's lawyer with the same information that goes in notices sent directly to debtors. Id. at 419.

Communicating With the Consumer

Communications With Third Parties – 15 U.S.C. §1692c(b)

(b) **Communication with third parties** Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(d) **"Consumer" defined** For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

Communicating With the Consumer

Communications With a Consumer's Attorney – Practice Pointers

- Treat any communication with a consumer's attorney as a communication with the consumer.
- Review all your documents to ensure you are including the statement "this communication is from a debt collector" as required in all subsequent communications by §1692e(11), including letters and any document that is not a "formal pleading." 15 U.S.C. §1692e(11) does not require the statement "this communication is from a debt collector" to be placed on a "formal pleading."
- Conservative approach is to put language on all documents that are not considered a "pleading." "Pleading" is defined as a complaint, answer and reply to affirmative defenses or other pleadings "permitted as required by the Court." 735 ILCS 5/2-603.

I'm Going to Immediately File a Lawsuit. What do I need to know?

Consumer entered into an oral consumer contract in Cook County, now lives in Lake County, Indiana, and the consumer goods purchased by consumer are located in DuPage County. Do these facts change your answer as to where debt collector can file suit?

A. In Cook County.

B. In Lake County, Indiana.

C. In DuPage County.

D. In all three counties: Cook County, Lake County, Indiana, and/or DuPage County.

E. In Cook County and/or Lake County, Indiana only.

I'm Going to Immediately File a Lawsuit. What do I need to know?

First, you need to know where you can file suit. Consumer signed contract in Cook County, now lives in Lake County, Indiana, and the contract consumer signed has a choice of venue provision for DuPage County. In which of the following can the debt collector file suit?

A. In Cook County.

B. In Lake County, Indiana.

C. In DuPage County.

D. In all three counties: Cook County, Lake County, Indiana, and/or DuPage County.

E. In Cook County and/or Lake County, Indiana only.

F. I DIDN'T COME HERE TO RE-TAKE THE !@#$ BAR EXAM!

I'm Going to Immediately File a Lawsuit. What do I need to know?

After figuring out the correct venue, those who go straight to filing suit have a big FDCPA challenge in making sure that the consumer gets the notice required by 15 U.S.C. § 1692g(a).

- When's the initial communication? It's not the pleadings, and putting the § 1692g(a) on a summons can overshadow the consumer's right to dispute within 30 days.
- Is it the first time you see the consumer in court? If that's the case, do you go back to the office and send them a 15 U.S.C. § 1692g(a) letter within 5 days? Do you have a system to make sure that happens?

I'm Going to Immediately File a Lawsuit. What do I need to know?

Once you handle the issue of timely sending the 15 U.S.C. § 1692g(a) letter to the consumer, you are subject to the same communication rules as debt collectors who do send collection letters.

FDCPA Damages

15 U.S.C. §1692k(a)

- Single Plaintiff Damages: $1,000 plus any actual damages

- Class Action Damages: $1,000 per class representative plus class damages not to exceed 1% of the debt collector's net worth or $500,000 (whichever is less)

- Reasonable attorneys' fees and costs to the prevailing plaintiff(s)

Portalatin v. Blatt, Hasenmiller, Liebsker & Moore, 900 F.3d 377 (7th Cir. 2018).

The plaintiff sued two debt collectors and settled with one. The settlement agreement did not allocate specific funds to specific claims. The plaintiff and the second debt collector proceeded with the litigation.

The Seventh Circuit held that FDCPA statutory damages are $1,000 per case, not $1000 per defendant. The Seventh Circuit also held that the plaintiff's claims against the debt collector were moot.

Portalatin v. Blatt, Hasenmiller, Liebsker & Moore, 900 F.3d 377 (7th Cir. 2018).

The Seventh Circuit also held that the plaintiff's claims against the debt collector were moot.

"When a plaintiff wants to settle with one defendant but maintain a claim against another defendant, one possibility is for the plaintiff to allocate all the funds in such a way as to maximize recovery against the non-settling defendant, if this is possible in good faith. But here, Portalatin did not allocate the settlement funds (other than to say each party bears its own costs and attorney's fees). When she settled with Midland, she agreed to dismiss all her claims against Midland in exchange for $5,000, and Midland agreed to release Portalatin from all claims related to the underlying debt. She failed to allocate any particular funds to any particular claims. Indeed, far from allocating, the settlement agreement says it encompasses and resolves all claims arising out of the facts alleged in or capable of being alleged in this federal action. Therefore, Blatt is relieved of the burden of proving which funds satisfy which claims."

Skibbe v. U.S. Bank Trust, N.A. for LSF9 Master Participation Trust, 309 F. Supp. 3d 5695 (N.D. Ill. 2018) (citations omitted).

Law firm filed a third foreclosure against the plaintiffs. The plaintiff claimed the law firm violated the FDCPA because the filing of the third foreclosure violated the Illinois single filing rule.

"The Fair Debt Collection Practices Act was 'designed to deter wayward collection practices.' It is not a mechanism to remedy violations of state pleading requirements. In the same vein, the FDCPA is not 'a vehicle to litigate claims arising under the Illinois rules of civil procedure' or 'state-court procedural and evidentiary missteps.'

* * *

This is not to say that certain conduct in state court litigation cannot lead to a violation of FDCPA. However, cases that result in liability under the FDCPA based on state court litigation are distinguishable from the case before us. In those cases, the state court filings contained false statements or misrepresentations."

Bona Fide Error Defense

15 U.S.C. §1692k(c)

"A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

To qualify for the bona fide error defense, a debt collector must show the following: (1) that the presumed FDCPA violation was not intentional; (2) that the presumed FDCPA violation resulted from a bona fide error; and (3) that it maintained procedures reasonably adapted to avoid any such error. Kort v. Diversified Collection Services, Inc., 394 F.3d 530 (7th Cir. 2005).

The bona fide error defense in §1692k(c) does not apply to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA, 130 S. Ct. 1605 (2010).

What Kind of Claims May Be Making Their Way to Me?

A letter stated "The above balance due includes a Verizon Wireless Collection Fee of $0.00." The Plaintiff alleged that this language threatened to collect a fee; even though the "collection fee" is $0.00, the plaintiff alleged that "the letter implied that there could be a collection fee added to the debt in a future letter. Tylke v. Diversified Adjustment Serv., Inc., No. 14-CV-748, 2014 WL 5465173, at *1 (E.D. Wis. Oct. 28, 2014).

A collection letter included preprinted "coupons," which included the balance due, the debt collector's address, and spaces for the amount enclosed and a phone number. In a bolder, slightly larger font than the body of the letter, this section's header reads: "***Detach Coupon And Mail Payment***." The Plaintiff claimed the letter demanded immediate payment and therefore Plaintiff's right to dispute the debt within 30 days was overshadowed. The Court found the Plaintiff's reading of the letter "bizarre and idiosyncratic." Baratta v. Financial Recovery Services, Inc., No. 18 C 03865, 2018 WL 5388057, at *1 (N.D. Ill. Oct. 29, 2018).

What Kind of Claims May Be Making Their Way to Me?

Claims in which the Plaintiff calls the debt collector during the 30 day validation period and tries to get the collector to say that payment is due immediately (overshadowing the validation period). For example, the following statement, made via a phone call during the 30 day validation period overshadowed the validation period: "Well, once it gets in collections, the balance is really due that day. So as soon as you can pay [$] 303 would be the best." McHugh v. Valarity, LLC, No. 4:14-CV-858 JAR, 2014 WL 6772469, at *2 (E.D. Mo. Dec. 1, 2014); see also Schuller v. AllianceOne Receivables, Mgmt., Inc., No. 4:15 CV 298 CDP, 2016 WL 427961, at *1 (E.D. Mo. Feb. 4, 2016); Glackin v. LTD Fin. Servs., L.P., No. 4:13-CV-00717 CEJ, 2013 WL 3984520, at *1 (E.D. Mo. Aug. 1, 2013).

What Kind of Claims May Be Making Their Way to Me?

Lots of "bottom of the barrel" cases. Two cases I'm involved with right now:

- The plaintiff claims that a letter is false and misleading because it does not inform the consumer that interest/late fees/other charges could accrue on the debt. However, interest/late fees/other charges were not accruing because the debt collector was forbidden from attempting to collect interest/late fees/other charges. The plaintiff argues that, because neither the original creditor or the debt collector expressly waived interest/late fees/other charges, interest/late fees/other charges theoretically could accrue, so the debt collector violated the FDCPA by not informing the plaintiff of that. The plaintiff's argument that interest/late fees/other charges could accrue was based on a sample credit card agreement the plaintiff's counsel found on the internet, which agreement the plaintiff admitted was not the agreement applying to the plaintiff's account. The case is awaiting decision on summary judgment.
- The plaintiff claims that the debt collector's demand for immediate payment within the 30 day validation period overshadowed her right to dispute the debt. The debt collector sent a 1692g(a) letter on January 6, 2018, and then, on February 1, 2018, the debt collector sent a letter simply offering the plaintiff the opportunity to settle. The February 1, 2018 letter did not demand payment by a date certain. In spite of a number of cases saying that an offer to settle without demand for payment by a date certain does not overshadow the consumer's 30 day dispute period, this case is also awaiting a decision on summary judgment.

Practice Tips: What to Do if You Get Sued

- Gather all relevant documents, including any letters, account notes, call recordings (if any).
- Make sure you do not allow any relevant evidence to be destroyed.
- Contact an FDCPA defense attorney immediately to ensure you do not default.
- Contact your insurer to see if your insurer covers your defense of these cases.

Your ideas?

Questions?

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SESSION TWO

Understanding Financial Statements

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ILCBA
ILLINOIS CREDITORS BAR ASSOCIATION
EDUCATION • LEGISLATION • VISION

LATIMER LEVAY FYOCK LLC

Understanding Financial Statements

ILCBA Fall Seminar
November 12, 2018
Presented by:

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Latimer Levay Fyock LLC
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INTRODUCTION

DISCLAIMER

The materials in this presentation are intended to provide a general overview of the issues contained herein and are not intended nor should they be construed to provide specific legal or regulatory guidance or advice. If you have any questions or issues of a specific nature, you should consult with appropriate legal or regulatory counsel to review the specific circumstances involved. Views expressed are those of the speaker and are not to be attributed to his firm or clients.

GOALS OF SESSION

- Understanding of what terms and concepts mean in financial statements
- Understanding the information reflected on your organization's financial statements and reports
- Understanding how the balance sheet, statement of cash flows and income statement interact.

AGENDA

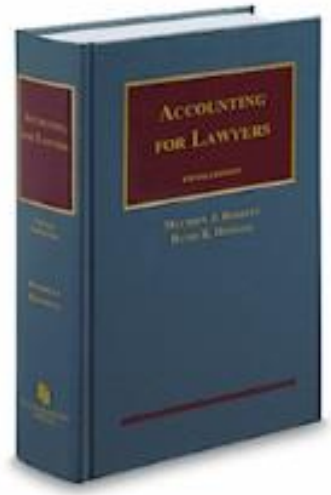
- Background and Why Accounting and Business Acumen Important
- How to read a financial statement
- What the financial statement says about the business
- What items on the balance sheet, income statement, and other key financial statements mean
- How to navigate the narrative contained in public financial statements
- How numbers can be traced from the various financial statements so that the lawyer can understand forensically how they work

THE INSIDE SCOOP

- Spent 5.25 years in accounting roles at very large insurance group
- Have spent 16 years of lawyer career in-house
  - Can tell you the amount of frustration that exists

WHY ACCOUNTING FOR LAWYERS?

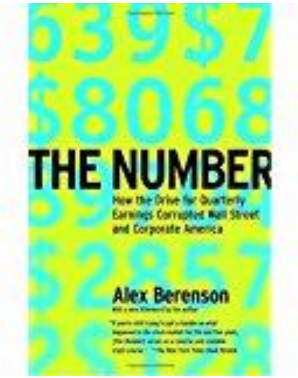
- What is need?
  - Some law schools offer
  - Old adage that lawyers are good at lawyering, but poor business people
  - Being able to discuss accounting and financial issues with clients is key
  - Also helps if running own business
- A caveat:
  - Really no such thing as "accounting for lawyer
  - There is just accounting
  - Goal of series

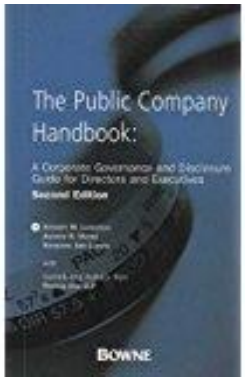


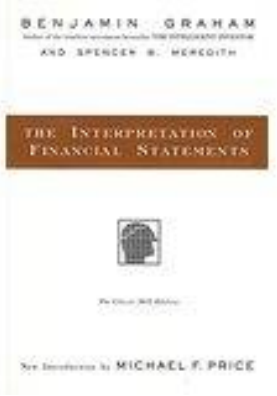
- SOME RESOURCES TO GET UP TO SPEED

VARIOUS RESOURCES

- The Number, by Alex Berenson
- The Public Company Handbook, RR Donnelly
- The Interpretation of Financial Statements, Benjamin Graham
- www.sec.gov







Search

We're improving EDGAR. Prefer the old page? It's still available.

SEARCHING COMPANIES' FILINGS

- https://www.sec.gov/edgar/searchedgar/companysearch.html

THEN COMPANY

- Say, given this audience:
  - Sears Holdings Corp
    - SHLD
  - What can we find?

10K-

- Investing Activities, p. 42-43: For 2017, net cash flows from investing activities consisted of cash proceeds from the sale of properties and investments of $1.1 billion, proceeds from the Craftsman Sale of $572 million and proceeds from the sale of receivables of $293 million, partially offset by cash used for capital expenditures of $80 million. For 2016, net cash flows from investing activities primarily consisted of cash proceeds from the sale of properties and investments of $386 million, partially offset by cash used for capital expenditures of $142 million. For 2015, net cash flows from investing activities primarily consisted of cash proceeds from the sale of properties and investments of $2.7 billion, partially offset by cash used for capital expenditures of $211 million. Proceeds from the sales of properties and investments in 2015 included approximately $2.6 billion of net proceeds from the Seritage transaction.
- Consolidated Balance Sheets, p. 60, receivables year over year went down to $343 M from $466 M (but they sold receivables as noted above)
- Selected Financial Data, p. 24: Revenues 2017- $16,702; 2016- 22,138; 2015- 25,146; 2014- 31,198; 2013- 36,188

- BACKGROUND AND WHY ACCOUNTING AND BUSINESS ACUMEN IMPORTANT

EXPECTATIONS OF CLIENTS

- Lawyers "have developed at least some working knowledge of accounting."
- Accounting "language of business"/"language of corporate governance"

WHAT ATTORNEY NEEDS A WORKING KNOWLEDGE?

- No matter what area of law you intend to practice, accounting and basic business skills are essential
- No matter which side, it will come into play

TOP TEN THINGS EVERY LAWYER SHOULD KNOW ABOUT ACCOUNTING

1. What constitutes a complete set of financial statements.
    1. Accompanying notes
    2. Balance sheet
    3. Income statement
    4. Statement of changes in owners' equity
    5. Statement of cash flows
2. Financial statements usage of "mixed-attribute model"
    1. Historical vs. current values
3. Poor accounting can violate the law – NB!
    1. FCPA – anti-bribery and accounting components
4. Importance of accompanying notes and MD&A
    1. Art vs. science

TOP TEN THINGS EVERY LAWYER SHOULD KNOW ABOUT ACCOUNTING

- Top ten things every lawyer should know about accounting (cont' d):
  5. GAAP is not static.
  6. Audits are not guarantees of accuracy
     1. "reasonable assurance"
  7. A bird in the hand is worth two in the bush
     1. Time value of money
  8. Different accounting rules can apply for different purposes
     1. So long as not illegal books!
  9. Be aware of legal issues involved with contingent liabilities.
  10. Motivations of different bends can influence discretionary cost allocation issues underlying financial statements.

WHY IS A BASIC UNDERSTANDING SO IMPORTANT?

- Judge Stanley Sporkin, US District Judge, Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901, 919-920 (D.D.C. 1990):

  "There are other unanswered questions presented by this case. Keating testified **[*920]** that he was so bent on doing the "right thing" that he surrounded himself with literally scores of accountants and lawyers to make sure all the transactions were legal. The questions that must be asked are: Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated?

  "Why didn't any of them speak up or disassociate themselves from the transactions?

  "Where also were the outside accountants and attorneys when these transactions were effectuated?

  "What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case." **29**

- You do not as a professional want to be in the position where these questions are asked about you!

PUBLIC FINANCIALS

- How many of you have read an annual report? 10K? 10Q? Annual Meeting Notice and Proxy?
- Learn to read these, and understand how to read these, and will give you valuable information and insights for investing, settlement of lawsuits, acquisitions, etc.

- HOW TO READ A FINANCIAL STATEMENT

PUBLIC FINANCIAL FILINGS

- Most Common:
- 10-K- Annual Report (SEC Act of 1934)
  - Financial statements
  - Management Discussion & Analysis
  - Footnotes
  - Letter from CEO- not required
- 10-Q- Quarterly Report
- 8-K- Current Report
- DEF 14A- Proxy Statement
  - Board governance
  - Compensation

THE FOUR FINANCIAL STATEMENTS

- Four Financial Statements (plus the notes, for complete picture):
  - Balance Sheet
    - Enterprise's financial assets and liabilities, and residual equity
    - Assets – Liabilities = Surplus
  - Income Statement
    - Shows extent to which enterprise's operations have caused changes in the amount of residual equity over a given period of time.
  - Statement of changes in owner's equity
    - Reconciles the changes in the equity section between balance sheet dates.
  - Statement of cash flows
    - Explains the changes in the enterprise's cash during a particular period.
    - Some have argued for "cash basis" of accounting – you either have cash in bank or on hand or you don't, but issues with it.

THE BALANCE SHEET

- It is a snapshot of a moment in time.
  - Ben & Jerry's Homemade, Inc. 1992 annual report compared the balance sheet to a photo from a trip
- Compares what business owns (assets) vs. what it owes (liabilities)

  -You want the asset side to be more than the liability side
    - -If liabilities exceed assets, hard to be considered a "going concern," i.e., a company that is likely to last!

THE BALANCE SHEET (CONT'D)

- Difference between what a business owns (assets) and what it owes (liabilities) represents net worth/surplus/equity
- Assets
  - Anything can be used by organization for future value/benefit
  - Presented on balance sheet in order of liquidity, i.e., how quickly can you convert to cash?
  - Commonly presented at historical cost, net of depreciation

LIABILITIES

- "Outside" sources
- Duties or obligations to provide economic benefits to some other entity in the future
- 3 characteristics:
  - Present duty or obligation
  - Obligated to provide a future benefit
  - Arisen from transaction to measure
  - Flip side of an asset

EQUITY

- Creditors' claims priority over "inside" claims
- Arithmetical amount that remains after subtracting liabilities from assets
- Types of entities (page 11)
  - Sole proprietorship – one owner: proprietorship
  - Partnership – co-owners: partner's equity
  - Corporation – shareholders – SH's equity

FUNDAMENTAL ACCOUNTING EQUATION

- E = A – L
- A – L = E
- A = L + E
  - This is the fundamental accounting equation

IMPORTANT POINTS ON BALANCE SHEET

- Assets = sum of liabilities and equity
- Speaks as of instant in time
- Balance sheet, with exceptions, records assets at historical cost
- Only assets and liabilities that meet certain accounting requirements.

ACCRUAL ACCOUNTING

- Method used by financial folks to:
  - Book revenue before paid for goods or services provided
  - Recognize obligations before pay for them
- Personal terms:
  - Send out invoices, if accrual method used, book revenues and then receivable at firm
  - Use credit card, you are using accrual method

ASSETS

- Things that a company owns
  - Cash
  - Accounts receivable
  - Property, Plant and Equipment
  - Prepaid Expenses, other assets
- Listed in order of liquidity

ASSETS

- Tangible v. Intangible
  - Tangible
    - Cash, Accounts Receivable, PP&E, etc.
  - Intangible
    - Lack physical substance/Often hard to evaluate
      - Includes:
        - Patents
        - Copyrights
        - Franchises
        - Goodwill
        - Trademarks and trade names
        - Software

LIABILITIES

- What the company owes
- Current Liabilities:
  - Obligations due within one year
- Long Term Debt and Obligations:
  - Obligations due more than one year from balance sheet date
- Other Liabilities

EQUITY/SHAREHOLDERS EQUITY/NET WORTH

- What is left over

CLASSIFIED BALANCE SHEET

- Sub-categories
- Current and long-term
- Helps reader understand financial statements

EXAMPLE OF CLASSIFIED BALANCE SHEET

			Daniel Cotter, Attorney at Law					
			Balance Sheet, January 31					
	Assets				**Liabilities & Proprietorship**			
Current:					Liabilities (all current):			
Cash				**3940**	Accounts Payable			2100
Fixed:						Total Liabilities		**2100**
Office Equipment			3500					
Library			4200					
Total Fixed Assets				**7700**	Proprietorship			**9540**
	Total Assets			**11640**				**11640**

THE INCOME STATEMENT

- Balance sheet is one way to see how well a business is doing
  - Historic – shows status of all transactions from beginning of business
  - As discussed, cannot tell you how well a business is able to earn a profit
- Income Statement tells us profitability
  - Revenues – amounts that the activities of a business generate
  - Expenses – cost incurred to produce those revenues
- Income Statement shows us extent to which an entity's equity/net worth has increased or decreased over a period of time.
- Ben & Jerry's analogized this statement to the long letter that accompanies the snapshot, telling you details of the journey from one balance sheet to the next.

THREE THINGS ABOUT THE INCOME STATEMENT

- aka statement of earnings or statement of operations

1. Balance sheet is point in time, income statement shows activity between the two balance sheet dates.
    - Income statements usually cover one year
        - Fifty-two week period called a fiscal year
2. Income statement only shows activities that caused an increase or decrease in equity
    - Would not show the impact of capital contribution or withdrawal
3. Income statement, like other financial statements, does not provide prospective information

REVENUES AND EXPENSES

- Revenues – increases in assets, decreases in liabilities, or both, resulting from:
  - Delivering goods
  - Rendering services
  - Engaging in ongoing major or central operations
- Gains – increases in assets or decreases in liabilities from:
  - Peripheral or incidental transactions not involving investments by owners
- Revenues and gains are "positives"

REVENUES AND EXPENSES

- Expenses – decreases in assets, increases in liabilities, or both, resulting from:
  - Using goods or services to produce revenue
- Losses – decreases in assets or increases in liabilities from:
  - Peripheral or incidental transactions not involving distributions to owners
- Expenses and losses sometimes referred to as "negatives"

THE STATEMENT OF CHANGES IN OWNER'S EQUITY

- Equity can change in more ways than by the income statement
  - Income statement shows business activities
- Equity can increase if owner invested in business
- Equity can decrease if owner withdrew assets from the business

THE STATEMENT OF CASH FLOWS

- *Cash flow* - movement of cash into and out of the enterprise
- Must be able to have cash to meet recurring expenses
  - *Payroll, rent, accounts payable, etc.*
- Looking at cash and accounts receivables and how they change from period to period can be very valuable
  - If the accounts receivable is significantly increasing, this may be a sign of collections problems

THE STATEMENT OF CASH FLOWS (CONT' D)

- Common inflows:
  - Sales for cash
  - Collections of accounts receivable
  - Short and long-term borrowings
  - Sale of PP&E
  - Sale of long-term assets
  - Issuance of stock for cash

THE STATEMENT OF CASH FLOWS (CONT' D)

- Common Outflows:
  - Current Operating Costs
  - Acquisition Of PP&E
  - Acquisition Of Other Long-term Assets
  - Repayment Of Short And Long-term Debt
  - Distributions To Owners

HISTORY OF STATEMENT OF CASH FLOWS

- Prepared for many years
- Different names but all drive toward same goal: find out how cash flows in organization, "assess an enterprise' s cash transactions"
- Despite it being around 21 years, 45 states continue to use the term "statement of changes in financial position" in their codes or administrative regulations

PURPOSE OF STATEMENT OF CASH FLOWS

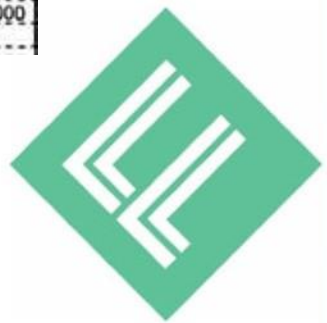
- Ability to generate positive future cash flows
- Ability to meet obligations, pay dividends and needs for external financing
- Address differences between net income and cash receipts and payments
- Effects on company's position.

"DOUBLE-ENTRY BOOKKEEPING"

- System accountants use to compile the end result financial statements.
  - Series of journals, ledgers, accounts, debits, credits, trial balances, and worksheets.
  - Both sides of the entry must equal each other/cancel each other out
- You likely used to single-entry
  - Checkbook

General Journal GJ1

Date	Account Title and Description	Ref.	Debit	Credit
20X1				
Aug. 1	Cash		50,000	
	Notes Payable			50,000
	Borrowed $50,000			
3	Equipment		30,000	
	Cash			30,000
	Purchased equipment			
6	Vehicles		20,000	
	Notes Payable			18,000
	Cash			2,000
	Purchased delivery truck			



DOUBLE-ENTRY BOOKKEEPING COMBINATIONS POSSIBLE:

- Increase in asset
  - (1) Increase in source
  - (2) Decrease in asset
- Decrease in asset
  - (1) decrease in source
  - (2) increase in asset
- Increase in source
  - (1) increase in asset
  - (2) decrease in source
- Decrease in source
  - (1) increase in source
  - (2) decrease in asset

ACCRUAL ACCOUNTING

- This method seeks to allocate revenues (income) and expenses to accounting periods they relate to, regardless of when the cash takes place.
- Vs. Cash Accounting:
  - Example of a law firm and taxation
  - Federal government:
    - Cash method for 9/30/05 - $319B deficit
    - Accrual method for 9/30/05 - $760B deficit

HOW TO NAVIGATE THE NARRATIVE CONTAINED IN PUBLIC FINANCIAL STATEMENTS

FEW INITIAL THOUGHTS

- Unaudited
- Criticisms include self-serving, hyperbole, etc.
- Not written so easily understood
- Heavily legaleased
  - Good for lawyers, but hard to read
- Go by many guises and names:
  - Business Review
  - Management Commentary
  - Management Discussion and Analysis

- Key is understanding what each of the four financial does
  - Understanding what notes intended for
  - Being able to “trace” or conduct forensics

- HOW NUMBERS CAN BE TRACED FROM THE VARIOUS FINANCIAL STATEMENTS SO THAT THE LAWYER CAN UNDERSTAND FORENSICALLY HOW THEY WORK

VERY BASIC EXAMPLE

BEGINNING BALANCE SHEET

			Dan Cotter, Attorney at Law				
			Balance Sheet, December 31				
	Assets				Liabilities & Proprietorship		
Current:					Liabilities (all current):		
Cash				**4000**	Accounts Payable		1400
Fixed:						Total Liabilities	**1400**
Office Equipment			3500				
Library			3000				
Total Fixed Assets				**6500**	Proprietorship		**9100**
	Total Assets			**10500**			**10500**

INCOME STATEMENT

		Dan Cotter, Attorney at Law			
		Income Statement			
		For the Month of January			
Professional Income					2200
Expenses:					
	Secretary			500	
	Rent			1100	
	Office Supplies			85	
	Printing			75	
		Total Expense			1760
Net Income					440

ENDING BALANCE SHEET

			Dan Cotter, Attorney at Law					
			Balance Sheet, January 31					
	Assets				**Liabilities & Proprietorship**			
Current:					Liabilities (all current):			
Cash				**3940**	Accounts Payable			2100
Fixed:						Total Liabilities		**2100**
Office Equipment			3500					
Library			4200					
Total Fixed Assets				**7700**	Proprietorship			**9540**
	Total Assets			**11640**				**11640**

STATEMENT OF CHANGES IN OWNER'S EQUITY

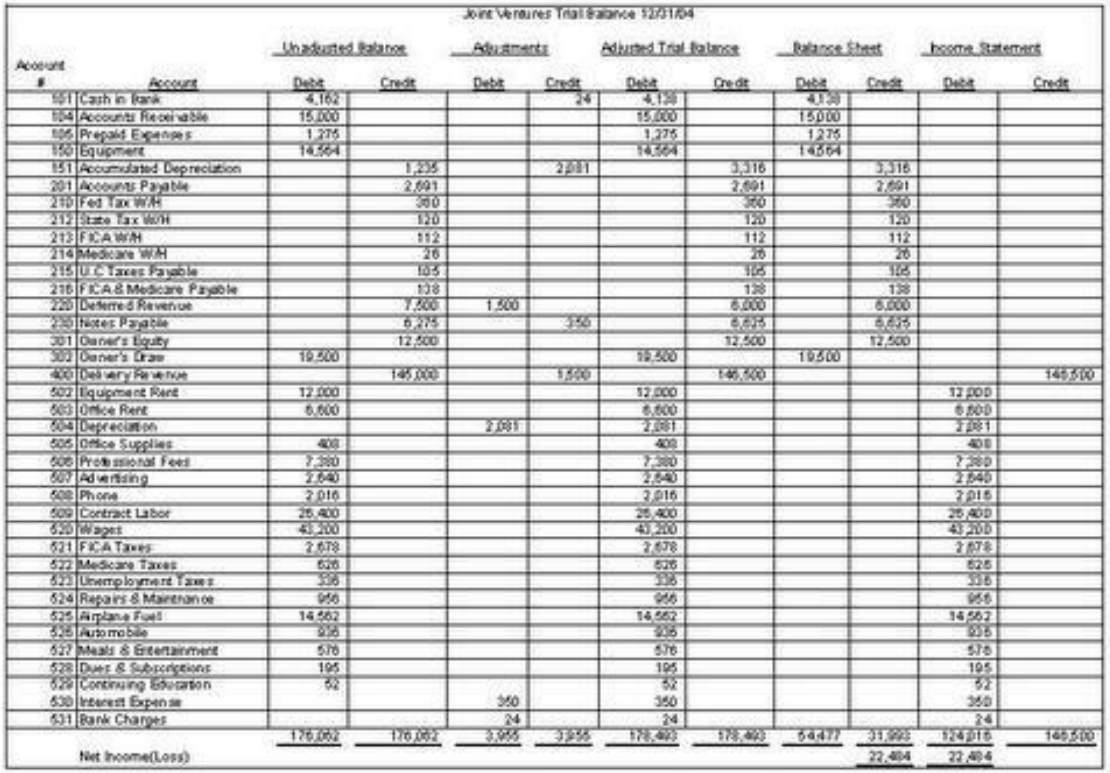
Daniel Cotter, Attorney at Law	
Statement of changes in equity/proprietorship for the month ended January 31, 20XX	
Balance at January 1, 20xx	**9100**
Changes in Equity for the month ended January 31, 20xx	
Issue of capital/shares/equity	0
Income for the month	440
Dividends/Withdrawals of equity	0
Balance at January 31, 20xx	**9540**

STATEMENT OF CASH FLOWS

Daniel Cotter, Attoreny at Law	
Statement of Cash Flows	
For the month ended January 31, 20xx	
Cash Flows from Operations:	
Operating Income	440
Increase in Accounts Payable	700
Net Cash Flow from Operations	**1140**
Cash Flows from Investments:	
Purchase of Library addition	-1200
Net Cash Flow from Investments	**-1200**
Cash Flows from Financing Activities:	
None	**0**
Net Change in Cash	-60
Beginning Cash Balance	4000
Ending Cash Balance	3940

SIX COLUMN TRIAL BALANCE WORKSHEET

- Illustrates interaction of income statement and balance sheet



Joint Ventures Trial Balance 12/31/04

Account #	Account	Unadjusted Balance		Adjustments		Adjusted Trial Balance		Balance Sheet		Income Statement	
		Debit	Credit	Debit	Credit	Debit	Credit	Debit	Credit	Debit	Credit
101	Cash in Bank	4,162			24	4,138		4,138			
104	Accounts Receivable	15,000				15,000		15,000			
105	Prepaid Expenses	1,275				1,275		1,275			
150	Equipment	14,564				14,564		14,564			
151	Accumulated Depreciation		1,235		2,081		3,316		3,316		
201	Accounts Payable		2,691				2,691		2,691		
210	Fed Tax W/H		360				360		360		
212	State Tax W/H		120				120		120		
213	FICA W/H		112				112		112		
214	Medicare W/H		26				26		26		
215	U.C Taxes Payable		105				105		105		
216	FICA & Medicare Payable		138				138		138		
220	Deferred Revenue		7,500	1,500			6,000		6,000		
230	Notes Payable		6,275		350		6,625		6,625		
301	Owner's Equity		12,500				12,500		12,500		
302	Owner's Draw	19,500				19,500		19,500			
400	Delivery Revenue		146,000		1,500		146,500				146,500
502	Equipment Rent	12,000				12,000				12,000	
503	Office Rent	6,600				6,600				6,600	
504	Depreciation			2,081		2,081				2,081	
505	Office Supplies	408				408				408	
506	Professional Fees	7,380				7,380				7,380	
507	Advertising	2,640				2,640				2,640	
508	Phone	2,016				2,016				2,016	
509	Contract Labor	25,400				25,400				25,400	
520	Wages	43,200				43,200				43,200	
521	FICA Taxes	2,678				2,678				2,678	
522	Medicare Taxes	626				626				626	
523	Unemployment Taxes	336				336				336	
524	Repairs & Maintenance	956				956				956	
525	Airplane Fuel	14,562				14,562				14,562	
526	Automobile	936				936				936	
527	Meals & Entertainment	576				576				576	
528	Dues & Subscriptions	195				195				195	
529	Continuing Education	52				52				52	
530	Interest Expense			350		350				350	
531	Bank Charges			24		24				24	
		176,062	176,062	3,955	3,955	178,493	178,493	54,477	31,993	124,016	146,500
	Net Income(Loss)								22,484	22,484	

CLOSING PROCESS

- To bring the income statement amount from six-column into balance sheet and to address what happened in month
- Journal Entries:
  - Revenue, income and gain accounts
  - Expense and loss accounts
  - Income summary account
- Adjusting Entries
- Closing Entries

Questions?

Dan Cotter
Latimer Levay Fyock LLC
dcotter@llflegal.com

SESSION THREE

Recognizing, Understanding and Referring a Colleague in Need

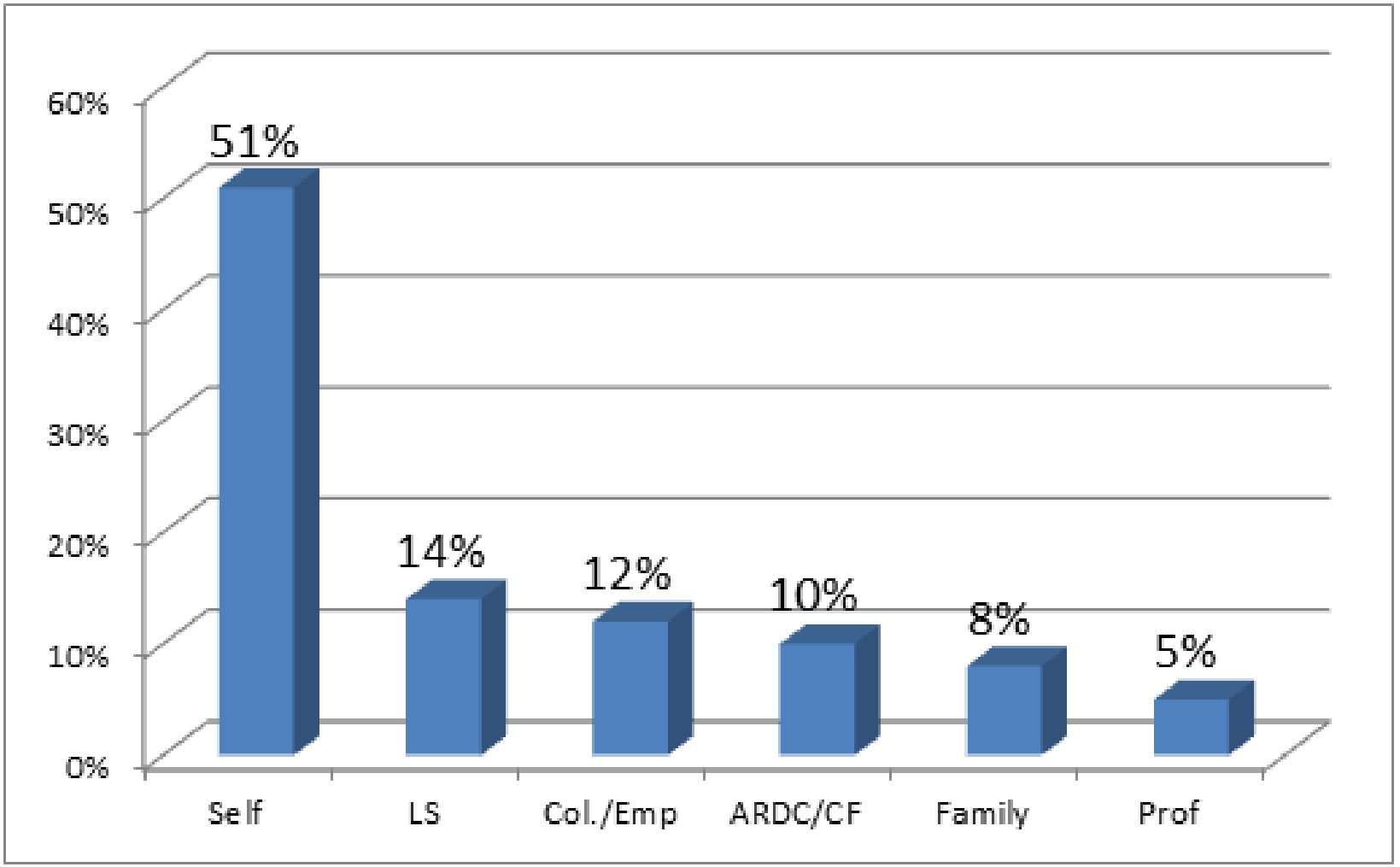
Robin Belleau

Executive Director,
Illinois Lawyers' Assistance Program

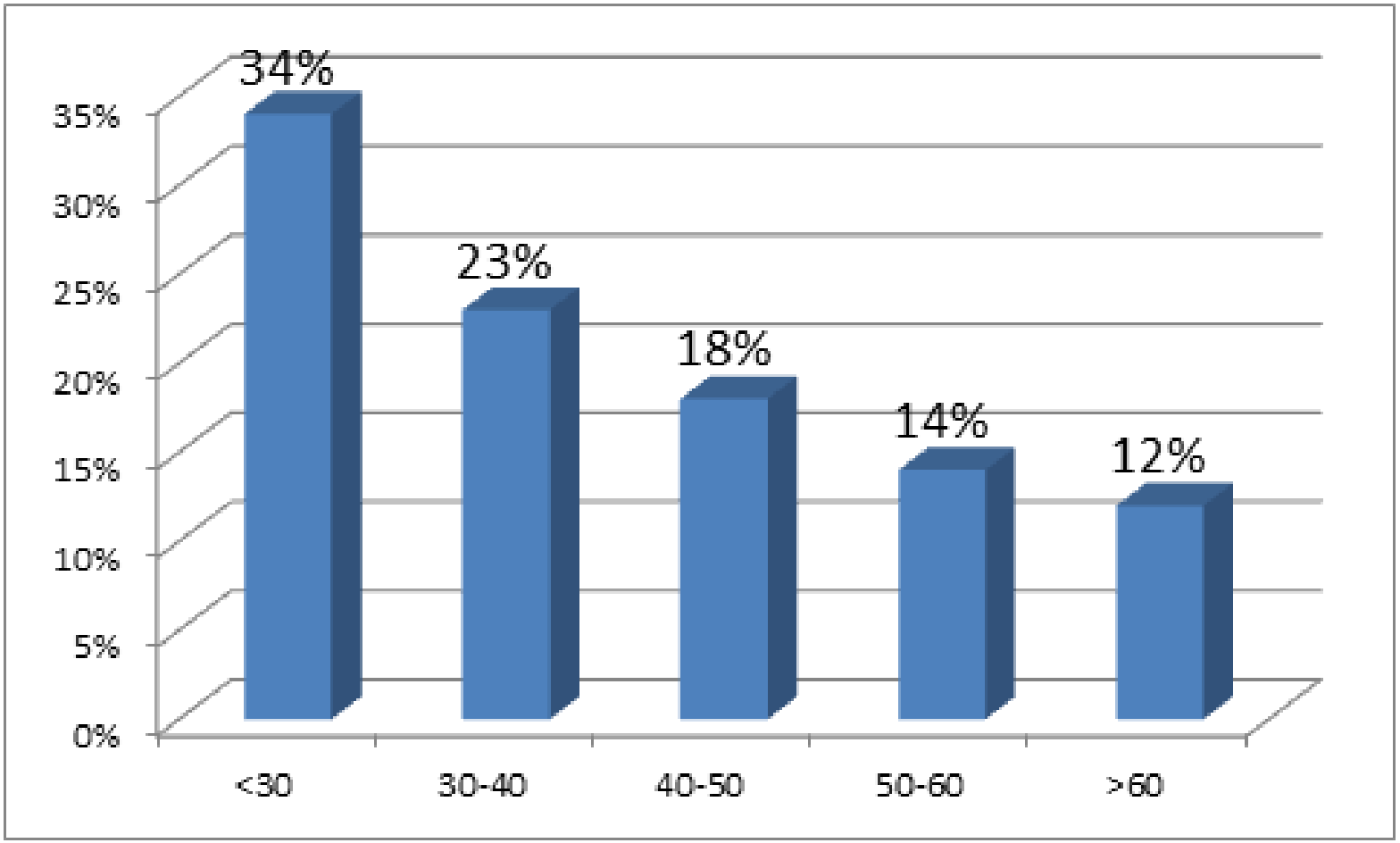
Recognizing, Understanding, and Referring

Robin M. Belleau, JD, LCPC
Executive Director
Illinois Lawyers' Assistance Program
20 S. Clark Street, Suite 450, Chicago, IL
1-800-LAP-1233

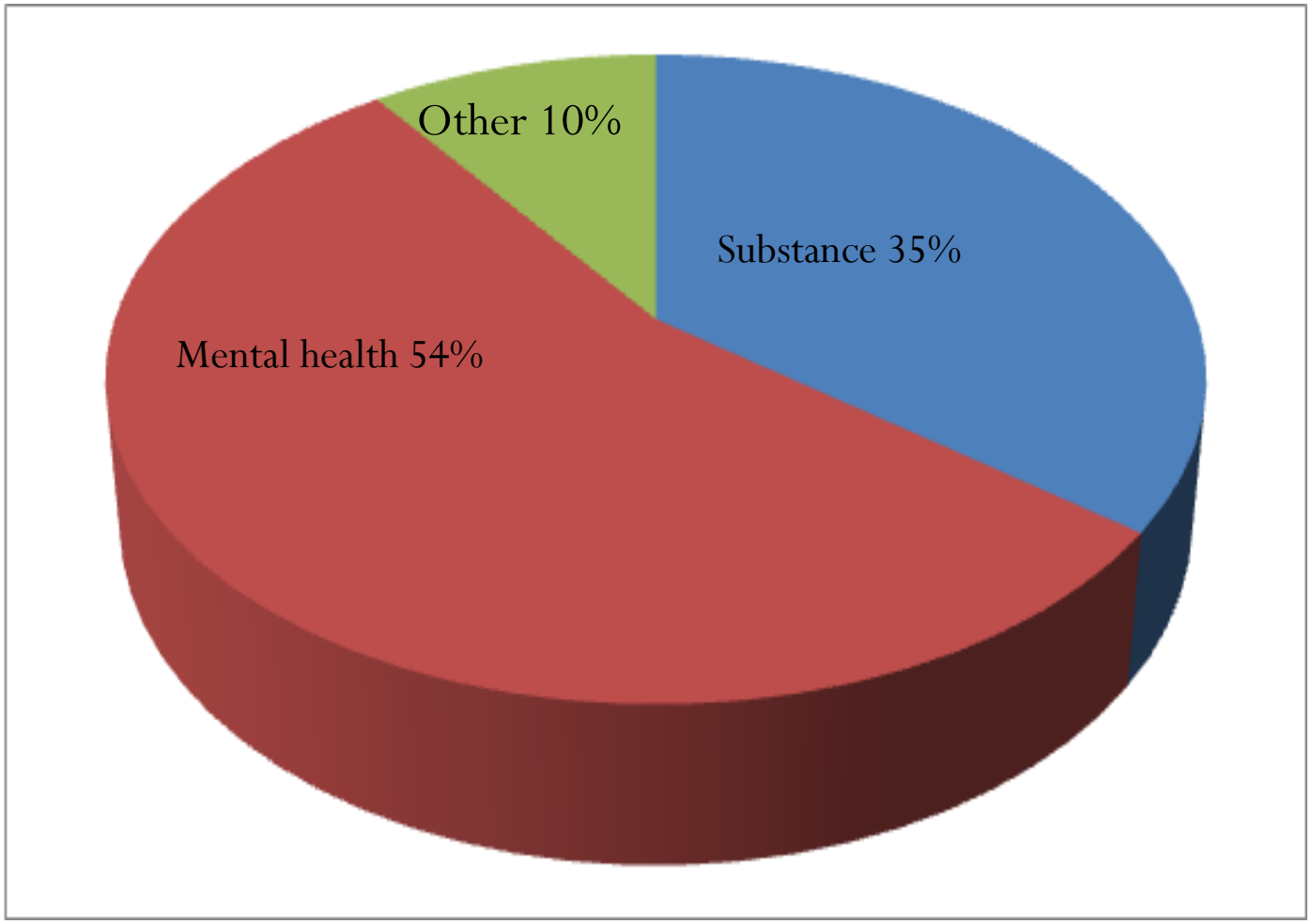
How Clients Got to LAP



Age Range of LAP Clients

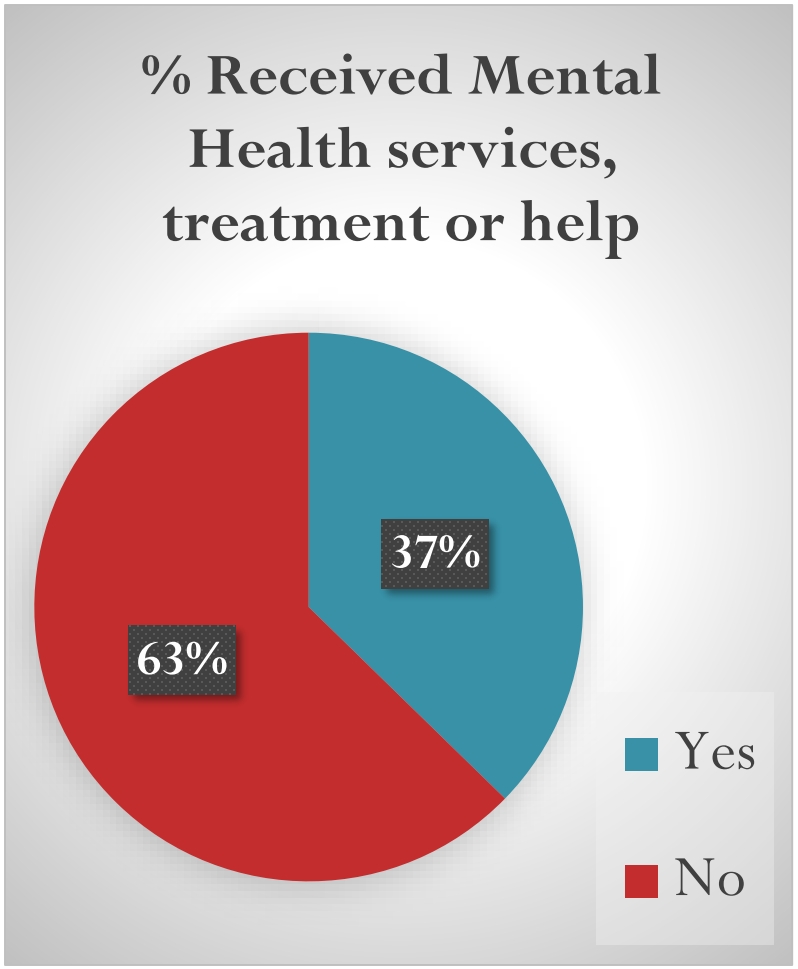


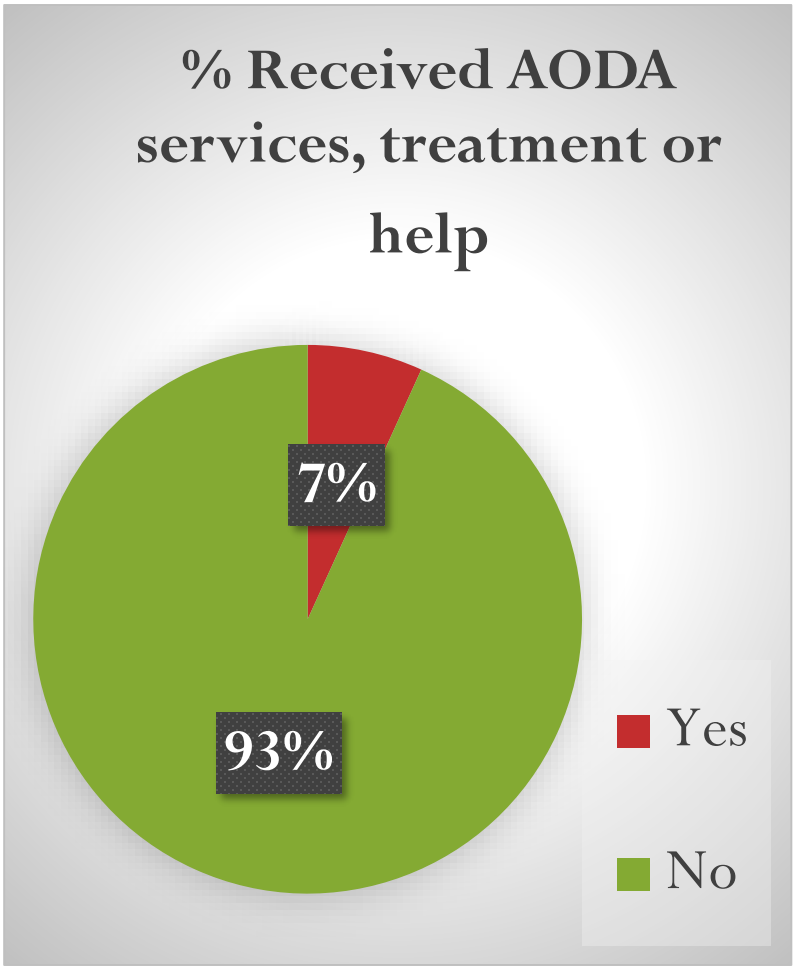
Issues



Satisfaction

Reported Treatment Rates from Study





Individual Factors

- Pessimism
- Competitive Nature
- Perfectionism

Life Situation Factors

- Spouse/Partner
- Children
- Health
- Finances

Organizational Factors

- High pressure, little credit
- Zero sum game
- Work load
- Client expectations
- Definition of success


DANGER!

Substance Abuse: What to look for

Follow the MAP

(Pacione & Belleau, ABA Solo Practice Journal, May 2015)

Substance Abuse: What to look for

Follow the MAP

(Pacione & Belleau, ABA Solo Practice Journal, May 2015)

1. **M**ood or attitudinal disturbances
2. **A**ppearance or physical changes
3. **P**roductivity and quality of work

unexplained trembling

Irritability

Increased worry

Fatigue

Anxiety

headaches

digestive problems

Perfectionism

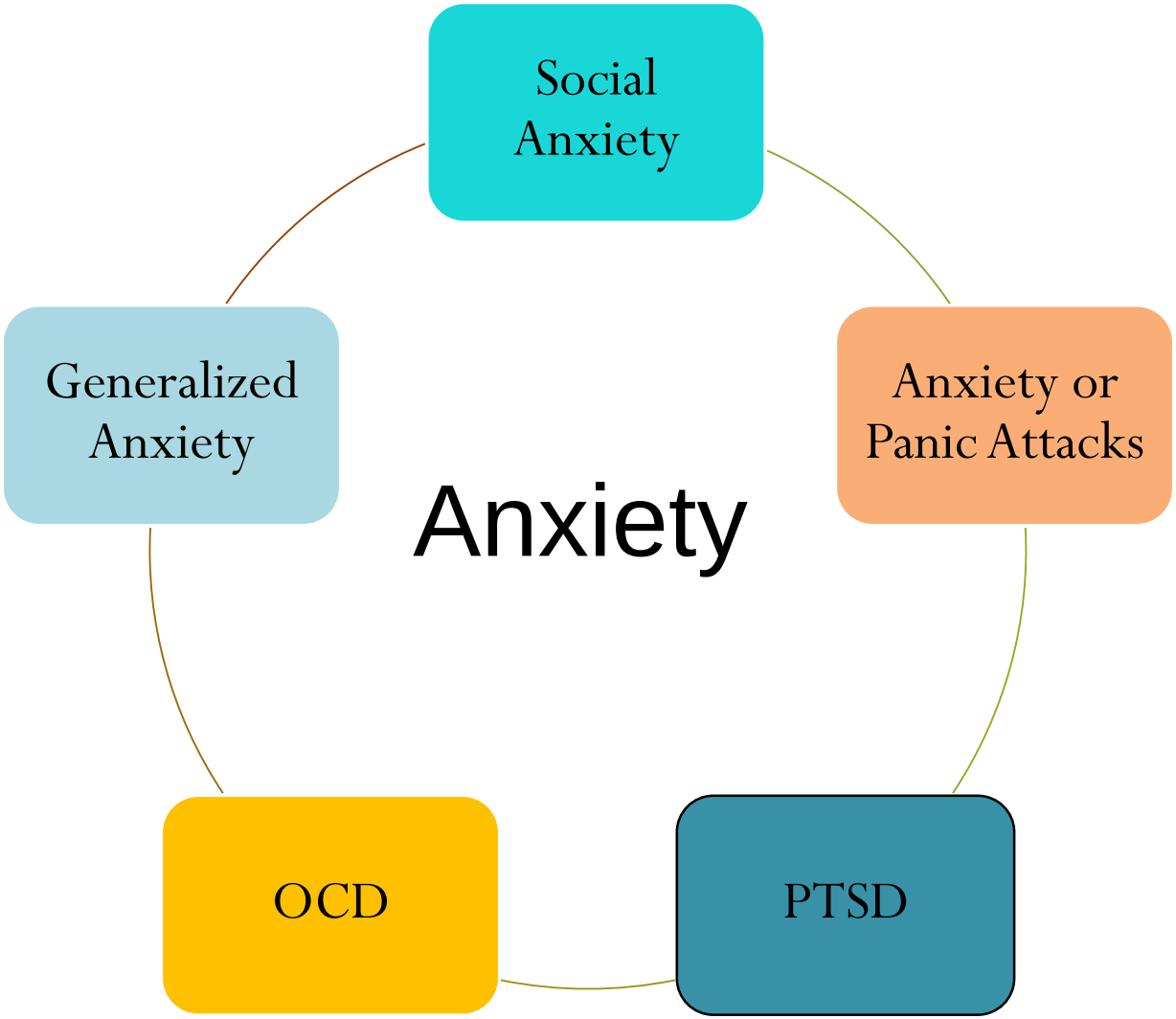
Decrease in productivity

Rumination

Unexplained pains

Look out for:

- “I can’t cope.”
- Increased arguing
- Increased sick days
- Work tasks taking longer to complete
- Increased fear of potential consequences
- Missed deadlines


Social Anxiety
Anxiety or Panic Attacks
PTSD
OCD
Generalized Anxiety
Anxiety

Changes in appetite

Thoughts/plans/attempts of suicide

Fatigue

Depression

Feelings of worthlessness or guilt

Changes in sleep

Difficulty thinking, concentrating or making decisions

Loss of interest in previously enjoyable activities

Look out for:

- “I don’t feel right”
- Obvious changes in mood
- Anhedonia – inability to feel pleasure
- Work tasks taking longer to complete
- Noticeable re-work
- Absenteeism, tardiness, withdrawal
- Indifference, apathy to self and/or others

Giving away possessions

Acquiring means to commit suicide (buying a gun, stockpiling prescriptions)

Declining performance and interest in work

Dis-regulation of sleeping and eating habits

Thoughts or feelings about suicide

Suicide

Feelings of worthlessness or guilt

Despondent mood or alcohol or drug use

Making a plan (where, when, how)

Isolation

Expressions of hopelessness, powerlessness, worthlessness, shame, guilt, self-hatred, inadequacy

Loss of interest and participation in social activities, hobbies, relationships

What Not to Do

- Do not argue about the “right or wrong” of suicide
- Avoid platitudes like:
  - “You have so much to live for”
  - “It will be better tomorrow”
- Do not discount their problems
- Refuse to be sworn to secrecy

What to Do

(CSSRS: Columbia Suicide Severity Rating Scale)

- ACE Card questionnaire
  - Ask
  - Care
  - Escort
- Only 6 questions
- Designed for peers

	In the Past Month	
Answer Questions 1 and 2	YES	NO
1) Have you wished you were dead or wished you could go to sleep and not wake up?		
2) Have you actually had any thoughts about killing yourself?		
If YES to 2, answer questions 3, 4, 5 and 6 **If NO to 2, go directly to question 6**		
3) Have you thought about how you might do this?		
4) Have you had any intention of acting on these thoughts of killing yourself, as opposed to you have the thoughts but you definitely would not act on them?		
5) Have you started to work out or worked out the details of how to kill yourself? Do you intend to carry out this plan?		
Always Ask Question 6	In the Past 3 Months	
6) Have you done anything, started to do anything, or prepared to do anything to end your life? Examples: Collected pills, obtained a gun, gave away valuables, wrote a will or suicide note, held a gun but changed your mind, cut yourself, tried to hang yourself, etc.		

Any YES must be taken seriously. Seek help from friends, family, co-workers, and inform them as soon as possible. If the answer to 4, 5 or 6 is YES, immediately ESCORT the person to Emergency Personnel for care.

Increased isolation

Impaired judgment

Cognitive Issues

Decreased ability to plan ahead

Decrease in ability to make and keep plans

Decreased ability to organize information/plan ahead

Look out for:

- “How do I do this again?”
- Repeated requests for instructions on simple tasks.
- Decreased interest in social interaction.
- Increase in mistakes.
- Increased in missed meetings, court dates, appointments, etc.
- Difficulty engaging in analytical thinking.

REFERRING

Talking to someone about LAP

- Call LAP. We will coach you on what to say to your colleague
- Show the LAP brochure (if handy)
- Highlight LAP's guaranteed confidentiality
- Say:
  - "Calling LAP is easy, free and totally confidential. No one has to know."
  - "Let's call LAP together right now." (and dial the phone)

How to call LAP with the person

- Once on phone with LAP:
  - Ask to speak with a clinician about a person you are referring.
  - Let the clinician know you are calling with a person who you are referring.
  - Put the person on the telephone to speak with the clinician.

How to call LAP without the person

Call or email LAP and explain:

- What you are concerned about and why;
- If and what kind of contact you have had with the person about your concerns;
- Whether or not the person knows you are calling;
- LAP may coach you how to do a “soft intervention;”
- How LAP can best contact the person.

What happens next

- If the person is willing to come in or be contacted an assessment will be done and a treatment/action plan created

- If the person is not willing, then LAP will:

  Reach out to the person and invite them to come in.

  Contact trained LAP Volunteers (bound by confidentiality) who may already have a relationship with the person to see if they can help connect the person with LAP.

  Intervention

ILLINOIS LAWYERS' ASSISTANCE PROGRAMS

Always Free + Confidential

WE CAN HELP WITH

Stress – Anxiety – Grief
Depression
Career Transitions
Addiction – Substance Abuse
& Much More

Services tailored to the legal profession:

- Short-term counseling
- Support Groups
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- Help with ARDC Concerns

CONTACT US//
Email// gethelp@illinoislap.org
Phone// 312-726-6607

www.illinoislap.org

STOP BY OUR OFFICE//
20 S. Clark St., Suite 450
Chicago, IL 60603

LAP
LAWYERS' ASSISTANCE PROGRAM

ACE CARD

ASK FRIENDS AND FAMILY

CARE FOR FRIENDS AND FAMILY

ESCORT FRIENDS AND FAMILY

See Reverse for Questions that Can Save a Life

	In the Past Month	
Answer Questions 1 and 2	**YES**	**NO**
1) Have you wished you were dead or wished you could go to sleep and not wake up?		
2) Have you actually had any thoughts about killing yourself?		
If YES to 2, answer questions 3, 4, 5 and 6 If NO to 2, go directly to question 6		
3) Have you thought about how you might do this?		
4) Have you had any intention of acting on these thoughts of killing yourself, as opposed to you have the thoughts but you definitely would not act on them?		
5) Have you started to work out or worked out the details of how to kill yourself? Do you intend to carry out this plan?		
Always Ask Question 6	**In the Past 3 Months**	
6) Have you done anything, started to do anything, or prepared to do anything to end your life? Examples: Collected pills, obtained a gun, gave away valuables, wrote a will or suicide note, held a gun but changed your mind, cut yourself, tried to hang yourself, etc.		

Any YES must be taken seriously. Seek help from friends, family, co-workers, and inform them as soon as possible. If the answer to 4, 5 or 6 is YES, immediately ESCORT the person to Emergency Personnel for care.

NATIONAL SUICIDE PREVENTION LIFELINE
1-800-273-TALK (8255)
suicidepreventionlifeline.org

**DON'T LEAVE THE PERSON ALONE.
STAY ENGAGED UNTIL YOU
MAKE A WARM HAND OFF TO
SOMEONE WHO CAN HELP.**

THE COLUMBIA LIGHTHOUSE PROJECT
IDENTIFY RISK. PREVENT SUICIDE.

LUNCH PRESENTATION

New Supreme Court Rule 280

Michael L. Starzec

Partner, Blitt & Gaines PC

ILCBA
ILLINOIS CREDITORS BAR ASSOCIATION
EDUCATION • LEGISLATION • VISION

SUPREME COURT RULE

280-280.5 & Affidavit

- Fall ICLBA Seminar, November, 2018

Purposes of Rule 280

- **Provide clarity to defendants about who is suing them and how the amount is calculated**
- **Standardize pleadings in certain types of collections actions**
- **Reduce continuance and voluntary dismissals unless properly noticed**
- **Provide a clear method for defendants to assert identity theft**

Rule 280. Applicability.

A civil action is subject to the requirements of this Part if the complaint contains any claim originating from a credit card or by a debt buyer attempting to collect a consumer debt.

Rule 280.1. Definitions for Credit Card or Debt Buyer Collection Actions.

- For purposes of a civil action subject to the requirements of this Part:
  - "Assignment" means a transfer of debt from the owner of the debt to the purchaser of the debt.
  - Debt buyer" means a person or entity that is engaged in the business of purchasing delinquent or charged-off consumer loans or consumer credit accounts or other delinquent consumer debt for collection purposes, whether it collects the debt itself or hires a third-party for collection or an attorney at law for litigation in order to collect such debt.
  - "Debt buyer collection action" means a civil action in which the complaint seeks to recover on a consumer debt purchased by a debt buyer.

Rule 280.2 Complaint in Credit Card or Debt Buyer Collection Actions.

In addition to the requirements set forth in Rules 131 and 282(a), the complaint in a credit card or debt buyer collection actions shall:

(a) Print the name of the person who signs the complaint under the signature line;

(b) Attach a completed Credit Card or Debt Buyer Collection Affidavit, together with all required documents, in accordance with the form accompanying this Rule;

(c) Include a statement that the suit is filed within a relevant statute of limitations; and

(d) Have the Credit Card or Debt Buyer Collection Affidavit signed by the Plaintiff or the Plaintiff's designated agent. For purposes of this Rule, the attorney for the Plaintiff may not sign the affidavit on behalf of the Plaintiff or Plaintiff's designated agent.

Rule 280.3 Continuance of Trial or Voluntary Dismissal of Credit Card or Debt Buyer Collection Actions.

Absent a properly noticed written motion for continuance under Rule 231 or for voluntary dismissal under section 2-1009 of the Code of Civil Procedure, a motion for continuance or voluntary dismissal made on the date of trial shall be denied and the case shall proceed to trial, unless:

(a) The court finds that (i) each party has consented to a continuance with an understanding of the potential consequences of not consenting, and (ii) a continuance serves the interest of justice; or

(b) The court is unable to proceed on the trial date, in which case an order may be entered continuing the case for a final trial date.

(c) Nothing herein shall limit the right of any litigant to seek a continuance subject the provisions and requirements of Rule 231(f)

Rule 280.4 Consequences for Non-Compliance.

If the plaintiff fails to comply with the requirements of this Part the court may not enter a default judgment, and the court, on motion or on its own initiative, may dismiss the complaint.

Rule 280.5 Identity Theft Relating to Credit Card or Debt Buyer Collection Actions.

(a) A defendant in a credit card or debt buyer collection action who asserts that he or she is a victim of identity theft with respect to the consumer debt that is the subject of the action, must serve the following on the plaintiff:

(1) An Identity Theft Affidavit in accordance with the form approved by the Illinois Attorney General; and

(2) An Identity Theft Affidavit (Credit Card or Debt Buyer Collection Action) in accordance with the form approved by the Illinois Supreme Court.

Of these two affidavits, only the Identity Theft Affidavit (Credit Card or Debt Buyer Collection Action) must be filed with the court. Within 90 days of service of the Identity Theft Affidavit (Credit Card or Debt Buyer Collection Action) on the plaintiff, the plaintiff or the court, on its motion, shall dismiss the case unless the plaintiff files an affidavit asserting facts that indicate the defendant is not the victim of identity theft and is responsible for the consumer debt at issue.

New Process for Asserting Identity Theft after a Suit is Filed

Standard Forms Approved by the Illinois Supreme Court - http://www.illinoiscourts.gov/Forms/approved/ID_theft/ID_theft.asp

Simple Language –

1. I am the defendant in this lawsuit.
2. This lawsuit is about a debt that I did not create. Someone stole my identity and used my identity to create the debt.
3. I have completed an Illinois Attorney General Identity Theft Affidavit. I am mailing the Illinois Attorney General Identity Theft Affidavit, along with all required documentation, to the plaintiff.

Key Points in Affidavit

- 1. Requires **account information** to be included that is meant to help the consumer identify the debt;
- 2. Requires a contract to be attached or, for revolving credit card accounts, **the charge-off statement**; and
- 3. An **unbroken chain of assignment** for debt buyer actions;
- 4. **Any additional amounts** claimed after the charge-off date to be clearly stated.

Preamble

Comes now affiant, and states:

- I_____am Plaintiff

  (Name of Affiant)

OR

- a designated Agent of _____ (Plaintiff).

IDENTIFICATION ABOUT THE CONSUMER DEBT OR ACCOUNT

- **AS OF THE CHARGE OFF THE CREDITOR/ASSIGNEE MUST DISLOSE:**

Full name of the creditor	Full name of the defendant as it appears on the account	Last four digits of the account number	Date the account was opened or the debt originated	Nature of the debt (credit card debt, payday loan, retail installment loan, etc.)

Required Attachments

Section B mandates that attached to the affidavit must be:

- **The written contract giving rise to the debt** that is the subject of this court case (the "Consumer Debt").
- **The court case is based on an unwritten contract,** and attached is a copy of a document provided to the consumer while the account was active, demonstrating that the consumer debt was incurred by the consumer. **For a revolving credit account, a statement reflecting the charge-off balance shall be deemed sufficient to satisfy this requirement.**

Additional Certifications & Safe Harbor

The Creditor/Assignee also that:

"it has in its possession and can produce on request the most recent monthly statement recording a purchase transaction, last payment, or balance transfer."

But the Creditor/Assignee is protected because:

"The statement reflecting the charge-off balance will not reflect any post charge-off payments or credits by or to the charge-off creditor, the debt buyer or their attorneys."

Statement as Most Recent Activity

- Section C requires data that explains:

Charge-off Balance	Charge-off Date	Date of Last Payment	Amount of Last Payment	Total Amount of Credits and/or Payments Since Charge-off Date*

Proof of Ownership

- Section 2 sets forth the necessity to list all prior owners of the debt *since* charge off, in chronological order. This section is not applicable if the Plaintiff is the charge off creditor.

From (Name)	To (Name)	Date of Assignment (On or About)
National Bank USA NA	**Formerly Assets LLC**	**1/3/2018**

Post Charge-Off Information

Plaintiff is seeking additional amounts after the charge-off date:

- ☐ No
- ☐ Yes
  - ☐ Total amount of interest accrued: $_____;
  - ☐ Total amount of non-interest charges or fees accrued $_____;
  - ☐ Plaintiff is seeking attorney's fees in the amount of $_____.

Balance due and owing as of date of affidavit: $_____.

SESSION FOUR

Hot Topics in Evictions and a View from the Bench

Robert Kahn
Partner, Sanford Kahn, LLP

&

The Honorable Martin Moltz
Associate Judge,
Municipal Department for the Circuit Court of Cook County

2018 IL App (1st) 171420

FIRST DISTRICT
FIFTH DIVISION
June 22, 2018

No. 1-17-1420

THE HABITAT COMPANY, LLC, as agent for Elm Street Plaza,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	No. 15 M1 700605
SHUN PEEPLES,	)	Honorable Jim Ryan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court, with opinion. Justices Lampkin and Rochford concurred in the judgment and opinion.

OPINION

¶ 1 Defendant Shun Peeples appeals from an order of the circuit court of Cook County denying her motion to seal her eviction court file pursuant to section 9-121(b) of the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-121(b) (West 2016)).[1] On appeal, defendant asserts that the circuit court erred in its interpretation of section 9-121(b) of the Act and thus improperly denied her motion to seal. For the reasons that follow, we affirm the judgment of the circuit court.

[1] As of January 1, 2018, the Forcible Entry and Detainer Act (735 ILCS 5/9-101 *et seq.* (West 2018)) is now known as the Eviction Act. We will use the title of the Act in effect at the time of the filing of this suit.

¶ 2 I. BACKGROUND

¶ 3 This matter commenced as a forcible entry and detainer action initiated by plaintiff, The Habitat Company, LLC, as agent for Elm Street Plaza (a property management company) against defendant (a tenant at a premises managed by plaintiff). In its complaint, plaintiff alleged that defendant breached the terms of her lease. Specifically, plaintiff asserted that on two separate occasions defendant verbally abused and used profanity toward the door staff at the premises in a hostile, threatening, and aggressive manner. Plaintiff maintained that defendant's repeated conduct disrupted the livability of the premises, interfered with management of the premises, and adversely affected the safety of the door staff. Plaintiff further asserted that defendant's actions were criminal and constituted the crime of disorderly conduct.

¶ 4 In lieu of a responsive pleading, defendant filed a motion for summary judgment in which she argued that she did not engage in any unlawful or criminal activities on plaintiff's property in violation of the terms of her lease.[2] Defendant further maintained that the "verbal abuse" and profanity directed toward the door staff did not constitute a material violation of the terms of the lease. In response to the motion for summary judgment, plaintiff argued that defendant was in material noncompliance with her lease where, on two separate occasions, she verbally abused and used profanity towards the door staff at the premises in a hostile, threatening, and aggressive manner. Plaintiff maintained that her conduct disrupted the livability of the premises, interfered with the management of the premises, and adversely affected the safety of the door staff. Plaintiff asserted that a genuine issue of material fact existed regarding whether defendant's conduct constituted material noncompliance under her lease. Plaintiff

[2] Pursuant to section 9-106 of the Act, a defendant need not file an answer or any other pleading, but instead "may under a general denial of the allegations of the complaint offer in evidence any matter in defense of the action." 735 ILCS 5/9-106 (West 2016).

attached an affidavit of Andrew Floyd (Floyd), a doorman at the premises, to its response. Floyd averred that on December 17 and December 18, 2014, defendant approached the front desk in an irate and aggressive manner, was verbally abusive toward him and his colleague, and stated in a threatening manner that he and his colleague were "b*** a***" and "lazy motherf***" who "don't do s*** all day." Floyd further averred that defendant continued to use inappropriate language and he found her aggressiveness and hostility to be unsettling, threatening, unreasonable, alarming, and disturbing. Plaintiff also attached the affidavit of Nicole Salter (Salter), the community manager for the apartment building. Salter averred that she is "familiar with *** incidents involving tenants, reports of incidents involving tenants, disruptions in the livability of the premises." Salter did, however, attest that defendant's "verbally abusive conduct and use of profanity toward Habitat's door staff on December 17 and 18, 2014, disrupted the livability of the building, adversely affected Habitat's agents' safety and the safety of the premises' tenants, interfered with the management of the building, and, in my determination, constituted the crime of disorderly conduct."

¶ 5 After the matter was fully briefed and argued, the circuit court granted defendant's motion for summary judgment in part and denied it in part. Summary judgment was granted as to plaintiff's allegations that defendant's conduct was criminal or unlawful. Summary judgment, however, was denied as to whether defendant was in material noncompliance with the terms of the lease.

¶ 6 Shortly thereafter, on August 3, 2015, an "agreed settlement order" (agreed order) was entered by the circuit court. The agreed order provided that the matter was dismissed with leave to reinstate and that the circuit court was to retain jurisdiction over the matter until December 31, 2016. Defendant was allowed to continue to reside at the premises. She was, however,

prohibited from verbally attacking or using profanity toward any of plaintiff's employees. A motion to reinstate was never filed; the agreed order dismissing the matter thus became final on December 31, 2016. No order was entered memorializing the dismissal with prejudice on December 31, 2016.

¶ 7 In March 2017, defendant filed a motion pursuant to section 9-121(b) of the Act (735 ILCS 5/9-121(b) (West 2016)) to seal the court file. Section 9-121(b) provides:

> "Discretionary sealing of court file. The court may order that a court file in a forcible entry and detainer action be placed under seal if the court finds that the plaintiff's action is sufficiently without a basis in fact or law, which may include a lack of jurisdiction, that placing the court file under seal is clearly in the interests of justice, and that those interests are not outweighed by the public's interest in knowing about the record." 735 ILCS 5/9-121(b) (West 2016).[3]

In her motion, defendant maintained that the forcible entry and detainer action against her was sufficiently without a basis in fact or law because, pursuant to the agreed order, the matter had been dismissed and plaintiff could no longer reinstate the case. Defendant further asserted that sealing the court file was in the interest of justice because her ability to obtain alternative housing was being affected by this case. Defendant maintained that the interests of justice are not outweighed by the public's interest in the knowledge contained in the record of the eviction action because the matter was not disposed of against her, rather it was dismissed with prejudice.

¶ 8 In response, plaintiff asserted that its action had a sufficient basis in fact or law, as evidenced by the circuit court's denial, in part, of defendant's motion for summary judgment.

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[3] We observe that this section was amended effective January 1, 2018. The amendment, however, did not substantively change subsection (b), as only the phrase "forcible entry and detainer action" was changed to "eviction action."

Plaintiff stressed the importance of court records being accessible to the public and noted that defendant's claim regarding her failure to obtain alternative housing was incorrect where she was not currently agreeing to vacate the premises.

¶ 9 In reply, defendant maintained that section 9-121(b) did not require her to demonstrate that "both prongs of the statute are met," only that either the action was sufficiently without a basis in fact or law, or that sealing is in the interests of justice and those interests are not outweighed by the public's interest in access to the record. Specifically, defendant asserted that there was no basis in law or fact where (1) plaintiff's action was dismissed with leave to reinstate and plaintiff never moved to reinstate; (2) plaintiff's allegations were never adjudicated, thus they remain unproven and dismissed; and (3) under the terms of the agreed order jurisdiction in the case lapsed on December 31, 2016. Defendant further maintained that sealing the file would serve the interests of justice by allowing her a fair opportunity to find new rental housing. Defendant's affidavit stated she is "a resident in good standing at Elm Street Plaza" but would like to move but is unable to find "alternative housing." Defendant further averred she had applied to lease new housing, but her application was rejected because she had an "Eviction Record Match." Defendant also noted that the public's interest in access to court files is not absolute, particularly where the eviction court file is being used for an improper purpose. Defendant observed that "on the basis of unadjudicated allegations, landlords have already used and will continue to use their knowledge of this file to deny [defendant] access to rental housing."

¶ 10 After hearing argument in the matter, the circuit court initially determined that although the motion was brought over 30 days after the case had been dismissed with prejudice, it had subject matter jurisdiction because section 9-121(b) did not impose any time limit to bringing a

motion to seal. Regarding the merits of the motion, the circuit court read section 9-121(b) to set forth "three separate elements" which must be established to seal a court file. The circuit court then concluded that defendant failed to establish the first element, that plaintiff's action was sufficiently without a basis in fact or law. In so concluding, the circuit court relied on the language of the agreed order wherein defendant specifically agreed to control her conduct in regard to plaintiff's employees thereby establishing that plaintiff's action did have a basis in fact and law. The circuit court concluded that since defendant could not establish the first element, it need not make any findings regarding the remaining elements. This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant maintains that the circuit court improperly interpreted section 9-121(b) of the Act and thus erred when it denied her motion to seal. In response, plaintiff first asserts that the circuit court lacked subject matter jurisdiction to consider defendant's motion to seal, and as a result this court lacks jurisdiction. As our jurisdiction is integral to rendering a determination in this matter, we first turn to consider this threshold issue. *In re Benny M.*, 2017 IL 120133, ¶ 17.

¶ 13 A. Jurisdiction

¶ 14 Plaintiff maintains that the circuit court did not have subject matter jurisdiction to consider the motion to seal because it was filed more than 30 days after the agreed order became final on December 31, 2016. Our review of a circuit court's decision concluding that it has subject matter jurisdiction is *de novo*. *Harper Square Housing Corp. v. Hayes*, 305 Ill. App. 3d 955, 959 (1999).

¶ 15 The general rule is that a trial court loses jurisdiction over a case and has no authority to vacate or modify a final judgment once 30 days have elapsed, unless a timely postjudgment

motion has been filed. *Robinson v. Point One Toyota, Evanston*, 2012 IL App (1st) 111889, ¶ 18. Every final judgment of a circuit court in a civil case is appealable as of right. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). Supreme Court Rule 303 provides that the appellate court has jurisdiction to hear an appeal in a civil case when the notice of appeal is filed within 30 days after entry of a final order. Ill. S. Ct. R. 303 (eff. Jan. 1, 2015).

¶ 16 A postjudgment motion must ordinarily be filed within 30 days of judgment. See 735 ILCS 5/2-1202(c) (West 2016) (motions in jury cases); 735 ILCS 5/2-1203(a) (West 2016) (motions in non-jury cases); 735 ILCS 5/2-1301(e) (West 2016) (motion to vacate default judgment). After the expiration of the 30-day period, the trial court lacks the necessary jurisdiction to amend, modify or vacate its judgment. *Robinson*, 2012 IL App (1st) 111889, ¶ 18. Once jurisdiction has been lost, the only means of challenging the judgment is through a collateral attack, by filing a petition under section 2-1401 of the Code of Civil Procedure or by proceeding under section 2-1301(g) of the Code of Civil Procedure. *Jones v. Unknown Heirs or Legatees of Fox*, 313 Ill. App. 3d 249, 252-53 (2000).

¶ 17 Here, no postjudgment motion was filed within 30 days of December 31, 2016, the date the dismissal became final. Defendant filed her motion to seal pursuant to section 9-121(b) of the Act in March 2017, beyond the 30-day period. Looking purely at the timing of defendant's motion, plaintiff argues that the circuit court lacked jurisdiction to consider the motion.

¶ 18 Defendant, however, maintains she is not attacking the agreed order or the resulting dismissal, but is instead raising a freestanding, collateral action to have her court file sealed. Defendant contends that the circuit court properly determined that it had jurisdiction as section 9-121(b) allows for such an action to be filed and cites *People v. Mingo*, 403 Ill. App. 3d 968 (2010). While we acknowledge that *Mingo* is a criminal matter, the pertinent issues therein were

primarily ones of statutory construction and subject matter jurisdiction, and we find the analysis in *Mingo* helpful and relevant to our considerations of the issues here.

¶ 19 In *Mingo*, the defendant was convicted of robbery and aggravated battery in 2004 and was ordered to pay "an undelineated $243 in '[f]ines, [c]ourt [c]osts, [f]ees [and] [p]enalties' " along with a $200 DNA assessment and awarded a credit of $5 per day spent in presentencing custody, totaling $1565. *Mingo*, 403 Ill. App. 3d at 970. Four years later, in 2008, the defendant filed a petition for revocation of the fines under section 5-9-2 of the Unified Code of Corrections (730 ILCS 5/5-9-2 (West 2008)). *Id.* The trial court denied the petition. *Id.* On appeal, defendant raised only the issue that the presentencing credit fully satisfied the DNA assessment and the judgment should be corrected to so reflect. *Id.*

¶ 20 Prior to addressing the merits of the defendant's claim, the reviewing court considered whether the trial court lacked jurisdiction to consider the defendant's petition in that the petition was filed more than 30 days after final judgment. *Id.* The *Mingo* court observed that the fact 30 days had passed since the judgment was entered does not "restrict the trial court's ability to address freestanding, collateral actions, such as postconviction petitions (725 ILCS 5/122-1 (West 2008)) or petitions brought under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008))." *Id.* at 970-71.

¶ 21 In order to determine if the defendant's petition was a freestanding, collateral action, the *Mingo* court considered the language and purpose of the statute. *Id.* at 971. Section 5-9-2 provides: "Except as to fines established for violations of Chapter 15 of the Illinois Vehicle Code, the court, upon good cause shown, may revoke the fine or the unpaid portion or may modify the method of payment." (Internal quotation marks omitted.) *Id.* (quoting 730 ILCS 5/5-9-2 (West 2008)). In examining the plain language of section 5-9-2, the reviewing court

concluded that "the legislature intended petitions for the revocation of fines to be freestanding actions, collateral to the original action." *Id.* The court noted that section 5-9-2 "does not impose any time limit on the filing of a petition to revoke fines" and that such a limitation is within the purview of the legislature, not the courts. *Id.* The *Mingo* court further noted that, "the legislature has demonstrated, on numerous occasions, its ability to set time limits for the filing of motions and petitions when it has so chosen." *Id.* The court also observed that "to read section 5-9-2 as requiring the filing of a petition for revocation of fines within 30 days of the judgment would be to make section 5-9-2 duplicative of section 5-8-1(c), thus rendering section 5-9-2 superfluous and meaningless." *Id.* at 972.

¶ 22 Finally, the *Mingo* court stated that the good-cause requirement in section 5-9-2 indicated that the legislature intended the statute to "provide a defendant relief from fines when factors, external to the original proceedings, would warrant the revocation of the fines to ease a defendant's financial burden." *Id.* This, according to the court, would "certainly" arise after 30 days had passed from the imposition of the sentence. *Id.*

¶ 23 In light of *Mingo*, in order for us to determine here whether a motion to seal pursuant to section 9-121(b) of the Act is a freestanding, collateral action, we must interpret the language of section 9-121(b), which we do *de novo*. *Bank of New York Mellon v. Laskowski*, 2018 IL 121995, ¶ 12. The principles governing statutory interpretation are familiar and well settled. The cardinal rule of statutory construction is to ascertain and give effect to the legislature's intent. *Id.* The most reliable indicator of legislative intent is the language of the statute, given its plain and ordinary meaning. *Id.* That said, a court also will presume that the legislature did not intend absurd, inconvenient, or unjust results. *Id.* Consequently, where a plain or literal reading of a statute renders such results, the literal reading should yield. *Id.*

¶ 24 The plain language of section 9-121(b) indicates that the legislature intended that motions to seal the court file could be filed while the action was pending or as freestanding actions, collateral to the original action. 735 ILCS 5/9-121(b) (West 2016). As in *Mingo*, the statute does not impose any time limit on the filing of a motion to seal the court file. See *Mingo*, 403 Ill. App. 3d at 971. Thus, we cannot read the statute as requiring that the motion to seal must be filed within 30 days of the entry of the judgment as the legislature did not express such a requirement. See *Moon v. Rhode*, 2016 IL 119572, ¶ 22.

¶ 25 In addition, we acknowledge, as the *Mingo* court did, "the legislature has demonstrated, on numerous occasions, its ability to set time limits for the filing of motions and petitions when it has so chosen." *Mingo*, 403 Ill. App. 3d at 971. Notably, the Act is procedurally governed by the Code of Civil Procedure (Code) (735 ILCS 5/1-101 *et seq.* (West 2016)) (in fact it is an act within the Code), which includes time limit prescriptions for the filing of various motions. See 735 ILCS 5/2-1203(a) (West 2016) (a party may, within 30 days after the entry of the judgment or within any further time the court may allow within the 30 days or any extensions thereof, file a motion for a rehearing, or a retrial, or modification of the judgment or to vacate the judgment or for other relief); 735 ILCS 5/2-1301(e) (West 2016) (the court may on motion filed within 30 days after the entry of a final order or judgment set aside any final order or judgment upon any terms and conditions that shall be reasonable). The legislature chose not to impose a time limitation as to a motion to seal under section 9-121(b).

¶ 26 The purpose of section 9-121(b) is to provide tenants protection from the adverse impact of eviction actions which had no sufficient legal or factual basis. The full adverse impact of an eviction action, such as a tenant's inability to find alternative housing due to the eviction record, will most likely come to light after the case has been resolved. The legislature's decision not to

include a time limitation thus serves the purpose of section 9-121(b) and demonstrates that the motion should be viewed as an independent proceeding. See *Mingo*, 403 Ill. App. 3d at 971. Accordingly, we conclude based on the plain language and purpose of section 9-121(b) that the legislature intended that a motion to seal is a freestanding, collateral action not subject to the ordinary 30-day jurisdictional time limit. See *id.* at 972. Consequently, we find the circuit court did not err when it determined it had subject matter jurisdiction to consider defendant's motion to seal.

¶ 27 Nonetheless, plaintiff maintains that we lack appellate jurisdiction because the order denying the motion to seal was not a final order.

¶ 28 Pursuant to the Illinois Constitution, our jurisdiction is limited to appeals from final judgments. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). Absent a supreme court rule, we lack jurisdiction to review judgments, orders, or decrees that are not final. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 22 (citing *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 9). "An order is final and thus appealable if it either terminates the litigation between the parties on the merits or disposes of the rights of the parties, either on the entire controversy or a separate branch thereof." *Bankfinancial, FSB v. Tandon*, 2013 IL App (1st) 113152, ¶ 18 (citing *Wilson v. Edward Hospital*, 2012 IL 112898, ¶ 19).

¶ 29 Here, as discussed, the eviction action was dismissed with prejudice in its entirety on the basis of the agreed order and the motion to seal was an independent, collateral action. We therefore find that the order denying defendant's motion to seal is a final and appealable order as it disposed of the rights of the parties as to the issue of sealing and there were no other pending claims or issues as to the underlying litigation. See *Village of Bellwood v. American National Bank and Trust Co.*, 2011 IL App (1st) 093115, ¶ 15 (finding an order denying a party's motion

to abandon eminent domain proceedings was a final and appealable order).

¶ 30 In so finding, we reject plaintiff's argument that by pursuing her motion to seal defendant was attempting to unilaterally modify the agreed order. As we have found, defendant's motion to seal does not attack or contest the agreed order or the resulting dismissal with prejudice; rather, defendant sought only that her court file be sealed, which was a separate and distinct proceeding from the underlying litigation and the agreed order. See *id.* ¶ 16.

¶ 31 In summary, we thus conclude the circuit court had subject matter jurisdiction to consider defendant's motion to seal and we have jurisdiction to entertain defendant's appeal from the order denying that motion.

¶ 32 B. The Motion to Seal

¶ 33 On appeal, defendant maintains that the circuit court erred (1) in its interpretation of section 9-121(b) and (2) when it denied her motion to seal. We address each claim in turn.

¶ 34 1. Statutory Construction of Section 9-121(b)

¶ 35 For ease of reference, we again set forth section 9-121(b):

> "Discretionary sealing of court file. The court may order that a court file in a forcible entry and detainer action be placed under seal if the court finds that the plaintiff's action is sufficiently without a basis in fact or law, which may include a lack of jurisdiction, that placing the court file under seal is clearly in the interests of justice, and that those interests are not outweighed by the public's interest in knowing about the record." 735 ILCS 5/9-121(b) (West 2016).

¶ 36 Defendant raises two issues of statutory construction. First, defendant maintains that the trial court improperly read the statute to require a showing of three, instead of two, separate elements. Defendant contends that the second comma in subsection (b) should be construed as

an "or" not "and." Thus, defendant asserts that the trial court has the discretion to seal the records *either* where the movant has demonstrated the matter is without a sufficient basis in fact or law *or* where the interests of justice outweighs the public's interest in the transparency of the judicial system. Defendant maintains that such a construction of section 9-121(b) gives effect to the legislature's intent, which, according to defendant, is to "make it easier for courts to seal eviction records" and to protect individuals who "find themselves with a black mark on their proverbial permanent record." (Internal quotation marks omitted.) 96th Ill. Gen. Assem., House Proceedings, Apr. 23, 2010, at 22 (statements of Representative Fritchey).

¶ 37 Plaintiff responds that the circuit court correctly determined that under section 9-121(b), the court must make three findings, and not two, before sealing a file.

¶ 38 We agree with plaintiff that the plain language of the statute indicates that the legislature intended for the circuit court judge to render three distinct findings under section 9-121(b). First, the statute expressly states that the circuit court may enter an order sealing the eviction court file upon findings that (1) the action is without a sufficient basis in fact or law, (2) the sealing is clearly in the interests of justice, and (3) those interests of justice outweigh the public's interest in knowledge of the case. 735 ILCS 5/9-121(b) (West 2016). The plain language dictates such a reading. After directing the court to make these certain findings, the statute lists those findings, with each finding preceded by the word "that." These necessary findings are separated by a comma and the word "and" is employed after the final comma. The well established rules of statutory construction require that the word "and" be read "as conjunctive and not disjunctive" and that the use of the word " 'indicates that the legislature intended that *all* of the listed requirements are to be met.' " (Emphasis in original.) *Soh v. Target Marketing Systems*, 353 Ill. App. 3d 126, 131 (2004) (citing 1A N. Singer, Sutherland on Statutory Construction § 21.14, at

129 (5th ed. 1993). We conclude that the legislature intended for these findings to be read conjunctively in a series. Accordingly, we decline to adopt defendant's reading of the statute, which would require us to read a word ("or") into the statute that does not exist. See *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 390 (2009) ("We will not depart from a statute's plain language by reading into it exceptions, limitations, or conditions that conflict with the legislative intent.").

¶ 39 Second, defendant asserts that the circuit court improperly interpreted the statute to require a determination that plaintiff's eviction action was sufficiently without a basis in fact or law *when it was initially filed.* Defendant maintains that because the statute uses the word "is" in the phrase "if the court finds that the plaintiff's action *is* sufficiently without a basis in fact or law," the proper reading of the statute requires the circuit court to consider whether plaintiff's case *currently* (*i.e.* at the time the motion to seal is filed) presents a sufficient basis. Defendant further asserts that because the circuit court lacked jurisdiction over the eviction action itself when the motion to seal was filed the action was to be viewed as "currently" being without a sufficient basis in law or fact.

¶ 40 In response, plaintiff argues that a court lacks jurisdiction in "every single case where the time period for taking any legal action has expired." Plaintiff contends that defendant's reading of the statute would lead to absurd results where, just as a consequence of the passage of time, the first element of section 9-121(b) can be satisfied.

¶ 41 We agree with plaintiff that defendant's interpretation (that any time the court lacks jurisdiction over the claim the action would automatically be without a basis in fact or law) would lead to an absurd result. See *Christopher B. Burke Engineering, Ltd. v. Heritage Bank of Central Illinois*, 2015 IL 118955, ¶ 17 (this court "avoids interpreting statutes in a manner that

would create absurd results"). Clearly, the legislature did not intend for this first element to be met solely on the basis of the passage of time, *e.g.*, that 30 days had expired since the circuit court rendered a final judgment or a determination on a posttrial motion in the eviction action. To allow such a result would essentially render this element superfluous, for in order to satisfy the first element all a party in an eviction action would need to do is wait until the circuit court no longer had jurisdiction and then file the motion to seal. See *Better Government Association v. Illinois High School Association*, 2017 IL 121124, ¶ 22 ("A reasonable construction must be given to each word, clause, and sentence of a statute, and no term should be rendered superfluous."). This cannot be what the legislature intended.

¶ 42 The inclusion of the phrase "which may include a lack of jurisdiction" thus informs us of the timing of the preceding clause, "if the court finds that the plaintiff's action is sufficiently without a basis in fact or law." 735 ILCS 5/9-121(b) (West 2016). As lack of jurisdiction cannot mean a lack of jurisdiction simply because the matter has concluded at the time the motion to seal is filed, it must therefore mean a lack of personal or subject matter jurisdiction while the case was pending. As previously discussed, the "which may include a lack of jurisdiction" language thus contemplates a defendant challenging subject matter or personal jurisdiction issues at the outset of the matter, but at least before the matter concludes. *Id.* Therefore, it follows that the circuit court is to examine whether a plaintiff's action is sufficiently without a basis in fact or law on all other ground as well while the matter was pending.

¶ 43 In sum, the plain language of section 9-121(b) of the Act requires the circuit court to render findings regarding three distinct elements, where determination of the first element must be made in consideration of whether the case when pending had a sufficient legal and factual basis.

¶ 44 2. The Propriety of the Circuit Court's Ruling on the Motion to Seal

¶ 45 Having so interpreted the statute, we now turn to consider whether the circuit court correctly denied defendant's motion to seal solely on the first prong of section 9-121(b), when it found that plaintiff's action had a sufficient basis in fact or law. See 735 ILCS 5/9-121(b) (West 2016).

¶ 46 A circuit court's determination as to whether court records should be sealed is reviewed for an abuse of discretion. *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 233 (2000). The threshold for finding an abuse of discretion is a high one and will not be overcome unless it can be said that the circuit court's ruling was "arbitrary, fanciful, or unreasonable, or that no reasonable person would have taken the view adopted by the [circuit] court." *Sharbono v. Hilborn*, 2014 IL App (3d) 120597, ¶ 29. When reviewing for abuse of discretion, the appellate court does not substitute its judgment for that of the circuit court or determine whether the circuit court acted wisely. *Andersonville South Condominium Association v. Federal National Mortgage Co.*, 2017 IL App (1st) 161875, ¶ 28.

¶ 47 On appeal, defendant argues that plaintiff's eviction action had no basis in law because at the time the motion to seal was filed, the eviction action had been dismissed with prejudice and thus the circuit court lacked jurisdiction over the eviction action. We disagree. As previously discussed, this argument is based on a misinterpretation of section 9-121(b). If we were to agree with defendant's argument, any defendant who waited until the circuit court lost jurisdiction over the eviction action would automatically satisfy the first prong of the statute. This cannot be what the legislature intended as there would be no discretion for the circuit court to exercise regarding this element. See *Landheer v. Landheer*, 383 Ill. App. 3d 317, 321 (2008) (a court may not depart from the plain language of the statute and read into it conditions that are inconsistent with

the express legislative intent). Defendant has offered no other argument that the case had an insufficient basis in fact or law. It is not "the obligation of this court to act as an advocate or seek error in the record" (*U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 459 (2009)), nor is it the province of this court to substitute our judgment for that of the circuit court (*Andersonville South Condominium Association*, 2017 IL App (1st) 161875, ¶ 28). Defendant has thus forfeited further review of this issue. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2017) (points not argued on appeal are forfeited); see *Vine Street Clinic v. HealthLink, Inc.*, 222 Ill. 2d 276, 301 (2006) (arguments not raised in either the circuit or appellate court are forfeited); *Guarantee Trust Life Insurance Co. v. Platinum Supplemental Insurance, Inc.*, 2016 IL App (1st) 161612, ¶ 41 (declining to consider an argument not raised on appeal). Consequently, we conclude that the trial court did not abuse its discretion when it denied defendant's motion to seal.

¶ 48 CONCLUSION

¶ 49 For the reasons stated above, we affirm the determination of the circuit court of Cook County.

¶ 50 Affirmed.

2018 IL App (1st) 171392
Appellate Court of Illinois, First District,
SECOND DIVISION.

Lezette MILTON and Antwonne Strong,
Plaintiffs–Counterdefendants–Appellants,
v.
Bourema THERRA, Fatoumata Traore, and
Unknown Occupants, Defendants–Appellees
(Bourema Therra, Counterplaintiff).

No. 1–17–1392
|
June 14, 2018

Synopsis

Background: Landlord brought forcible entry and detainer action against commercial tenant stemming from a rent dispute, and tenant counterclaimed for lost business profits. The Circuit Court, Cook County, No. 16 M 1709788, David A. Skryd, J., entered judgment in favor of tenant and found landlord in contempt. Landlord appealed.

Holdings: The Appellate Court, Mason, P.J., held that:

[1] tenant's counterclaim for lost profits was outside the proper scope of the forcible entry and detainer action, and

[2] trial court deprived landlord of due process by finding her in contempt of court without giving proper notice and a hearing.

Affirmed in part, vacated in part, and remanded with instructions.

West Headnotes (24)

[1] Landlord and Tenant
Damages and amount of recovery

Commercial tenant's counterclaim for lost profits was outside the proper scope of landlord's forcible entry and detainer action, despite argument that tenant lost profits from his business because landlord wrongfully denied him possession of the leased premises, where counterclaim sought money damages. 735 Ill. Comp. Stat. Ann. 5/9-106.

Cases that cite this headnote

[2] Forcible Entry and Detainer
Trial of title and right of possession

A forcible entry and detainer proceeding is unique in that it is a summary statutory proceeding for determining possession rights without the added complication of deciding unrelated matters. 735 Ill. Comp. Stat. Ann. 5/9-106.

Cases that cite this headnote

[3] Forcible Entry and Detainer
Trial of title and right of possession

The only factual questions that need to be answered in a forcible entry and detainer action are which party is entitled to immediate possession and whether a defense which is germane to the distinctive purpose of the action defeats plaintiff's asserted right to possession. 735 Ill. Comp. Stat. Ann. 5/9-106.

Cases that cite this headnote

[4] Contempt
Nature and grounds of power

A trial court possesses the ability to compel compliance with its orders, via a contempt order, in a summary forcible entry proceeding.

Cases that cite this headnote

[5] Contempt
Criminal contempt

Contempt
Civil contempt

Contempt of court may be either civil or criminal, and either direct or indirect, with varying due process requirements depending on the classification. U.S. Const. Amend. 14.

Cases that cite this headnote

[6] **Contempt**
Criminal contempt
Contempt
Civil contempt

Whether contempt is civil or criminal turns on the purpose of the contempt charge.

Cases that cite this headnote

[7] **Contempt**
Criminal contempt

"Criminal contempt" is used to punish past contumacious conduct, including an act committed against the majesty of the law in disrespect of the court or its process.

Cases that cite this headnote

[8] **Contempt**
Civil contempt

"Civil contempt" is used as a means to compel compliance with a court order, usually for the benefit or advantage of another party to the proceeding.

Cases that cite this headnote

[9] **Contempt**
Purging contempt after adjudication

Civil contempt proceedings are avoidable through obedience, and an alleged contemnor must be able to purge a civil contempt charge by complying with the order the court sought to enforce.

Cases that cite this headnote

[10] **Contempt**
Nature and Elements of Contempt

Contempt, whether civil or criminal, may be direct or indirect.

Cases that cite this headnote

[11] **Contempt**
Nature and Elements of Contempt

The distinction between direct and indirect contempt largely depends on where the contumacious conduct took place.

Cases that cite this headnote

[12] **Contempt**
Nature and Elements of Contempt

"Direct contempt" occurs in the judge's presence or in an integral or constituent part of the court.

Cases that cite this headnote

[13] **Contempt**
Nature and Elements of Contempt

All contempt other than direct contempt is indirect contempt and must be established by the presentation of evidence.

Cases that cite this headnote

[14] **Contempt**
Nature and Elements of Contempt
Contempt
Disobedience to Mandate, Order, or Judgment

A finding of indirect civil contempt relies on the existence of a court order and willful disobedience of that court order.

Cases that cite this headnote

[15] **Contempt**
Notice or other process;attachment

Issuance of a rule to show cause is appropriate only in a civil contempt proceeding.

Cases that cite this headnote

[16] **Constitutional Law**
Proceedings
Contempt
In general;counsel

Because judges in indirect contempt proceedings do not have personal knowledge of the allegedly contumacious conduct, the contemnor cannot be punished summarily; rather, due process requires that the contemnor receive an evidentiary hearing and adequate notice of the time and place of such hearing. U.S. Const. Amend. 14.

Cases that cite this headnote

[17] **Constitutional Law**
Proceedings
Contempt
In general;counsel

Landlord did not receive adequate notice and an evidentiary hearing before trial court held her in indirect civil contempt in forcible entry and detainer proceeding, and therefore her procedural due process rights were violated, where the hearing on tenant's first petition for rule to show cause was described as a hearing seeking the issuance of a rule to show cause, not a hearing on a rule to show cause issued by the court, the court failed to notify landlord of the hearing on the second petition for rule to show cause or issue a rule to show cause, and the court did not afford landlord an opportunity to explain her noncompliance with order that simultaneously and improperly "entered" a rule to show cause and "reserved" attorney fees and costs. U.S. Const. Amend. 14.

Cases that cite this headnote

[18] **Constitutional Law**
Proceedings

To satisfy due process, notice of an indirect civil contempt proceeding must contain an adequate description of the facts on which the contempt charge is based and inform the alleged contemnor of the time and place of an evidentiary hearing on the charge within a reasonable time in advance of the hearing. U.S. Const. Amend. 14.

Cases that cite this headnote

[19] **Contempt**
Notice or other process;attachment

The petition for rule to show cause and rule to show cause work in concert to notify the alleged contemnor of the charges against her and the time and place of an evidentiary hearing.

Cases that cite this headnote

[20] **Contempt**
Notice or other process;attachment

A party's petition for a rule to show cause typically initiates civil contempt proceedings but the court must also issue a rule to show cause to satisfy notice requirements.

Cases that cite this headnote

[21] **Contempt**
Notice or other process;attachment

The rule to show cause is the method by which the court brings the parties before it for a hearing; it is not itself a contempt finding.

Cases that cite this headnote

[22] **Constitutional Law**
Proceedings

When a court fails to issue a rule to show cause and serve it on the alleged contemnor prior to holding her in indirect civil contempt, the court deprives her of due process because she lacks proper notice of the contempt proceeding. U.S. Const. Amend. 14.

Cases that cite this headnote

[23] **Constitutional Law**
Proceedings

In order to find a defendant guilty of indirect contempt of court, due process requires that the defendant not only be advised of the charges but also be accorded a fair hearing. U.S. Const. Amend. 14.

Cases that cite this headnote

[24] **Constitutional Law**
Proceedings

The due process requirement of a fair hearing before a contemnor may be found guilty of indirect contempt is not satisfied by allowing the contemnor to testify and to cross-examine the other party's witnesses; rather, she must be allowed to present evidence on her own behalf, so that she has a full opportunity for explanation for noncompliance, and this entails the opportunity to show that the version of the event related to the judge was inaccurate, misleading, or incomplete. U.S. Const. Amend. 14.

Cases that cite this headnote

***927** Appeal from the Circuit Court of Cook County, Illinois. No. 16 M 1709788, Honorable David A. Skryd, Judge Presiding.

Attorneys and Law Firms

Arthur J. Data III, of Chicago, for appellants.

Arthur E. Rosenson, of Cohen Rosenson & Zuckerman LLC, of Chicago, for appellees.

OPINION

PRESIDING JUSTICE MASON delivered the judgment of the court, with opinion.

****208** ¶ 1 In these forcible entry and detainer proceedings, the trial court entered judgment in favor of the tenants, Bourama Thera [1] and Fatoumata Traore, finding that the landlord, Lezette Milton, [2] wrongfully denied the tenants possession of the leased premises. The trial court also entered judgment in favor of Thera on his counterclaim for lost profits sustained as a result of the interruption of his business conducted on the premises, as well as repair costs, attorney fees, and court costs in the total amount of $29,615.95. During the course of the proceedings, the trial court found Milton in contempt for failing to comply with certain orders and awarded Thera relief in the form of attorney fees incurred in pursuing two petitions for a rule to show cause, as well as compensation for personal property allegedly stolen by Milton.

¶ 2 In this appeal, Milton challenges (i) the judgment entered in Thera's favor for lost profits, contending that the claim was beyond the court's authority in a forcible action, and (ii) two of the contempt orders, contending that the court failed to follow ***928** ****209** the procedures required to make such findings. We agree with Milton and vacate the money judgment in Thera's favor as well as two of the contempt findings and remand for further proceedings.

¶ 3 Milton filed her verified complaint on June 8, 2016, naming only Thera as a defendant. She alleged that she (and Antwonne Strong) owned the leased premises located at 12255 S. Halsted Street in Chicago, having purchased the property following a lender's foreclosure. Milton claimed that as of May 31, 2016, Thera owed $5109 in unpaid rent under a commercial lease for the property entered into between Thera and Letitia Jenkins, the previous owner of the property. A copy of the lease was attached to the complaint. The lease between Jenkins (whose first name was incorrectly spelled "Leticia" in the lease) and Thera had a 10–year term commencing February 2, 2012, and provided for monthly rent in the amount of $425. Milton also attached a ledger purportedly showing the history of rent payments, which reflected monthly payments of $425. Finally, Milton attached a 10–day notice reflecting service on Thera on May 3, 2016.

¶ 4 On the same day the complaint was filed, Milton changed the locks on the premises, proceeded to commence major construction work, and removed and discarded certain personal property used in Thera's business, a salon called Tata Hair Braiding, which Thera operated with his wife.

¶ 5 Milton's self-help was the subject of substantial motion practice in the forcible entry case. The trial court initially ordered Milton to provide Thera with keys to the new locks by July 22, 2016. During a status hearing on July 28, 2016, the court ordered Milton to complete the rehab work on the premises by August 11, 2016, and to provide Thera access to the premises. Additionally, during this hearing, Milton sought and was granted leave to amend her complaint to add a party and a count based on

Milton's claimed discovery of a different lease for the premises. Despite the court's July 28 order, Milton again changed the locks on July 29.

¶ 6 Milton did not immediately file her amended complaint, and after she changed the locks for the second time, Thera filed a counterclaim seeking lost business profits as a result of being locked out of the premises. On September 13, 2016, Thera also filed a petition for a rule to show cause against Milton for having failed to comply with the July 28 order regarding completion of the work and providing Thera access to the premises.

¶ 7 Milton responded to the petition, alleging that she lacked control over completion of the work, since she had no expertise in construction and had hired a contractor to perform the repairs. Milton also filed a motion to dismiss Thera's counterclaim, arguing that Thera's claim for lost profits was not within the scope of the forcible entry proceedings. Milton later filed her amended verified complaint on October 14, 2016.

¶ 8 In her amended complaint, which added Traore as a defendant, Milton claimed that the lease attached to her original complaint was not, in fact, a valid lease for the property and that both she and the lender had been unaware of the existence of any other lease at the time Milton purchased the property. Milton alleged that the lease attached to the original complaint had been forged by Thera in an attempt to make a "legitimate claim to possession of the property." Milton claimed the real lease for the property—attached as an exhibit to the amended complaint—was entered into between Jenkins (whose first name is correctly spelled "Letitia") and Traore, doing business as Tata Hair Braiding. According to Milton, Traore "allowed [Thera] to use the property." The newly ***929 **210** discovered lease was for a three-year period from April 1, 2011, to April 1, 2014, and provided for rent in the amount of $900 per month. The tenant's signature on the lease is illegible, but there are initials next to Traore's name on the same page. "Oumou Thera" is also listed as a tenant, but there are no initials next to that name, and Thera did not sign the lease. Unlike the original complaint, the amended complaint did not attach the ledger of rental payments showing rental payments of $425 per month during 2015 and 2016, when the supposed "real" lease would not have been in effect. In addition to the count seeking possession of the property, Milton included a claim for fraud based on Thera's alleged conduct in forging the 10–year lease. She sought $1425 in damages, representing unpaid rent under the newly discovered lease.

¶ 9 The trial court held a hearing on Thera's petition for a rule to show cause on October 21, 2016. The order entered on that date recites, "Defendant's motion is granted and a Rule to Show Cause is entered against Plaintiffs; Plaintiffs are ordered (again) to complete all work in the leased premises by 11/30/16." The order further reserved consideration of Milton's "right to recover attorney's fees & costs & related relief." No transcript of the October 21, 2016, hearing is contained in the record, and the order contains no factual findings. Thera later filed a petition for attorney fees.

¶ 10 The work on the premises was not completed by November 30. After a status hearing held on December 14, the court ordered that the tenants could resume occupancy of the premises the following day based on Milton's representation that the work had been completed.

¶ 11 Thera filed a second petition for a rule to show cause on January 24, 2017, alleging that Milton had failed to comply with the October 21, 2016 order because work on the premises had not been completed, evidenced by the fact that the premises lacked heat and running water. The court granted Milton an opportunity to respond and also granted Thera leave to file a fee petition relative to the first petition for a rule to show cause.

¶ 12 In her response, Milton asserted that, insofar as heat and running water were concerned, she was unable to comply with the court's order because neither of those utilities was in her name. She pointed out that both the original and the newly discovered lease provide that the tenant is responsible for utilities. Milton further asserted that work on the premises was complete "to the extent that Defendants can move back into the property and continue their business."

¶ 13 All matters, including Milton's motion to dismiss the counterclaim and Thera's pending petition for rule, were later scheduled for trial on March 16, 2017. No transcript of the trial is included in the record, and the parties have instead provided us with an agreed statement of facts pursuant to Illinois Supreme Court Rule 323(d) (eff. Dec. 13, 2005). As it pertains to the evidence at trial, the parties stipulated:

"Milton testified she purchased the Premises from a bank knowing that defendant was then leasing the Premises pursuant to a lease that had been given to Milton by the Bank ('Lease A') and that this lease provided for defendant to pay $425.00 in rent per month for the Premises. Lease A was entered into evidence. (PX1) After filing this lawsuit, Milton testified she spoke with Jenkins who provided her with another lease for the Premises, which lease was not signed by Defendant ('Lease B'). Lease B was also admitted into evidence. (PX2) Lease B provided for rent in the amount of $900.00 per month for the Premises. Jenkins testified she owned the Premises ***930 **211** before it was foreclosed by the bank and sold to Plaintiff. She testified that Lease A was never signed by her and that her first name was spelled incorrectly and that Lease B was the last lease she signed for the Premises before the Premises was foreclosed on. Letitia provided two checks corresponding to rent under the lease that she provided, both of which were from 2011 and pre-dated the commencement of the term of Lease A.

On cross-examination, Milton admitted that, in March 2016, she acquired the Premises knowing that Defendant was leasing the Premises to operate his business under Lease A. Milton admitted that, in March 2016, she met with Defendant and told him that she now owned the Premises. She then accepted from Defendant on March 4 a rent payment for March 2016 in the amount of $425 under Lease A and provided defendant with a receipt. Milton admitted that, in April and May 2017, she refused * * * to provide Defendant with a receipt for the $425 monthly rent payments Defendant offered. Milton admitted that her Landlord's Ten Day Notice contained incorrect statements. (DX3) For instance, the Notice was purportedly signed by Milton on May 3, 2016, but was notarized by Linda Nickel on June 3, 2010. The Notice sought payment of $5,109 in rent but Milton had just acquired title to the Premises in March 2017 and had accepted the March rent payment from Defendant. As a result, $5,109 of rent was not due Milton as of June 2017. After filing the forcible action on June 8, 2017, Milton admitted that she subsequently accepted Defendant's April and May 2016 rent payments ($425 each, totaling $850) that were tendered through her counsel on June 27, 2016. (DX2) Milton admitted also that, on June 8, 2017, she locked Defendant out of the Premises without advance notice so that he could not operate his business, removed all of his belongings from the Premises, and demolished much of the interior.

On cross-examination, Jenkins admitted that before the premises was foreclosed on by the bank, Defendant had been her tenant, had been paying her rent, and that she had provided Defendant with monthly receipts for his $425 rent payments.

Defendant testified that, from August 2000 to the present, he and his wife operated 'Tata Hair Braiding' at 12255 S. Halsted in Chicago under a series of written leases. Most recently, in January 2012, defendant, as tenant, and Jenkins, as landlord, entered into Lease A for the Premises[.] The Lease A term commenced February 2, 2012, and ends February 2, 2022. The rent is $425 per month. Defendant provided proof of the receipts provided to him by Jenkins for the dozen or so monthly $425 payments that he had timely made to Jenkins under Lease A in 2014, before the foreclosure proceedings began and a receiver was appointed. (DX4) Defendant testified that, before Milton purchased the Premises, he recorded Lease A on April 30, 2015, with the Cook County Recorder of Deeds as Document No. 1512013025. In March 2016, Defendant testified that Milton stopped by and informed defendant she now owned the Premises, having purchased it from a bank due to the Premises being in foreclosure. As a result, Defendant testified he paid Milton rent for March 2016 in the amount due under Lease A ($425) and that Milton accepted the payment and tendered to him a receipt. (DX1) Defendant denied being a party to Lease B or ever paying rent under Lease B. In April and May, Defendant testified that Milton refused to provide him with receipts for the $425 rent payments ***931 **212** he was offering to make. After the filing of the forcible action, defendant tendered to Plaintiffs' counsel on June 27, 2016, his April and May 2016 rent payments that had been due under Lease A ($425 each, for a total of $850) and that Plaintiff accepted these payments. Defendant testified that, on June 8, Plaintiffs locked him out of and removed his belongings from the Premises. As a result, he and his wife were put out of business until April 2017. By paying all rent due under the Lease to Milton for March–May 2016 (and otherwise being excused from paying rent thereafter under various Court Orders), Defendant testified that he had fully performed his obligations arising under the Lease but that Plaintiffs had materially breached the Lease by denying him access to the Premises."

¶ 14 With respect to both claims in Milton's complaint, the court ruled in favor of Thera and against Milton. (Traore never filed an appearance and is not mentioned in the judgment order.) The court further ruled in favor of Thera and against Milton on his counterclaim for lost profits, although no evidence of Thera's lost profits was presented at trial. With respect to the pending rule to show cause, the court awarded Thera the sum of $2953, representing the amount he expended to render the premises habitable, as well as court costs and attorney fees.[3] The court directed Thera to file supplemental supporting documents to establish his lost profits and attorney fees. No separate order on Thera's pending petition for a rule to show cause was ever entered.

¶ 15 On April 20, 2017, the court entered final judgment awarding Thera a total of $26,615.95 for lost profits, repair costs, attorney fees, and court costs. The court further permitted Thera to offset rent due under the lease against the judgment, effectively relieving him of his obligation to pay rent for the remainder of the lease term. The order states that it is final and there is no just reason to delay enforcement or appeal. The court did not enter a separate order addressing Milton's motion to dismiss the counterclaim.

¶ 16 Evidently the court's judgment did not deter Milton in her efforts to oust Thera from the property. In an emergency motion for a temporary restraining order filed on May 8, 2017, Thera alleged that on May 2 Milton broke into the premises, deactivated the alarm, and removed certain property belonging to Thera. Milton also demanded rent for March and April, in violation of the court's April 20 order permitting Thera to offset rent against the judgment. At the May 8 hearing on Thera's motion, Milton was ordered to vacate the premises and allow Thera to offset rent, both of which she thereafter refused to do, leading to yet another petition for a rule to show cause filed on May 15, 2017.

¶ 17 On May 18, 2017, the trial court entered an order stating: "The motion is granted and a rule to show cause is entered against Lezette Milton as to why she should not be held in civil contempt for violating the Court's May 8, 2017 (and April 20, 2017) orders." The court set a hearing on the rule to show cause for May 23. It also granted Thera leave to recover his attorney fees and the value of the personal property taken from the premises, unless such property was returned by May 22.

¶ 18 Thera submitted a supplemental fee petition seeking $3237 in attorney fees and $4255 in compensation for his stolen property, which included a television, a computer, ***932** ****213** couches, cabinets, and security cameras. On May 23, 2017, "the submissions and evidence having been considered by the Court," the trial court entered a supplemental judgment granting Thera the full amount he requested. The court noted that it was entering judgment over Milton's objection that she had not been served with a rule to show cause and was not afforded a hearing in accordance with due process.

¶ 19 ANALYSIS

¶ 20 On appeal, Milton argues that (i) the trial court could not consider Thera's counterclaim for lost profits in a forcible entry and detainer action and (ii) the trial court deprived her of due process by finding her in contempt of court without giving her proper notice and a hearing. We consider these contentions in turn.

¶ 21 Thera's Counterclaim for Lost Profits

[1] ¶ 22 Milton argues that the trial court could not rule on Thera's counterclaim for lost profits, since Milton's cause of action was brought as a forcible entry and detainer action, in which the court is limited to deciding the issue of possession. Thera argues that, under the facts of this case, his lost profits are sufficiently tied to the issue of possession such that the trial court could properly consider them. We agree with Milton.

[2] **[3]** ¶ 23 A forcible entry and detainer proceeding is unique in that it is a summary statutory proceeding for determining possession rights without the added complication of deciding unrelated matters. *100 Roberts Road Business Condominium Ass'n v. Khalaf*, 2013 IL App (1st) 120461, ¶ 31, 374 Ill.Dec. 816, 996 N.E.2d 263; *Newport Condominium Ass'n v. Talman Home Federal Savings & Loan Ass'n of Chicago*, 188 Ill. App. 3d 1054, 1058, 136 Ill.Dec. 612, 545 N.E.2d 136 (1988) (when entertaining forcible entry and detainer actions, the court "has limited and special jurisdiction without equitable powers"); *Bismarck Hotel Co. v. Sutherland*, 92 Ill. App.

3d 167, 174, 47 Ill.Dec. 512, 415 N.E.2d 517 (1980). Thus, the forcible entry and detainer statute provides that "no matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise. However, a claim for rent may be joined in the complaint, and judgment may be entered for the amount of rent found due." 735 ILCS 5/9–106 (West 2016). Our supreme court has defined "germane" to mean closely allied, related, or connected. *Rosewood Corp. v. Fisher*, 46 Ill. 2d 249, 256, 263 N.E.2d 833 (1970). Therefore, the only factual questions that need to be answered in this type of proceeding are "which party is entitled to immediate possession and whether a defense which is germane to the distinctive purpose of the action defeats plaintiff's asserted right to possession." *First Illinois Bank & Trust v. Galuska*, 255 Ill. App. 3d 86, 90, 194 Ill.Dec. 209, 627 N.E.2d 325 (1993). In *Avenaim v. Lubecke*, 347 Ill. App. 3d 855, 862, 283 Ill.Dec. 227, 807 N.E.2d 1068 (2004), the court found four general categories of claims that are germane to the issue of possession:

> "(1) claims asserting a paramount right of possession; (2) claims denying the breach of the agreement vesting possession in the plaintiff; (3) claims challenging the validity or enforceability of the agreement on which the plaintiff bases the right to possession; or (4) claims questioning the plaintiff's motivation for bringing the action." (Internal quotation marks omitted.)

See also *American National Bank v. Powell*, 293 Ill. App. 3d 1033, 1044, 229 Ill.Dec. 439, 691 N.E.2d 1162 (1997).

***933** ****214** ¶ 24 Accordingly, Illinois courts have consistently held that a claim that seeks damages and not possession is not germane to the purpose of a forcible entry and detainer proceeding. *Sawyier v. Young*, 198 Ill. App. 3d 1047, 1053, 145 Ill.Dec. 141, 556 N.E.2d 759 (1990) (holding that a counterclaim, unrelated to the question of possession, that solely sought money damages based on a real estate contract was not germane to the forcible action); *Great American Federal Savings & Loan Ass'n v. Grivas*, 137 Ill. App. 3d 267, 275, 91 Ill.Dec. 870, 484 N.E.2d 429 (1985) (finding that the remaining count of defendant's counterclaim sought damages for plaintiffs' alleged fraud and deceit, and therefore did not concern the issue of possession); *Bismarck Hotel Co.*, 92 Ill. App. 3d at 174, 47 Ill.Dec. 512, 415 N.E.2d 517 (stating that claims involving fraud are insufficiently germane to a forcible entry and detainer action, as "there is no nexus between the claim and the issue of which party is entitled to possession"); *Wells Fargo Bank, N.A. v. Watson*, 2012 IL App (3d) 110930, ¶ 16, 362 Ill.Dec. 201, 972 N.E.2d 1234 (holding that an issue of whether a party committed fraud on the court in obtaining a mortgage foreclosure judgment was not germane to a forcible entry and detainer action).

¶ 25 Thera argues that these cases are distinguishable because his claim for damages is premised on his right of possession. Specifically, he lost profits from his business because Milton wrongfully denied him possession of the leased premises. Therefore, he asserts that his damages are germane to the purpose of the forcible entry and detainer proceeding.

¶ 26 This court rejected a similar claim in *Powell*, 293 Ill. App. 3d 1033, 229 Ill.Dec. 439, 691 N.E.2d 1162. The landlord in *Powell* brought a forcible entry and detainer action against a tenant. The tenant filed a counterclaim for breach of the implied warranty of habitability and sought a refund of overpaid rent. *Id.* at 1037, 229 Ill.Dec. 439, 691 N.E.2d 1162. Although the court acknowledged that a breach of the implied warranty of habitability is by itself germane to the issue of possession, because the claim for breach was coupled with a request for monetary damages, it was no longer germane. *Id.* at 1045, 229 Ill.Dec. 439, 691 N.E.2d 1162.

¶ 27 Similarly, Thera's counterclaim for lost profits, although premised on his right of possession, is outside the scope of the Forcible Entry and Detainer Act because it seeks monetary damages.[4] Accordingly, the trial court's judgment for Thera on his counterclaim must be vacated.

¶ 28 That said, we sympathize with Thera's position. Milton, bent on gaining possession of the premises and sabotaging Thera's business, openly flouted several of the trial court's orders. If there was an argument to be made for expanding the scope of issues "germane" to a forcible proceeding, this case would provide compelling support.

¶ 29 Yet, if forcible proceedings are to retain their summary nature, they cannot be burdened by issues that typically would entail motion practice, discovery, and perhaps expert testimony. And the entry of a money judgment against a litigant in the context of these summary proceedings poses serious due process concerns.

¶ 30 Ultimately, a litigant in Thera's position has the remedies of indirect civil or criminal contempt to (i) compel compliance with the forcible entry court's orders or (ii) punish the willful disobedience of those ***934** ****215** orders. In addition, Thera can pursue a claim for damages against Milton. And apart from the procedural irregularities in connection with the petitions for rule to show cause discussed below, we express no view regarding the trial court's decision to allow Thera to set off against rent due under the lease any amounts awarded as attorney fees or other costs associated with Milton's noncompliance with court orders.

¶ 31 Contempt of Court

¶ 32 Milton next argues that the circuit court's judgment awarding Thera attorney fees and costs should be vacated because she was denied procedural due process in the contempt proceedings related to the October 21, 2016 order that reserved attorney fees and costs as a remedy and the March 16, 2017 judgment that ultimately granted Thera repair costs, attorney fees, and costs. She contends she was deprived of due process because the circuit court did not issue a rule to show cause, nor did it hold a hearing to allow Milton to present evidence in her own defense, before it awarded Thera relief in its March 16, 2017 order. We agree that Milton's procedural due process rights were violated as they relate to the March 16 order and that, as a result, the findings of contempt must be vacated. [5]

[4] ¶ 33 We preface our discussion of the many procedural irregularities in the circuit court's contempt proceedings by observing that, as noted above, Milton was an utterly noncompliant and difficult litigant who openly flouted numerous court orders. And even in a summary forcible entry proceeding, a trial court necessarily possesses the ability to compel compliance with its orders. *D'Agostino v. Lynch*, 382 Ill. App. 3d 960, 968, 320 Ill.Dec. 446, 887 N.E.2d 590 (2008). But contempt proceedings are *sui generis* and require careful adherence to well-established procedures and safeguards to preserve the alleged contemnor's right to due process.

[5] ¶ 34 Contempt may be either civil or criminal, and either direct or indirect, with varying due process requirements depending on the classification. *People v. Javaras*, 51 Ill. 2d 296, 299, 281 N.E.2d 670 (1972); see generally *In re Marriage of Betts*, 200 Ill. App. 3d 26, 43–48, 146 Ill.Dec. 441, 558 N.E.2d 404 (1990).

[6] **[7]** **[8]** **[9]** ¶ 35 Whether contempt is civil or criminal turns on the purpose of the contempt charge. *Betts*, 200 Ill. App. 3d at 43, 146 Ill.Dec. 441, 558 N.E.2d 404; *Emery v. Northeast Illinois Regional Transportation Co.*, 374 Ill. App. 3d 974, 977, 313 Ill.Dec. 502, 872 N.E.2d 485 (2007). Criminal contempt is used to punish past contumacious conduct, including "an act committed against the majesty of the law in disrespect of the court or its process" (*Pryweller v. Pryweller*, 218 Ill. App. 3d 619, 629, 161 Ill.Dec. 884, 579 N.E.2d 432 (1991)), whereas civil contempt is used as a means to compel compliance with a court order, usually "for the benefit or advantage of another party to the proceeding" (*id.* at 628, 161 Ill.Dec. 884, 579 N.E.2d 432). See *Betts*, 200 Ill. App. 3d at 43, 146 Ill.Dec. 441, 558 N.E.2d 404; *Felzak v. Hruby*, 226 Ill. 2d 382, 391, 315 Ill.Dec. 338, 876 N.E.2d 650 (2007). Civil contempt proceedings are "avoidable through obedience," and an alleged contemnor must be able to "purge" a civil contempt charge by complying with the order the court sought to enforce. *People v. Warren*, 173 Ill. 2d 348, 368, 219 Ill.Dec. 533, 671 N.E.2d 700 (1996); ***935** ****216** *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 279, 307 Ill.Dec. 885, 860 N.E.2d 539 (2006); *Felzak*, 226 Ill. 2d at 391, 315 Ill.Dec. 338, 876 N.E.2d 650.

[10] **[11]** **[12]** **[13]** **[14]** ¶ 36 Contempt, whether civil or criminal, may be direct or indirect. The distinction between direct and indirect contempt largely depends on where the contumacious conduct took place. See *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 41, 343 Ill.Dec. 182, 934 N.E.2d 506 (2010). Direct contempt occurs in the judge's presence or in an "integral or constituent part of the court." *Betts*, 200 Ill. App. 3d at 48, 146 Ill.Dec. 441, 558 N.E.2d 404; *Javaras*, 51 Ill. 2d at 299, 281 N.E.2d 670. All other contempt is indirect and "must be established by the presentation of evidence." *Wierzbicki v. Gleason*, 388 Ill. App. 3d 921, 934, 329 Ill.Dec. 162, 906 N.E.2d 7 (2009); *Javaras*, 51 Ill. 2d at 300, 281 N.E.2d 670; *Betts*, 200 Ill. App. 3d at 48, 146 Ill.Dec. 441, 558 N.E.2d 404; *Bank of America, N.A. v. Freed*, 2012 IL App (1st) 113178, ¶ 20, 361 Ill.Dec. 565, 971 N.E.2d 1087. "A finding of indirect civil contempt relies on the existence of a court order and willful disobedience of that court order." *Sinkus v. BTE Consulting*, 2017 IL App (1st) 152135, ¶ 29, 411 Ill.Dec. 245, 72 N.E.3d 1251.

[15] ¶ 37 Milton's conduct was obviously not committed in the court's presence and so was indirect. It is less clear whether her contempt was civil, criminal, or both, particularly since the trial court made no attempt to designate the form of contempt at issue. In its October 21, 2016 order granting Thera's first petition for a rule to show cause, the trial court directed Milton to complete the work by November 30, suggesting that the contempt was intended as civil. *Pryweller*, 218 Ill. App. 3d at 628, 161 Ill.Dec. 884, 579 N.E.2d 432 (civil contempt is a means to compel compliance with a court order, typically for the benefit of another party). Additionally, issuance of a rule to show cause is appropriate only in civil contempt. *Betts*, 200 Ill. App. 3d at 58–59, 146 Ill.Dec. 441, 558 N.E.2d 404 (because a respondent in indirect criminal contempt proceedings has a right against self-incrimination, she cannot be required to "show cause" as to why she should not be held in contempt). But the court never provided Milton with a way to purge her contempt, either in its October 21, 2016 order or in its March 16, 2017 order in which it awarded Thera repair costs, court costs, and attorney fees. Moreover, the record is unclear as to whether Milton had completed the work before the court's March 16, 2017 order. See *In re J.L.D.*, 178 Ill. App. 3d 1025, 1031, 128 Ill.Dec. 170, 534 N.E.2d 190 (1989) (contempt was criminal where respondent "was not given the opportunity to purge the contempt, nor could she have since the act had already been done and corrected"); *In re Marriage of O'Malley*, 2016 IL App (1st) 151118, ¶¶ 28–29, 407 Ill.Dec. 930, 64 N.E.3d 729 (where contemnor complied with court order prior to court's finding of "indirect civil contempt," the contempt was properly classified as indirect criminal contempt, since contemnor had no way to purge the contempt).

[16] **[17]** ¶ 38 But regardless of whether the contempt is classified as civil or criminal, the trial court failed to provide Milton with the due process required for an adjudication of indirect contempt. Because judges in indirect contempt proceedings do not have personal knowledge of the allegedly contumacious conduct, the contemnor cannot be punished summarily. *Pryweller*, 218 Ill. App. 3d at 629, 161 Ill.Dec. 884, 579 N.E.2d 432. Rather, due process requires that the contemnor receive (i) an evidentiary hearing and (ii) adequate notice of the time and place of such hearing. *Id.*; see also *Betts*, 200 Ill. App. 3d at 52–53, 146 Ill.Dec. 441, 558 N.E.2d 404 (in civil contempt, the contemnor is entitled to minimal due process, consisting of notice and ***936** ****217** an opportunity to be heard; in criminal contempt, in addition to the foregoing, the contemnor is also entitled to procedural safeguards normally applicable to criminal trials, such as the right to counsel and the right to be proved guilty beyond a reasonable doubt). Milton argues that she received neither. We agree.

[18] **[19]** **[20]** **[21]** ¶ 39 Notice of an indirect civil contempt proceeding must (i) "contain an adequate description of the facts on which the contempt charge is based" and (ii) "inform the alleged contemnor of the time and place of an evidentiary hearing on the charge within a reasonable time in advance of the hearing." (Internal quotation marks omitted.) *City of Quincy v. Weinberg*, 363 Ill. App. 3d 654, 664, 300 Ill.Dec. 387, 844 N.E.2d 59 (2006); see also *In re Parentage of Melton*, 321 Ill. App. 3d 823, 829, 254 Ill.Dec. 845, 748 N.E.2d 291 (2001). The petition for rule to show cause and rule to show cause work in concert to notify the alleged contemnor of the charges against her and the time and place of an evidentiary hearing. *In re Marriage of LaTour*, 241 Ill. App. 3d 500, 508, 181 Ill.Dec. 865, 608 N.E.2d 1339 (1993). A party's petition for a rule to show cause typically initiates civil contempt proceedings, but the court must also issue a rule to show cause to satisfy notice requirements. *Id.* at 508, 181 Ill.Dec. 865, 608 N.E.2d 1339; *Betts*, 200 Ill. App. 3d at 53, 146 Ill.Dec. 441, 558 N.E.2d 404. The rule to show cause is "the method by which the court brings the parties before it for a hearing"; it is not itself a contempt finding. *LaTour*, 241 Ill. App. 3d at 507, 181 Ill.Dec. 865, 608 N.E.2d 1339.

[22] ¶ 40 When a court fails to issue a rule to show cause and serve it on the alleged contemnor prior to holding her in indirect civil contempt, the court deprives her of due process because she lacks proper notice of the contempt proceeding. See *People ex rel. Williams v. Williams*, 156 Ill. App. 3d 438, 442, 108 Ill.Dec. 764, 509 N.E.2d 460 (1987); *Sanders v. Shephard*, 185 Ill. App. 3d 719, 730–31, 133 Ill.Dec. 712, 541 N.E.2d 1150 (1989). For instance, *Williams* held that an alleged contemnor did not have adequate notice where a rule to show cause was filed, defendant was held in contempt, the contempt was purged, and then no new petition for rule to show cause was filed, and no new rule to show cause was issued before the defendant was found in indirect civil contempt at a later hearing. *Williams*, 156 Ill. App. 3d at 443, 108 Ill.Dec. 764, 509 N.E.2d 460. Defendant believed the hearing was in regard to a motion to modify an order

for support, the only motion pending before the court at that time, and was never given notice that the hearing would concern his alleged contempt. *Id.* at 441–43, 108 Ill.Dec. 764, 509 N.E.2d 460. Similarly, in *Sanders*, 185 Ill. App. 3d at 722–23, 730–31, 133 Ill.Dec. 712, 541 N.E.2d 1150, notice requirements were not met when the court issued an emergency *ex parte* order of protection directing a father to produce his child in court on a certain date stating, " 'Willful violation of any provisions of this order constitutes contempt of court and may further result in fine or imprisonment.' " At the hearing when the father was to produce the child, the father failed to do so. The mother presented a petition for rule to show cause to the court, and the court held a contempt hearing *instanter*, finding the father in civil contempt. *Id.* at 723, 133 Ill.Dec. 712, 541 N.E.2d 1150.

¶ 41 Here, Milton was not informed of the charges against her by "information, notice or rule to show cause" before the court essentially granted Thera relief by awarding attorney fees and costs to be determined at a later date. *Williams*, 156 Ill. App. 3d at 442, 108 Ill.Dec. 764, 509 N.E.2d 460. Although Thera's petition for rule to show cause initiated the contempt proceedings and likely informed Milton of the facts upon which the charge was based, ***937 **218** the record reveals that the October 21, 2016 hearing was described as a hearing seeking the issuance of a rule to show cause, not a hearing on a rule to show cause issued by the court. Milton would have been on notice that the October 21, 2016 hearing concerned whether the court should issue a rule to show cause, not whether Milton should be held in indirect civil contempt. When the court simultaneously "entered" a rule to show cause and awarded Thera attorney fees and costs, it confused two distinct procedures: issuing a rule to show cause and finding a party in contempt. Thus, Milton was never informed of the time and place of an evidentiary hearing, as is required. *Weinberg*, 363 Ill. App. 3d at 664, 300 Ill.Dec. 387, 844 N.E.2d 59; *Melton*, 321 Ill. App. 3d at 851, 254 Ill.Dec. 845, 748 N.E.2d 291.

¶ 42 At no point between the time Thera filed his September 13, 2016 petition for rule to show cause and the court's October 21, 2016 order did the court issue or serve a rule to show cause or in any way notify Milton of the possibility that the court would award Thera relief at that time. Like the respondents in *Williams* and *Sanders*, Milton had no reason to believe the October 21, 2016 hearing would concern whether she should be found in contempt or that Thera's entitlement to attorney fees would be determined when she came to court that day. Because the court failed to issue a rule to show cause based on Thera's September 13, 2016 petition and serve it upon Milton before granting Thera relief, Milton did not receive adequate notice and was deprived of due process in the first contempt proceeding.

¶ 43 As for Thera's second petition for rule to show cause filed on January 24, 2017, Milton was apprised of the facts upon which the contempt charge was based through Thera's second petition for rule to show cause. But the court failed to either notify Milton of the hearing on the petition or issue a rule to show cause. Like *Williams*, here there was no rule to show cause pending before the court upon which it could base an award of attorney fees. Therefore, because the process relating to the second contempt petition was defective, the trial court's order must be vacated.

[23] **[24]** ¶ 44 Moreover, this lack of proper notice also effectively deprived Milton of a fair hearing. "[I]n order to find a defendant guilty of indirect contempt of court, 'due process requires that the defendant [not only] be advised of the charges, [but also] be accorded a fair hearing.' " *Williams*, 156 Ill. App. 3d at 442, 108 Ill.Dec. 764, 509 N.E.2d 460 (quoting *People v. Edwards*, 69 Ill. App. 3d 626, 628, 26 Ill.Dec. 139, 387 N.E.2d 969 (1979)). It is not enough that the contemnor be allowed to testify and to cross-examine the other party's witnesses (*id.* at 443, 108 Ill.Dec. 764, 509 N.E.2d 460); rather, she must be allowed to present evidence on her own behalf, so that she has "a full opportunity for explanation for noncompliance." *Pryweller*, 218 Ill. App. 3d at 631, 161 Ill.Dec. 884, 579 N.E.2d 432. This entails " 'the opportunity to show that the version of the event related to the judge was inaccurate, misleading, or incomplete.' " *People v. Jashunsky*, 51 Ill. 2d 220, 225, 282 N.E.2d 1 (1972) (quoting *Johnson v. Mississippi*, 403 U.S. 212, 215, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971)).

¶ 45 In its October 21, 2016 order, the circuit court simultaneously and improperly "entered" a rule to show cause and "reserved" attorney fees and costs. Accordingly, Milton had no opportunity to present evidence to explain her noncompliance with the July 28, 2016, order before the court granted remedies. Additionally, Milton was denied the opportunity to be heard before the court's March 16, 2017 judgment granting attorney fees and

costs ***938** ****219** to Thera. The record does not reflect that Milton was afforded the opportunity to explain her noncompliance with the October 21, 2016 order at the March 16, 2017 hearing before the court awarded attorney fees and costs, as there was no mention of the petition for rule to show cause in the proceeding. Even if the petition for rule to show cause had been mentioned in the proceeding, there was still no rule to show cause issued before the court awarded attorney fees. Thus, the March 16, 2017 hearing would have concerned whether a rule to show cause should be entered, not whether Milton should be held in contempt. Thus, the court denied Milton the opportunity to be heard on whether she should be found in contempt before it granted Thera attorney fees and costs.

¶ 46 Furthermore, although the parties do not raise this issue, we observe that the trial court did not enter a valid contempt order against Milton. See *Emery*, 374 Ill. App. 3d at 978, 313 Ill.Dec. 502, 872 N.E.2d 485 (civil contempt order was invalid where the order failed to specify whether the contempt was civil or criminal and failed to identify the contumacious conduct with specificity). Indeed, the court never explicitly entered a finding of contempt against Milton; in its October 21, 2016 order, the court purportedly entered a rule to show cause against Milton, while in its March 16, 2017 order, the court awarded attorney fees and costs to Thera without making any finding of contempt or reciting the factual basis on which any such finding was premised.

¶ 47 Accordingly, the court's March 16, 2017 award of attorney fees, court costs, and repair costs to Thera must be vacated.

¶ 48 CONCLUSION

¶ 49 We affirm the trial court's judgment for Thera on the forcible entry and detainer and fraud counts of Milton's complaint. We vacate the court's judgment in favor of Thera on his counterclaim for lost profits because it was outside the proper scope of a forcible entry and detainer action, and to permit Thera on remand to proceed with the claim for damages without the need to refile, we direct the court to sever the counterclaim and send it to the appropriate division of the circuit court. We additionally vacate the court's March 16, 2017 award to Thera of "repair costs of $2,953, court costs, lost income, and attorney's fees," since Milton was not given due process in connection with the contempt proceedings. If, on remand, Thera wishes to pursue a charge of indirect criminal contempt against Milton for her failure to comply with the court's July 28 and October 21, 2016 orders in a timely fashion, he may do so, but all procedural safeguards associated with an indirect criminal contempt proceeding, as described above, must be followed.

¶ 50 Affirmed in part, vacated in part, and remanded with instructions.

Justices Neville and Pucinski concurred in the judgment and opinion.

All Citations

2018 IL App (1st) 171392, 107 N.E.3d 925, 424 Ill.Dec. 206

Footnotes

1 Although the case caption lists defendant's name as "Bourema Therra," defendant spells it as "Bourama Thera."

2 Although Antwonne Strong is named as a plaintiff and is alleged to be an owner of the property, he had no apparent involvement in the proceedings, and so we refer only to Milton.

3 The record is unclear as to whether the repair work on the premises was complete as of the court's March 16, 2017, order. Thera resumed operation of his business sometime in April 2017.

4 We note that Milton's fraud claim, in which she sought $1425 in unpaid rent, was likewise outside the scope of the Forcible Entry and Detainer Act, although, in any event, the court found that no fraud occurred.

5 Milton does not challenge the trial court's supplemental judgment on May 23, 2017, granting Thera $7492 in attorney fees and compensation for stolen property. Accordingly, we do not consider the propriety of that judgment.

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