REPORT
OF THE
ILLINOIS JUDICIAL
CONFERENCE
1977

CHAIRMAN

FREDERICK S. GREEN
Judge, Fourth Judicial District
Appellate Court

VICE-CHAIRMAN

MEL R. JIGANTI
Judge, Circuit Court of
Cook County

SECRETARIAT

ADMINISTRATIVE OFFICE OF THE
ILLINOIS COURTS

ROY O. GULLEY
DIRECTOR

14

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ILLINOIS JUDICIAL CONFERENCE

SECRETARIAT
ADMINISTRATIVE OFFICE OF THE
ILLINOIS COURTS
312/793-3250

30 NORTH MICHIGAN AVENUE
CHICAGO, ILLINOIS
60602

August 23, 1978

Hon. Daniel P. Ward
Chief Justice
Illinois Supreme Court
Supreme Court Building
Springfield, Illinois 62706

Dear Mr. Chief Justice:

I tender herewith, on behalf of the Executive Committee, the Report of the Illinois Judicial Conference for the year 1977.

The report includes the proceedings of the Associate Judge Seminar held on March 30 - April 1, 1977, the Judicial Conference held on September 7, 8 and 9, 1977 and the several regional seminars held throughout the State during the year. Of particular importance are the reports summarizing the various Conference sessions.

Respectfully submitted,

Mel R. Jigarti
Chairman,
Executive Committee

MRJ/ck

TABLE OF CONTENTS

REPORT
OF THE
1977 ASSOCIATE JUDGE SEMINAR
OF THE
ILLINOIS JUDICIAL CONFERENCE

Lake Shore Club of Chicago
MARCH 30-APRIL 1, 1977

ILLINOIS SUPREME COURT

Hon. Daniel P. Ward
Chief Justice

Hon. Robert C. Underwood
Hon. Joseph H. Goldenhersh
Hon. Howard C. Ryan
Hon. William G. Clark
Hon. Thomas J. Moran
Hon. James A. Dooley

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AGENDA

OF THE

1977 ASSOCIATE JUDGE SEMINAR

WEDNESDAY, MARCH 30, 1977

10:00 A.M. - 1:00 P.M.	*Registration* (Main Lounge) *General Session* (Ballroom) Presiding: Hon. Joseph F. Cunningham Invocation: Rev. Royal Speidel, Minister, Chicago Temple Opening Remarks: Hon. Frederick S. Green, Chairman, Executive Committee Report of Memorials Committee: Hon. Francis X. Connell, Chairman Hon. Billy Jones Hon. Matthew A. Jurczak
1:30 P.M.	*Study Committee Reports* Bail Procedures in Illinois Enforcement of Support Orders
2:45 P.M. - 3:30 P.M.	Discussion Session on Enforcement of Support Recommendations
3:45 P.M. - 4:45 P.M.	Discussion of Bail Practices and Procedures
5:30 P.M.	*Social Hour* (Main Lounge)
6:30 P.M.	*Dinner* (Ballroom) Address: Hon. James A. Dooley, Justice, Illinois Supreme Court

THURSDAY, MARCH 31, 1977

7:00 A.M. - 9:00 A.M.	*Breakfast* (Mediterranean Room — 3rd fl.)
9:30 A.M. - 12:00 Noon	*Seminar Session*
12:00 Noon	*Luncheon* (Ballroom) Program Honoring Retired Associate Judges and Introducting New Associate Judges Presiding: Hon. Thomas J. Moran, Justice, Illinois Supreme Court

2:00 P.M.	*Seminar Session*
5:00 P.M.	*Social Hour* (Mediterranean Room — 3rd fl.)
6:00 P.M.	*Dinner* (Optional — Mediterranean Room)
	Panel Session — Discussion of Amendments to Article V of Supreme Court Rules (Optional —Ballroom)
	Panel:
	Hon. Joseph F. Cunningham, Moderator
	Hon. Peter Bakakos
	Hon. Warren G. Fox
	Hilmer C. Landholt, Esq.
	Capt. R. J. Miller
	Lt. Duane Heady

FRIDAY, APRIL 8, 1977

7:00 A.M. - 9:00 A.M.	*Breakfast* (Mediterranean Room — 3rd fl.)
9:30 A.M.	*Seminar Session*
12:00 Noon	*Adjournment*

REPORT OF PROCEEDINGS

The Illinois Judicial Conference held its annual Associate Judge Seminar on March 30-April 1, 1977 at the Lake Shore Club of Chicago, 850 Lake Shore Drive. A total of 279 judges were in attendance.

Judge Joseph Cunningham, Chairman of the Coordinating Committee, called the seminar to order at the opening general session. The Reverend Royal Speidel, pastor of the Methodist Church, the Chicago Temple, delivered the invocation.

INVOCATION

Let us pray. Our Heavenly Father, we thank you for the orderliness of your nature. You have created life with meaning so the behavior of square pegs fits square holes and round concerns have round solutions.

Yet, Lord, we know it is not so simple to judge behavior and to see order. However, we thank you that you have given us ears to hear, minds to listen, and hearts to feel, that judges might be correct, that rights shall be recognized, and the right shall be done.

Grant us all grace to understand what makes for strength in America, how we can contribute to fairness for all and avoid injustice for everyone. That we can overcome ugly blemishes of unfair advantage, that the beauty of equality might prevail, provide your specific blessings upon this seminar.

May each person gain some value and may each understand how to make some contributions. Thank you that in our self-giving, we gain, and in losing ourselves, we find life. Amen.

REMARKS OF THE HONORABLE FREDERICK S. GREEN, CHAIRMAN OF THE EXECUTIVE COMMITTEE

Thank you very much, Mr. Chairman, distinguished guests, and fellow judges.

It is certainly again my pleasure to be with this energetic and activist group as we pursue the twin goals of improvement of administration of justice and of judicial education.

The work of your Study Committees on bail and on the enforcement of support orders are typical of this effort. By attacking these very practical subjects, we can all learn a good deal more, get the information we need to be better judges, and also make recommendations for the improvement of administration of justice.

This seminar has been very effective, and these twin goals are the very things that the Judicial Conference is about.

I think it appropriate that I take two minutes of your time to report to you as to the status of some things that are being worked upon by the Judicial Conference.

You may remember last year that I indicated to you that we were taking on a new seminar approach this year, and we hope to bring many more of you into the seminars. We have just about completed six sections under this new program dealing with Civil Procedure, Civil Remedies, Criminal Law, a total of some 300 judges, many of which have been associate judges who have attended these sessions, a more comprehensive two-and-a-half-day program developed by professors for the education of judges.

We will soon be going about planning of another program of these things for the ensuing year, and you will again have an opportunity to look over the list and to register for these programs.

The reference works that are coming out by the various committees are going along well, and a new revised Criminal Law Bench Book has been drafted, the editorializing has been finalized, as I understand it, and it is expected it will be available in the Fall.

Also available will be a new Bench Book on Juvenile Law being prepared by the Committee on Juvenile Problems.

I think it appropriate, also, that I report to you as to the status of several study committee reports. The report of the committee on Contributions Among Joint Tort-Feasors was presented to the Executive Committee, approved by the Executive Committee, and sent on to the Supreme Court. We have received no direct word as to what the situation in the Supreme Court is, but I noticed in the report of the Chief Justice he recommended to adopt Contributions Among Joint Tort-Feasors, so that would give us at least some indication of action in that regard.

The report of the study committee in regard to changes of a new Mental Health Code has been presented to the Executive Committee. Certain parts of that were approved by the Executive Committee and sent on to the Supreme Court. Other parts were sent to Judge Schneider's committee to have them advise us in regard to certain matters in that respect.

I would also regretfully report that the report of the Committee for Discovery of Misdemeanor Cases was presented to the Executive Committee of our Conference and was approved by that group and sent to the Supreme Court, but I have been advised in the last ten days or so that the Supreme Court has rejected these recommendations.

We hope to find out more about that, and I think the Coordinating Committee will find out more about that very shortly.

With the ongoing studies of the Committee on Civil Offenses pretty well formalized, it will soon be sent to the Coordinating Committee and then to the Executive Committee, and hopefully on to the Supreme Court.

The Committee on Jury Selection is busy revising the handbooks for jurors and is also studying the concept of Multi-County Jury Commissions.

It is the very sincere desire of the Executive Committee of the Judicial Conference to be responsive to the needs and suggestions of the judiciary of the State. This seminar gives you an opportunity to sit around together discussing these problems, discussing ideas that you have.

You then can send them to your Coordinating Committee, which will in turn go through the Executive Committee, and if approved, on through to the Supreme Court.

We are all interested in your suggestions.

I certainly look forward to being with you during this seminar, and I welcome the opportunity to again be with you.

Thank you very much.

REPORT OF THE MEMORIALS COMMITTEE

Hon. Francis X. Connell, Chairman

Mr. Chairman, Justices of the Appellate Court, and members of the Judicial Conference, it is a distinct honor and solemn privilege of the Committee on Memorials, consisting of Judge Billy Jones, Judge Matthew Jurczak, and Judge Francis X. Connell to present to this Conference appropriate resolutions honoring the memory of our fellow judges, both sitting and retired, who have departed this life since our last Seminar held in 1976.

We so honor these Illinois judges:

Judge George Borovic, Jr., 18th Circuit, deceased November 19, 1976;

Judge Richard K. Cooper, Cook County, deceased November 19, 1976;

Judge Edwin C. Hatfield, Cook County, deceased August 12, 1976;

Judge Lester Jankowski, Cook County, deceased December 14, 1976;

Judge Barney E. Johnston, 20th Circuit, deceased December 18, 1976;

Judge Jack R. Kirkpatrick, 9th Circuit, deceased March 27, 1977;

Judge Frank S. Loverde, Cook County, deceased January 12, 1977;

Judge Joseph T. Suhler, 16th Circuit, deceased September 14, 1976;

Judge George B. Van Vleck, 18th Circuit, deceased August 12, 1976.

Appropriate Commemorative Resolutions for each of the judges named above have been prepared by the Committee, and we sincerely mourn and regret the loss to the judiciary of these public servants who have contributed immensely to the administration of justice.

They have served laudably in the performance of their duties as upholders and defenders of the law.

Mr. Chairman, I move that the Memorial Resolution for each of these distinguished colleagues who have departed this life since our last Conference be made a part of the permanent records of the Conference and that copies thereof be sent to their nearest relatives and to the clerks of the respective courts over which they presided, to be spread upon the records of said courts.

HON. JOSEPH CUNNINGHAM: It will be so ordered.

ADDRESS BY THE HONORABLE JAMES A. DOOLEY, JUSTICE OF THE ILLINOIS SUPREME COURT

My old friend, Judge Buckley, fellow students of the law:

After such an over-generous introduction, I know wisdom would indicate my uttering the favorite words of every audience: "And in conclusion." However, it is duty which brings us here. Let me assure you of my awareness of your presence as a captive audience.

As I listened to Bob Buckley introduce all these honorable people, I could not but recall that it was said of those who plotted Caesar's death: "they were all honorable men."

The other day a very interesting incident was related. A man was to have a heart transplant. The surgeon saw him the morning before the operation and said: "Mr. Jones, we're very fortunate. We have the heart of a 19-year-old-boy, who was killed in a skiing accident. We also have the

heart of a 32-year-old man, killed in a hunting accident." And he continued, "Of course, there is a third one, the heart of a 59-year-old reviewing court judge, who was killed when falling asleep; he fell off the bench during the presentation of a case. Now," he said, "you are most fortunate to have such a choice. What heart do you prefer?"

The patient replied, "I'll take the judge's heart."

The doctor responded, "All right, but," he said, "Mr. Jones, I am curious. Would you please tell me why you selected the 59-year-old judge's heart over the younger men?"

"Oh," Jones said, "that was easy. His heart was used the least."

As I look at this audience, the thought that strikes me is the difference between work of reviewing courts and those of original jurisdiction. The administration of justice depends to a very minor degree upon reviewing courts. They handle a very minute fraction of the litigation in this state or in any other jurisdiction, and affect only certain segments of society.

Reviewing courts operate in a climate where they have all the time they desire. They can study the various problems which are presented to them; they can likewise research and analyze the work of other courts who will pass on relevant issues. And then, in addition to that, they have the benefit and experience of the entire membership of the court. With all those facilities at hand, reviewing courts should never be wrong. But, of course, law is not an exact science, and the human equation plays a very important part, and you and I know that reviewing courts are not always right.

On the other hand, the quantum and quality of justice which is administered in the State of Illinois depend in large measure upon the work you do. Of course, you handle a great bulk of the litigation, but more than that, your courts are not only of original, but ultimate jurisdiction. *For the far greater part, your decisions and the judgments you enter are final.* Many orders are non-appealable. Those which are appealable depend in large measure upon the economic condition of the litigant. More than that, there is always the question of whether or not the issue will still be viable when the reviewing court reaches it; consider, if you would, an election contest.

Like all who have studied the subject, we believe that it is not only important but necessary to the vitality of the third branch of government that our best men be not in the reviewing courts, but in courts of original jurisdiction. Such courts need men of legal ability, men endowed with an extraordinary amount of plain, common sense, and men with all those saintly virtues encompassed by the words "judicial temperament."

We appreciate that yours is not an easy task. Most of your decisions are made almost instantaneously. Should the evidence offered be admitted? Should the motion to suppress the confession or the evidence be granted? Has some unforeseeable extra judicial event, such as a newspaper article or a television program, created a potential interference with a litigant's right

to a fair trial? Those are but gross samplings of daily decisions made by you in the trial of cases — and as we noted, almost on the spot.

A trial in and of its very nature is a struggle in a closed arena. Every lawsuit is cut from some human passion — lust, or greed, or envy is the warp and woof of most litigation. Frequently, in the trial of a lawsuit, there are manifestations of the passion underlying the case. Of course, that does not make your work easier.

More than that, however, you function alone in the decision-making process. You do not have, in many instances, the opportunity to research the question. More than that, we know in Cook County many of you are located in places where there are no law books. You have no law clerk. You have no fellow judge to confer with. The basis of your decision is your own learning, your own experience, and above all, your own common sense. This is the climate in which you as modern *nisi prius* judges function.

Although this is a difficult task, nonetheless, it is one which affords a very unique opportunity — an opportunity afforded few men — namely, to play a part in dispensing justice according to the great majesty of the law. Remember, this opportunity is unique. If this great opportunity and the equally great trust it entails are faithfully served, the rewards are proportionately great. The riches of these rewards transcend beyond the mundane. They are those priceless intangibles, such as self-satisfaction, a happy conscience, and a good name — intangibles which cannot be bought or sold in any marketplace. They are earned only through unflagging devotion to duty.

While this obligation of yours is one which has great weight, never let it be oppressive. Remember, yesterday is a cancelled check; tomorrow is a promissory note. The important thing is each day. The judge who never made a mistake never made anything, and, certainly, will not leave his mark on the law.

Upon you ladies and gentlemen depends the public image of the judiciary and judicial process. It is with you the public has direct dealings. The impressions you convey in your day-in and day-out work are quickly communicated to the community. Believe me, the greatest press relations man of the judiciary is a good judge.

It has been indicated by your presiding officer that most of my professional life has been spent in the courts — not on the bench, but at the bar. Actually, as you know, we are nouveau arrive on the judicial scene. We would, with your forebearance, desire to tell you what lawyers expect in judges.

Lawyers believe that a judge should know the Civil Practice Act, the Rules of the Supreme Court, and the law of evidence, as well as the particular statutes which control the court in which he sits. If a judge is familiar with procedure and the law of evidence, he has a 50/50 chance of being correct on the substantive questions.

Lawyers appreciate judges who desire to be educated on the subject matter of the litigation. Lawyers can be of great assistance to a court. We should avail ourselves of the work product of the members of the profession. We must never forget that a lawyer has lived — and sometimes died a thousand deaths — with this case. Treat it well. Too many cases have been lost, not by lawyers, but by judges.

What I am trying to convey to you can be illustrated by an experience of some years ago. We were about to try a case before a very experienced judge, a man with over three decades on the Circuit Court. Before the trial started, he called both counsel into chambers and said: "Gentlemen, you know, this is the first time I have ever had a Federal Employers Liability action before me. Would each of you, on a single sheet of paper, submit what each of you believe to be the leading cases?"

We did. That judge tried that case as if his entire judicial experience had been spent in trying actions arising under that particular statute.

We are a great believer in motions in limine. This vehicle will advise you in advance of the problems to be resolved during the trial, the forks in the road, which you will meet. With the aid of a well prepared motion in limine and supporting authorities, you will have an opportunity to prevent committing error, and will not be faced with the problem of how to cure that error.

Courts expect courtesy from lawyers, witnesses, and court personnel. Courtesy is something that courts cannot expect unless they themselves deal in it. Judicial courtesy is simply good manners. It is easier to be polite than to be autocratic. More than that, it softens the blow your duty may dictate.

Judges have to be courageous. Many times, you may not agree with the law that binds you. But your duty must always be clear. Frequently, a lawyer in the case will be personally offensive to you. Never make yourself his opponent. You are the judge, not the adversary.

Frequently, you may believe that a particular litigant who, under the law, should not succeed, should prevail. Whatever matters may affect you as individuals, they cannot impress you as judges. Remember, the duty of each of you is to decide not what you personally think may be right, but that which is right according to law.

Every judge has a definite philosophy of the law whether he knows it. These are inherited instincts, experiences, and acquired convictions that give us all a certain stream of tendency. Never allow this philosophy to affect duty as you know it.

How will I know I am a good judge? Let me answer by recalling the incident of Lord Mansfield. In the 1780's, during the anti-Catholic riots in London, his home was destroyed. His library of law books, which he had painstakingly annotated, were burned. Lord Mansfield's reputation for justice was such that the leader of the mob, which had done terrible

damage, elected to be tried before him, although he could have been tried before other judges. And after the trial, not even the convicted uttered a word that there had been anything unfair about the proceedings. This, of course, is a high goal. But isn't it better that our objectives be not too easily accomplished?

In the same vein, recall the great Lord Brougham. In speaking to the House of Lords on behalf of a commission to investigate the administration of justice in the Common Law Courts of England, he used this flowery language: "It was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler will be our sovereign's boast, when he shall have it to say that he found law dear and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence."

Ladies and gentlemen, that quotation was prompted by a knowledge that amongst you are many knights. It has been a privilege and a pleasure to address such an illustrious audience.

Thank you, and Godspeed.

CEREMONY HONORING RETIRED AND NEW JUDGES

Hon. Thomas J. Moran, Justice of the Illinois Supreme Court

Mr. Chairman, Chief Judge Cunningham: I was told there would be no talks and I was going to be a glorified master of ceremonies here today, but by the time we got through with all the resumes it was sort of a speech. But I appreciate the kind remarks.

Justice Green, Judge Gulley, Judge Buckley, Justice McNamara, Judge Wendt, Judge Calvin, all members here at the dais, but more important all of the Judges beyond the dias here, I am honored to participate in your seminar this year, and I hope in the future that members of our court will take a more active part in your seminars. I am sure they will.

I have had a long feeling and a desire, as far as the Illinois court system, that there should be communication not only between the bar and the bench, but more importantly between members of the bench themselves, and with a little more work, I am sure that we will arrive at that result. I know, speaking for the Court, that it is their contemplated desire to become more active in your seminars each year. I might add that there was a little mixup this year. We were in session. We had already stated that we would be with you, but then the Clerk set the schedule for March, and Justice Dooley came in last evening, and, incidentally, the Justices are sitting there today hearing arguments, and I came in late last night.

But, to get on with my duties, if I may.

As all of you look around, I am sure that you are missing about 30 faces that you have not seen for the last three or four years. But as of mid-February this year, 30 of your members have been appointed by the Supreme Court to the Circuit bench. Three ex-Associates, all three having accepted appointments as Circuit Court Judges, are largely responsible for this seminar. And I would like to recognize Chief Judge Cunningham, your Chairman, Judge Buckley, Vice Chairman, and Judge Shonkwiler, who, I believe, is sitting out in the audience. I saw him a minute ago.

The large number of changes in your ranks best speaks for the outstanding performance of — and the confidence the Supreme Court has in — the Associate Judges of Illinois.

Today is a day for appreciating both the old and the new; for renewing friendships and savoring memories shared with our recently retired colleagues, and for establishing new relationships with those who have recently taken the bench. It is a symbolic day, the witnessing of the transfer of authority from a predecessor to a successor, the forging of another link in the continuity of change within a vital, viable institution.

When the time comes, as it has now, to honor and pay tribute to the judges who have retired, each of us vicariously shares with them the mixed emotions of the moment, the warm satisfaction of looking back at a job well done, and the twinge of regret that inevitably comes with leaving.

We are grateful that, after many years of public service, they will be able to enjoy a more relaxed way of life.

And I will cut in here for just a moment. I asked Gene Wachowski how everything was going, and he said that his wife will not let him stay at home. He now has a desk in a law firm, and he is enjoying it tremendously. You can notice that from the tan he has.

It is with admiration and respect we recognize their many accomplishments as Judges of your court system. I know I speak on behalf of every judge in the State, and on behalf of my colleagues on the Supreme Court when I extend our heartfelt thanks and best wishes to each of the retired judges.

The judges here today, one of them has been formerly introduced, of course, a man from my own district, Tom Cliffe sitting up here, also going to join Gene Wachowski in the good life.

We have another judge who was supposed to be here on the dais with us, but he couldn't make it. I'm mentioning right now George Bunge from DuPage. George attended Northwestern University School of Law and was admitted to the Illinois Bar in 1925. He was appointed on March 4, 1964 as a Magistrate of the Circuit Court and subsequently became an Associate Judge by virtue of the 1970 Constitution. He retired on June 30, 1976, and he resides in Downers Grove. George, before taking the bench, served as an Assistant State's Attorney in DuPage County during the 1940s.

This gentleman sitting to my left here was an Associate Judge of the 16th Judicial Circuit, serving in DeKalb County, and Tom lives in Sycamore right now. He received his undergraduate and law degrees from Northwestern University and was admitted to the Illinois Bar in 1932. He was an Assistant Attorney General in the 1940s, a Master-in-Chancery in the 1950s, and a Justice of the Peace from 1961 until 1964 when he became a Magistrate of the Circuit Court by virtue of the 1962 Judicial Article Amendment. He was appointed a Magistrate in 1967 and became an Associate Judge on July 1, 1971, pursuant to the 1970 Constitution. Judge Cliffe retired on December 6, 1976.

The next one we have is the Honorable Ben Gorenstein.

Are these gentlemen present, judge?

JUDGE CUNNINGHAM: Yes, they are.

JUSTICE MORAN: I wonder if they would stand. Tom, would you mind standing, please? (Judge Cliffe arose and the members applauded)

JUSTICE MORAN: I was going to ask that they remain standing.

Please hold the applause until I go through the list.

Judge Gorenstein, are you here with us today?

Let me tell you about him, gentlemen.

He was an Associate Judge of the Circuit Court of Cook County, a resident of Lincolnwood, a graduate from the University of Illinois, and received his law degree from John Marshall Law School in Chicago in 1932. He was admitted to the Illinois Bar in March of 1933 — that great year — that great vintage year — and before becoming a Magistrate of the Circuit Court in 1965, he was the chief analyst of the Unemployment Compensation Bureau of the Illinois Department of Labor. He was an Assistant Attorney General, a Title Examiner for the Cook County Registrar of Titles, and also served as an adjudicator for the Veterans Administration. Judge Gorenstein became an Associate Judge for the Circuit Court on July 1, 1971, retiring February 1, 1977.

The next gentleman is the Honorable James R. Hansgen, Associate Judge of the 15th Circuit.

Jim, are you here?

He received his undergraduate and law degrees from the University of Illinois and was admitted to the Illinois Bar in 1938. Prior to his appointment as a Magistrate on January 1, 1967, he served as a Master-in-Chancery, City Attorney of Galena, Village Attorney of Hanover and Scales Mound, and as an Assistant State's Attorney of Jo Daviess County. Judge Hansgen became an Associate Judge of the Circuit Court on July 1, 1971, retiring December 31, 1976. He is presently residing in Galena.

The next gentleman, the Honorable Marvin E. Johnson. Judge Johnson, Associate Judge of the 18th Circuit. He was admitted to the Illinois Bar in 1937, after receiving his law degree from Chicago Kent College of Law.

He was a Justice of the Peace from 1953 to 1961 and a Police Magistrate of Elmhurst, where he resides, from 1961 until January 1, 1964 when he became an Associate Judge — in those days Magistrate. He was appointed a Magistrate in 1965 and became an Associate Judge on July 1, 1971. Judge Johnson retired on December 30, 1976.

The next gentleman is the Honorable Irving Kipnis, Associate Judge of the Circuit Court of Cook County, resides in Flossmoor, and retired on May 1, 1976. He attended Central College in Chicago and graduated from Chicago Kent College of Law in 1940. That year he was admitted to the Illinois Bar. He was appointed a Magistrate of the Circuit Court on June 1, 1964, and prior thereto, he was an arbitrator for the Illinois Industrial Commission from 1948 to 1951, and an Assistant State's Attorney of Cook County from 1951 to 1953. Judge Kipnis became an Associate Judge of the Circuit Court on July 1, 1971 with the advent of the new constitution.

The next gentleman is the Honorable Gordon Moffett, Associate Judge of the 18th Circuit. He attended Wheaton College and Northwestern University, and received his Ph.D. Degree from the University of Chicago. He was awarded the J.D. Degree from the University of Chicago Law School and was admitted to the Illinois Bar in 1930. He was president of the DuPage County Bar Association and a Master-in-Chancery from 1963 to 1965. On June 1, 1966 he was appointed a Magistrate of the Circuit Court, and he became an Associate Judge on July 1, 1971. Gordon presently resides in Wheaton, and retired June 30, 1976.

These gentlemen are the men who have retired in the past year. (Applause)

This was another vintage year because we have quite a few new judges, most of them sitting right before us at the table here. As I call their names, I am going to ask each of them to stand and remain standing, if they would, please, and then we can hold our applause, gentlemen, until they have all been introduced, if you would.

First, I would like to call on Judge Arlie O. Boswell, Jr., First Circuit. Judge Boswell was appointed July 1, 1976, resides in Harrisburg, and that's in Saline County.

This is a familiar name. Judge George J. Moran, Jr.

Is that your father down there?

JUDGE GEORGE J. MORAN: Yes.

JUSTICE MORAN: Third Circuit. Appointed April of 1977, and resides in Granite City, Madison County.

His father I was talking about was a colleague of mine on the Appellate bench, George J., and we always got our mail mixed up, and even our pictures in the Blue Book.

From the Ninth Circuit, we have Honorable Arthur M. Padella, Sr., appointed February 1, 1977, and resides in Monmouth, Warren County. We

also have the Honorable Richard C. Ripple, appointed May 1, 1976, who resides in Carthage, Hancock County.

From the Twelfth Circiut, we have Thomas A. Ewert, appointed April 19, 1976. Resides in Bonfield, Kankakee County.

It says here that you're just 31.

JUDGE EWERT: That's right.

JUSTICE MORAN: Probably, one of the youngest.

We also have Herman S. Haase, appointed February 15, 1977. Resides in Plainfield. That's in Will County.

The Honorable Edward A. McIntire, appointed February 1, 1977. Resides in Kankakee, Kankakee County.

From the Thirteenth Circuit, the Honorable Fred P. Wagner, appointed April 1, 1976. Resides in La Moille, Bureau County. The Honorable James L. Waring, appointed April 1, 1976. Resides in Ottawa, LaSalle County.

From the Fourteenth Circuit, Honorable Clark C. Barnes, appointed January 6, 1977. Resides in Rock Island, Rock Island County.

From the Fifteenth Circuit, Honorable Eric S. DeMar, appointed February 1, 1977. Resides in Warren, Jo Daviess County.

In the Sixteenth Circuit, James K. Marshall, appointed December 6, 1976. Resides in Sandwich, DeKalb County. Fred M. Morelli, Jr., appointed December 6, 1976. Resides in Sugar Grove, Kane County. And Richard Weiler, appointed December 1, 1976, who resides in Aurora, Kane County.

From the Eighteenth Circuit, we have the following:

Kevin P. Connelly. Appointed December 21, 1976. Resides in Glen Ellyn, DuPage County.

Robert A. Cox. Appointed July 1, 1976 and resides in Wheaton.

Incidentally, the Eighteenth Circuit is DuPage County, so, I won't have to repeat that.

Next we have Philip J. R. Equi. Appointed January 15, 1977. Phil resides in Wheaton.

Samuel Keith Lewis. Appointed October 1, 1976, and he resides in Elmhurst.

James R. Sullivan. Appointed August 2, 1976. Resides in Oak Brook.

Duane G. Walter. Appointed January 31, 1977, and Duane lives in Winfield.

From the Nineteenth Circuit there are two appointments. Michael J. Sullivan, who was appointed December 6, 1976, and resides in Woodstock. That's in McHenry County. And from Lake County, Alphonse F. Witt. Appointed July 15, 1976, and he resides in Highland Park, Lake County.

From the Twentieth Circuit, Milton S. Wharton who was appointed

December 6, 1976, and resides in East St. Louis, St. Clair County. He also is competing for one of the youngest members, and he is 31 years old.

Is that right:

JUDGE WHARTON: Thirty.

JUSTICE MORAN: Cook County. All appointed July 1, 1976, gentlemen, and I will just mention their names and where they reside.

Clarence Bryant. Resides in Chicago.

Henry Budzinski. Resides in Chicago.

William Callahan. Chicago.

Robert J. Downey. Resides in Chicago.

Edward Fiala, Jr. Resides in Northbrook.

Charles Leary. He is from Oak Lawn.

Edward Marsalek from Chicago.

Michael McNulty. Lemont.

Nicholas Pomaro. Arlington Heights.

Frank Salerno. River Forest.

Marjan Pete Staniec. Chicago.

Jack Stein. Chicago. Jack is back there.

Frank Sulewski. Chicago.

Eugene R. Ward from Wilmette.

Stephen Yates. Chicago.

Gentlemen, will you welcome all of your new colleagues.

In closing then, all of us congratulate the new judges who will carry on and build upon the good work of those who have gone before them.

And to our retiring judges, our heartfelt appreciation for their dedication, and our most sincere wishes for their long, healthy and happy life. And I hope you live so long that you break the Pension Fund.

Thank you.

Topic I—STUDY COMMITTEE ON BAIL PROCEDURES

Remarks of the Honorable Peter Bakakos

Bail in Illinois is largely the work of the Associate Judges. It is therefore appropriate that the Study Committee on Bail is part of the Associate Judge Seminar.

As we understand it, the task of the Committee is to examine the pretrial release system in Illinois and to possibly suggest improvements in the system.

In 1964 Illinois became the first state to adopt ten-percent deposit bail as part of its new Code of Criminal Procedure.

Well, not declaring the professional bail bondsman unlawful, the system had the effect of eliminating them. The Code also authorized other innovative release and return to court procedures. Since that time, there has not been a comprehensive in-depth examination of this unique Illinois system in Illinois.

Divergent practices and attitudes have developed in different areas of the State. Vestiges of a still older system continue to be impressed upon current procedures.

In some important respects existing practices have left unimplemented laws that were intended to be utilized. Examples of some of the problems that have already been identified by the Committee and which require attention may be found in the questionnaire that was sent to you.

Is is true, for example, as the League of Women Voters has recently charged, that whether a defendant in Illinois is released on cash bail or on his own recognizance depends, one, on the county in which he was arrested, and two, on which judge happens to be presiding?

And, that the more downstate the location, the less likely the accused is to be granted release on recognizance?

It may be so. Our own initial survey discloses that a judge of one circuit authorizes release on recognizance of two percent in misdemeanor cases and none in felonies.

While at the other end, judges in another circuit report that recognizance bonds are permitted in 84 percent of misdemeanor and 48 percent of felonies.

May pretrial release be denied in any case in Illinois or not? It seems to be an open question. What are those "other conditions of bail" the judge may properly impose? How are imposed conditions to be enforced?

Jail without bail in civil cases? Do we have a problem?

What do judges say about preventive detention?

These are just a few of the examples of perplexing problems that have surfaced. Perhaps most disappointing to the Committee was our discovery of the role of the Judicial Inquiry Board and the Courts Commission on bail.

Twenty-four cases have reached the Courts Commission to date. In seven of these, or almost one in three, there were allegations of the misuse of bail.

In some cases, it is true, the judge was exonerated. In several, criticism was directed against the procedures involved.

You and I cannot afford to perpetuate outdated procedures that set us up and then trap us.

The Committee considers it has responsibility in all of the areas mentioned. Because of the scope of the work, the Committee has been authorized for an initial period of two years.

In addition, the Supreme Court Committee on Criminal Justice Programs has recommended a funding for our project, which will carry the inquiry to all parts of Illinois.

This first year has been mandated as an information-gathering year. For that reason, we do not propose to lecture, provide case material, report or recommend at this meeting.

We will instead seek to identify problems, discuss them, and receive your suggestions and criticisms. We do have the questionnaire results, and these will be made available to you today.

Ultimately, of course, we do hope to make some sensible recommendations that might be worthy of your consideration.

The Committee includes Judge Robert McQueen from Lake County. He is Vice-Chairman. He is responsible for the statement of objectives that could be found with your reading material.

Judge Alan W. Cargerman of Oregon, Illinois. He did an excellent analysis of the new Supreme Court Rules relating to misdemeanor and traffic cases that the Supreme Court has adopted and which go into effect in Illinois on April 1 and in Cook County on July 1.

I was a member of that Revision Committee, so our committee did have input into those changes. Those rules are the subject of a separate discussion program tomorrow night.

On April 28 and 29 the committee will be meeting at Rock Island, and Judge Cunningham is in charge of that meeting. Matthew Moran is advising us as to some Cook County procedures. David Shields and Judge Goldenhersh, who is liaison, and Professor Robert Burns is the reporter who puts things together for us.

I might add that in addition to these things that I — these practical things that I have related, the American Bar Association and National Council on Criminal Justice standards and goals have also developed modern standards.

These need to be examined and possibly implemented in Illinois. Also to be considered are three release and recognizance programs which are currently operating in Illinois and which are publicly funded, one in Cook County, Rock Island County, and DuPage.

We will be giving those matters our attention today with the object in mind of trying to put together some kind of coherent pretrial release system.

Topic II—STUDY COMMITTEE ON ENFORCEMENT OF SUPPORT ORDERS

A. Although this study committee did not have its report ready for presentation, it proceeded by staging a debate of the contested issues involving enforcement of support orders. These issues were then discussed by the judges in smaller groups and ballots were cast. The issues voted upon and the results of the balloting were as follows:

	Yes	No
I. Would you be in favor of limiting the applicability of the proposed enforcement rule only to parties on welfare at the initiation of the program rather than applying the rule uniformly in all cases of court-ordered support?	(26)	(160)
II. Should recipients of court-ordered support receive notice of hearings on the Rule to Show Cause?	(129)	(33)
III. Should the court's support order direct the recipient to notify the court of any changes in the payor's ability to make timely support payments which come to his or her attention?	(111)	(69)
IV. Should a *written*, rather than *oral*, petition by the Clerk be required before the court issues a Rule to Show Cause for delinquency?	(160)	(24)
V. In the event that the State's Attorney elects not to represent the Clerk on enforcing support obligations, should the court appoint counsel to prosecute the cause on behalf of the Clerk rather than proceed in the absence of a legal representative of the Clerk?	(93)	(85)
VI. Would you be in favor of increasing filing fees in divorce and other domestic matters as the method of obtaining the funds necessary to pay for counsel and staff to administer the proposed enforcement rule?	(105)	(73)

B. Summary Of Discussions

Report of Professor Leigh H. Taylor

After considering the report of the Committee and engaging in discussion the members of my seminar felt strongly that any uniform rule should not be limited to welfare recipients. This nearly unamious consensus was based on notions of treating like cases equally and of responding to this problem in the most systematic way possible. The only sentiments for limiting the proposed uniform system to welfare cases were expressed in terms of establishing a uniform system in a sensible way beginning to

implement the system and permitting it to grow to at some time in the future include all support orders.

Most judges felt that providing the recipient with notice of any enforcement procedure would tend to minimize the benefits from the proposed rule.

All judges felt that the language in ballot topic number 3 was incorrect. They felt the recipient should never be required to notify the court of a change of the payor's circumstances. Altering the language to require payor notification troubled some of the judges. In this regard information contained in Section 1 following the Committee's Support Order was felt to be much too broad for it encourages payors to present to the court, *at any time*, their inability to presently comply with existing orders either in respect to timing or total amount. Most judges felt that this language would invite much more modification litigation and should be altered perhaps to state only the applicable law regarding the duty of the payor with respect to a change of circumstance.

It was a consensus of my seminar that the clerk utilize a written petition for rule to show cause in order for there to be an accurate record.

The judges in my group did not feel that an attorney was necessary to represent the clerk for reason solely that the clerk was subject to cross-examination and was in effect placed as an adversary. The consensus however was that an attorney should be provided to remove any necessity for either clerk or the court to engage in the kind of rigorous cross-examination of the payor which most judges felt was necessary to the satisfactory resolution of issues presented in a rule to show cause. Thus insulating the judge, the clerk serving merely as an agent or officer of the court in reporting, was the primary reason for providing an attorney in post-decree litigation.

One judge observed that Macon County has ceased it's program approximately three years ago because of a fear that it had exceeded its power in requiring that payors direct their payments to the clerk of the court. Their reluctance to continue, it was suggested, was based upon their fears that the Courts Commission might ultimately determine that they did not have this broad judicial power.

Several judges expressed the feeling that some bonding provision ought to be used although everyone agreed that the present bonding provisions (i.e., 10%) were inappropriate. Rather the judges suggested that the Committee might want to pursue a bonding procedure to secure payment of the full amount due should there be a default.

Finally, while the members of my seminar felt strongly that such procedure was needed they noted that there would be considerable opposition by many members of the bar and thus they favored the inclusion of the provision which permitted litigants to pursue enforcement on their own. There was some ambivalence with respect to the right of litigants to control whether support should be paid or not (i.e., whether litigants could agree to opt out from the system entirely). That question though was resolved by the

vast majority's feeling that permitting litigant control would seriously and negatively affect the entire system.

Finally, it should be noted that most members of my seminar favored the development of a uniform system for the reasons advanced by the Committee.

Topic III—COURTROOM PROCEDURES AND DECORUM

A. Summary of Advance Reading Material

I. The Law of Contempt — An Outline
II. Questions for Discussion — Contempt Situations
III. Remarks of Hon. Roy O. Gulley on Courtroom Decorum
IV. Judicial Profile Questionnaire — Survey of Judicial Practices

B. Summary of Discussions

Reports of Professors Donald H. J. Hermann and Vincent F. Vitullo

The reporter wishes to acknowledge the leadership of the Honorable Irwin Cohen, Chairman of the Committee on Courtroom Procedures and Decorum, and the Honorable Bill J. Slater, Vice-Chairman. The Committee as a whole directed and reviewed the preparation of the reading and reference material used in the seminar discussions. The materials consisted of an outline of law and sample orders for use in contempt proceedings prepared by Professors Hermann and Vitullo; a copy of the address of the Hon. Roy O. Gully on March 27, 1974, on the subject of courtroom decorum; a series of questions for discussion prepared by Judge Cohen; and a questionnaire on courtroom decorum drafted by the Hon. James K. Robinson. The Committee provided six seminars on this material; one set of the seminars was led by the Hon. Irwin Cohen who was joined by the Hon. Wallace I. Kargman, the Hon. William J. Reardon and Professor Donald H. J. Hermann; the other set of three seminars was led by the Hon. Bill J. Slater who was joined by the Hon. Thomas P. Cawley, the Hon. James K. Robinson, and Professor Vincent F. Vitullo.

Each seminar discussed at some length the returns on the questionnaire on courtroom procedures and decorum which is included in these materials. Those attending the seminar had the opportunity to offer their opinions in problem areas raised by the questionnaire and to raise, for discussion, other areas of concern relating to courtroom decorum — particularly the judge's responsibility for the appearance of justice in his or her

courtroom. Emphasis was placed on the judge's role as courtroom administrator and the need for concern for public relations.

Opportunity was given to raise questions about the procedures in contempt and the nature of civil versus criminal contempt and the differences in required procedures for direct and indirect contempt. A full analysis of this subject matter is provided in the outline on the Law of Contempt which is included in this report.

A series of questions for discussion were prepared for the seminar. Time limitations precluded an extensive consideration of these problems. However, the questions have been included in this report and citations are here provided for those who wish to pursue any interest provoked by these questions.

Several recommendations to the Conference were made during the Seminar discussions. Special appreciation was directed to the League of Women Voters for their constructive contribution to court administration through the providing of the Court Watchers Project and its reports. Among the significant concerns and suggestions expressed by seminar participants were the following: there was expressed a need for presiding judges to make sure that sitting judges take responsibility for the appearance and conduct of courtroom staff particularly clerks and baliffs. Concern was expressed regarding the leniency of some judges in granting excessive numbers of continuances. Interest was expressed in the St. Clair County courtroom use of the video and sound taping system. Some judges urged a more extensive orientation program for new judges including a bench book for new judges and a month-long program of instruction by judges and professors. The suggestion was made that a video-tape be made of the mock trial providing proper model of judicial conduct on the bench. It was suggested that all judges be required to annually visit jails or prisons in their districts. Finally, it was observed at all the seminar discussions that something needs to be done to improve the judicial image and to improve communications with the public; to that end it was suggested that the Administrative Office develop a press release program on judicial activity and that the judge's association be urged to prepare educational films and consider other public relations activity such as institutional advertising.

IN THE CIRCUIT COURT OF THE
30TH JUDICIAL CIRCUIT
JUSTICE COUNTY

People of the	)	
State of Illinois	)	
	)	
vs.	)	71-CR-545734
	)	
Malacum C. Badacus	)	

ORDER
[DIRECT CONTEMPT]

Now, in the name and by the authority of the People of the State of Illinois, the defendant, Malacum C. Badacus, being present in his own proper person and with his counsel, Mr. Carl R. Solewick, the matter against said defendant of alleged direct contempt is considered by this court.

And, thereupon, the Court DOES FIND:

[1] That on May 21, 1971, being one of the days of the May term A.D., 1971, of the Circuit Court, 30th Judicial Circuit, Justice County, the case of the People of the State of Illinois vs. Malacum C. Badacus, Case No. 71-CR-545734, Treason, came on to be heard in the regular course before this court.

[2] That a petit jury had been duly impaneled and sworn to try the issues before them in said case.

[3] That throughout said trial, which commenced on May 19, 1971, the court repeatedly asked the said defendant to obey the court's rulings and instructions and admonished him concerning his improper courtroom behavior.

[4] That on May 21, 1971, during the direct examination of Mary Madden, the following took place:

Mr. Doyle, Assistant State's Attorney: . . . Q. Mrs. Madden what, if anything, did you see the defendant, Mr. Badacus, do after he signed his name to the paper?

Mr. Badacus: Objection, Objection. The witness is about to tell a lie.

The Court: Overruled. It's your lawyer's responsibility to make any objection, and keep your voice down. You don't need to shout.

Mr. Badacus: I'm not hollering at you. You don't even know how to rule on objections, you dirty sonofabitch. I'm not going to be railroaded into any prison by any dirty, tyrannical old dog like yourself. Take that . . .

The Bailiff: Look out!

The Court: Let the record show that during the last comments from the defendant he was shaking his fist at the court, and that he did throw a book at the court. I am citing Mr. Badacus for direct contempt of court. Mr. Badacus, your remarks have been contemptuous as have many of your acts. You have totally disregarded the Court's orders and instructions. You have been warned many times. Mr. Solewick, do you or your client have anything to say prior to sanctions being entered?

Mr. Badacus: Go to hell. I don't want to talk to you anymore.

The Court: Then please sit down and keep quiet.

Mr. Solewick: No, he's pretty well said it all.

[5] That the conduct of the defendant, which took place in front of this court while in open session, tended to impede and interrupt the proceedings and lessen the dignity of this court. That the Court further finds that the defendant who is now and here present in open Court, is by reason of said conduct, guilty of direct contempt of this court.

IT IS, THEREFORE, ORDERED AND ADJUDGED, that the said Malacum C. Badacus, because of said contempt, be sentenced to a period of six months in the County Jail of Justice County, or until otherwise discharged by due process of law. Warrant of Commitment to issue, instanter, directed to Sheriff to execute.

JUDGE

IN THE CIRCUIT COURT OF THE
30TH JUDICIAL CIRCUIT
JUSTICE COUNTY

Clyde C. Cunningham	)	
	)	
vs.	)	No. 71-L-798369
	)	
Dennis R. DeFaultie	)	

ORDER
[INDIRECT CONTEMPT]

This cause being heard on the 28th day of May 1971, on the rule to show cause heretofore entered against Dennis R. DeFaultie, respondent herein, to show cause, if any he has, why he should not be held in contempt of this court for refusing to comply with the order of this court heretofore entered on the 3rd day of February 1971.

And said Dennis R. DeFaultie, having on said 28th day of May 1971, appeared in person and by his attorney Joseph Z. Laraia, and the court having jurisdiction of this cause and the parties hereto and having heard the testimony herein and having heard the arguments of counsel and said respondent DOES FIND:

[1] That said Dennis R. DeFaultie has failed and willfully refused to comply with the order of this court entered on the 3rd day of February 1971.

[2] That the said respondent has repeatedly expressed and shown his defiance of this court and the aforesaid order, and that no sufficent cause is shown by him why he should not comply with the aforesaid order, but that although able to do so, willfully failed and refused to obey the aforesaid order of his court.

[3] That the court further finds and adjudges the said respondent to be guilty of contempt and that said contempt has tended to defeat and impair the rights and interest of the plaintiff herein and to impede, embarrass and obstruct the court in its administration of justice and to bring the administration of justice into contempt.

IT IS THEREFORE ORDERED that said respondent Dennis R. DeFaultie be and is hereby ordered committed to the County Jail of Justice County, Illinois for a period of thirty days, there to remain charged with said contempt until the sentence has been served or until he has purged himself of contempt by paying to the Circuit Clerk of Justice County the sum of $1500.00, which said sum is to be applied on the judgment heretofore entered in the above entitled cause, the Clerk to transmit said funds to plaintiff if and when received, or until said respondent is released by due process of law. Warrent for such commitment to issue instanter, directed to the Sheriff to execute.

_____

JUDGE

The following questions were prepared for consideration by those attending the Seminar conducted by the Committee on Courtroom Decorum and Procedures. Citations to materials useful in considering the questions are provided below.

I. Mrs. Smith was a spectator in a local trial court. While the court was hearing cases she was requested by a court baliff to be quiet, the lady said to the bailiff "fuck you, you motherfucker" which was heard by the judge who stopped the trial he was hearing and told the State's Attorney to file a contempt petition.

The court holds a hearing on petition for direct contempt that alleged essentially that:

1. Mrs. Smith was a spectator;
2. She was abusive in that she used loud language, loud enough to disturb the proper function of the court;
3. The court directed bailiffs to maintain the said dignity of said court;
4. While instructing Mrs. Smith to remain quiet, she used language "fuck you, you motherfucker" again causing court to stop normal proceedings;

a. Can you find defendant guilty of contempt?

b. If yes, for what act, or acts?

c. Would this be direct or indirect contempt?

d. What are the rights of Mrs. Smith, i.e. if she asked for an attorney or right to plead to the charges. How would you rule?

* * *

For an analysis of this problem, see *People v. Wilson*, 35 Ill.App.3d 86 (1975), where the court held: "Criminal contempt of court is generally defined as conduct which is calculated to embarrass, hinder or obstruct a court in its administration of justice or derogate from its authority or dignity, thereby bringing the administration of law into disrepute. Causing a commotion which requires the court to suspend the hearing of a case has been held to constitute direct, criminal contempt of court. The mere use of street vernacular which does not cause an imminent threat to the administration of justice, on the other hand, does not usually constitute direct contempt of court."

II. Mr. Acton was issued tickets for traffic violations and on his day in court, he appeared in the courtroom wearing a turban as required by his Eastern religious sect. The judge told the court bailiff to request the defendant to remove the turban or leave the courtroom. The defendant approached the bench and discussed his religious beliefs with the judge; after this discussion, defendant was ordered out of the court. Mr. Acton promptly complied with this order of the court. He was further ordered not to appear again with the turban on. The defendant met his lawyer, Mr. Bracton, who as a Rabbi and a lawyer, wearing a skull cap outside of the courtroom. Both of them re-entered the courtroom and approached the bench where a "polite" discussion took place and the judge then ordered the lawyer to leave the courtroom and to never appear before him wearing the skull cap. The judge further ordered that Mr. Acton be held in contempt of court for violating his prior order that provided defendant was not to appear in a turban, and the judge sentenced the defendant to "jail for five days, for violating his prior order".

a. Was the action of the judge proper?

b. Would this be civil or criminal contempt?

c. What effect, if any, on the Constitutional Rights of the parties if raised on *appeal*?

* * *

For an analysis of the problems presented by this question, See, *American Cyanamid Co. v. Rogers*, 21 Ill. App. 3d 152 (1974). The court observed in this case that: "[C]riminal contempt consists of acts either committed in the presence of or outside the presence of the court which tend to impede its proceedings, lessen its dignity, disregard or abuse its processes or a refusal or failure to obey a valid order of the court, and is instituted to vindicate the authority or the dignity of the People, as represented by their judicial tribunal. Civil contempt, however, is a remedial process utilized in the civil suit where one party has a right to require some act on the part of the defendant for his benefit and advantage and obtains an order of the court commanding that it be done and the other party refused to do as directed." Further the court observed: "[A]n order finding a defendant in civil contempt of court must find that the conduct of

that defendant is willful and further must contain within its four corners a statement of what the defendant must do to purge himself. In such cases, therefore, the contempt proceeding is designed to coerce a respondent to do that which he has been previously ordered to do for the benefit of the judgment creditor. In short, its purpose and its result are coercive, and punishment by fine or imprisonment is purely incidental. Not so in criminal contempt. A criminal contempt is wholly punitive and its aid or assistance to a private party is purely incidental.

III. You are a judge hearing a civil motion call. Mr. Righteous, a non-lawyer, files a limited appearance to vacate a default judgment. In his petition, Mr. Righteous states that the affidavit of the special process server is signed by Mr. Longarm and contains the statement that he was appointed by order of court. Mr. Righteous also states at time of service he was in Cuba on his honeymoon and attaches supporting documents. Upon the hearing you find that the special process server who was appointed was a Mr. Sewer Service and not Mr. Longarm and that the affidavit is defective in that there is no description, location or time of service on the summons. You vacate the default judgment and quash the service of summons and the plaintiff states he is dismissing the case.

The clerk calls the next case when Mr. Righteous addresses you demanding that some further action be taken against Mr. Longarm. You courteously explain that the suit is dismissed, that he obtained what he asked for, and that your action terminated the matter. You proceed to the next case when you are politely interrupted by Mr. Righteous; and a discussion results in which you suggest that he see his own attorney or the State's Attorney and you advise him that this terminates the discussion whereupon he leaves the courtroom.

The next day you are confronted by Judge Friendly who tells you he spoke to Mr. Righteous and he quotes Mr. Righteous as stating "that if you do not change your ruling that you better be willing to go to the court's commission".

a. If you were the judge, what would you do prior to knowing of the discussion with Judge Friendly?

b. Would your answer be different if you were informed of statement of your Chief Judge?

c. If you decide on further action what form would it take and what procedures would you follow?

d. Would your decision be affected by the civil contempt authorized in the Illinois Statutes for filing false affidavits by process servers?

* * * *

This question involved a need to consider distinctions between direct and indirect criminal contempt which is described in the "Outline of the Law of Contempt" included in this report.

IV. Miss Jones, after testifying before a grand jury, was called as a witness in the trial of the case growing out of the grand jury's action. After the court declared Miss Jones a hostile witness and after she conferred with her attorney Mr. Smith, he stated that he advised her as to her constitutional rights and that she possibly could incriminate herself if she was to testify and further, he advised her of the judge's right to use sanctions such as contempt. She refused to testify and upon People's motion, the court gave the defendant a grant of immunity as drafted by an order agreed to by the State's Attorney and her attorney which contained the phrase . . . "except for perjury committed in the giving of such testimony . . . ". However, all parties agreed that grant would cover breadth of the grant authorized by Article 106 of the Code of Criminal Procedure. Miss Jones was called to testify under the grant of immunity, but by advice of counsel, she refused to testify and the court found her in direct contempt of court . . . "until such time as she appears before the court and answers the questions propounded to her thereby purging herself of the aforesaid contemptious acts".

The stated reason for Miss Jones not testifying was that she would be exposed to inconsistent statements with her Grand Jury testimony, and that the State's Attorney indicated that he would prosecute for same. Her attorney requested immunity from such, but the court did not clear up the situation, stating that under present Illinois law Miss Jones could not be prosecuted by the State's Attorney under the circumstances she described as the basis for her refusal to testify.

Query, if you were the reviewing court, would you consider the conduct of Miss Jones a contemptuous act since she was acting under advice of counsel? Would this act be civil or criminal? Could she be punished after the trial was over?

* * * *

An analysis of this question required examination of *Shillitani v. United States,* 384 U.S. 364 (1966), where the United States Supreme Court held that: [t]he act of disobedience consists solely 'in refusing to do what had been ordered,' i.e., to answer the questions, not 'in doing what had been prohibited.' And the judgments imposed conditional imprisonment for the obvious purpose of compelling the witnesses to obey the orders to testify. When petitioners carry 'the keys of their prison in their own pockets,' the action 'is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees.'"

V. Assume all the facts stated in question IV along with the following: Miss Jones is called to testify a few days later in the same trial and again she refused to testify based on advice from her counsel, and the judge enters the following order: "That she has been granted immunity, and that she has committed direct contumacious conduct, and

that said defendant is now sentenced to six months in the county jail or until such time as she purges herself of her contempt." Which order means that if Miss Jones should change her mind and decide to testify at any time prior thereto she may purge herself of her contempt and be relieved of this order. The court further advised Miss Jones that the 6 months sentence provided in the order is a penalty for violating his order.

After the trial was over Miss Jones notified the judge she was willing to testify. Upon being brought before the judge, and after explaining her position, the judge nonetheless refused to allow her to purge herself and remanded her to the Sheriff for completing the balance of the 6 month sentence.

Assume you are the reviewing court. *Query*: Would you reverse or sustain the trial court. What reasons would you give to justify your decision? How would you classify the contempt of Miss Jones?

* * * *

The problem presented by this question was considered in *People v. Denson*, 59 Ill.2d 546 (1975). The court observed: "Here it is clear that the judge had two separate and distinct purposes in mind. One, of course, was the desire to compel the witness to testify. The other was to punish the contemnor for refusing to do what she had been ordered to do, i.e., answer certain questions put to her by the prosecutor under a grant of immunity." The court held: "that the contempt order in this case was a valid dual-purpose order."

VI. You are a judge in a state which has a statute requiring all judges to file an ethical statement. The statute contains provisions for the violations thereof by censure, reprimand, removal from office and/or a fine. The provision for removal has been held unconstitutional. You fail to file the ethical statement and a suit is filed requesting that you be reprimanded, fined or censured.

The trial court upon a hearing enters an order for you to file the statement by November 1, 1976. You fail to do so and after a hearing you are found in contempt for willfully disobeying the court order and sentenced to sixty days in jail with the proviso that you are to be released upon the filing of the statement.

You challenge the power of the court to enter such an order and state that by the terms of the statute you can only be fined, reprimanded or censured.

Question: On appeal do you believe that the contempt order should be affirmed or reversed? State your reasons.

* * * *

In the case on which this question was based, *In Re Kading*, 238 N.W.2d 63, 70 Wis.2d 508 (1976), the Supreme Court of Wisconsin held that the sanctions available to the Supreme Court for violation of the Code of

Judicial Ethics included reprimand, censure or civil contempt. The contempt power was held to exist independently of statute.

VII. A court, after a hearing, entered the following order: The conduct of Mr. Gold in refusing to employ Mr. Brick on June 1, following his service as a juror in the circuit court is contemptuous of this court and obstructs the court in the discharge of its duties. Wherefore the court orders that the respondents shall employ the petitioner and shall pay the petitioner back pay from June 1; it is further ordered that this cause be continued for one year to insure compliance with this order, at which time if Mr. Gold has complied with the order, Mr. Gold will be discharged."

Further that Mr. Gold's incarceration for noncompliance would last for 60 days or until Mr. Gold complies with the order heretofore entered; and that there was no just reason to stay enforcement or delay an appeal of this matter.

Questions:

1. How would you classify this order, civil or criminal contempt?
2. On appeal, what would your decision be in reference to the court order?
3. Assume Mr. Gold filed a motion to vacate the contempt order and after a full hearing the motion is denied. Mr. Gold appeals the denial order. How does that affect your answer?

* * * *

Consideration of this question is aided by reference to *Kryzak v. Accurate Cost Products, Inc.*, 39 Ill.App.3d 136 (1976), where the Court observed that: "The Supreme Court has indicated that where a finding of contempt has been made and the punishment for such contempt consists of the traditional fine or imprisonment, such an adjudication is a final and appealable order. However, it is well established that an order adjudging a person in contempt, but which does not impose punishment, whether by fine or imprisonment, is not reviewable." Also, See, *Henry v. Waz*, 35 Ill.App.3d 752 (1976).

VIII. Judge Timely has a case assigned to him that has been continued fifty times. He calls the state's attorney and the defense attorney, Mr. Busy, and sets a final date for trial. Everyone agrees that they will go to trial on the set date. When that date arrives, the judge, state's attorney and a panel of jurors sit patiently waiting for Mr. Busy. About 11:30 Mr. Busy's secretary calls to inform Judge Timely that Mr. Busy is engaged in another case before the chief judge. Mr. Timely has his bailiff call the chief judge's court to reach Mr. Busy. Unable to find Mr. Busy by phone, he sends his bailiff to the court and the bailiff returns advising Judge Timely that Mr. Busy is not there.

Judge Timely issues a rule to show cause why Mr. Busy should not be held in contempt of court for failure to appear, said rule returnable at 2:00 P.M. the same day.

At 5:00 P.M. of the same day, Mr. Busy saunters into Judge Timely's court in response to the rule and asks for a continuance to obtain counsel and to reply to the rule.

Questions:

1. If you were Judge Timely, how would you rule on Mr. Busy's request?
2. How would you proceed to take action against Mr. Busy?
3. Would your action be civil or criminal contempt — direct or indirect?
4. If this action is civil contempt what is the degree of proof; if criminal, what is the degree of proof?
5. If Judge Timely elects to proceed as a direct criminal contempt, can he ask Mr. Busy questions per the civil practice act, Sec. 60. Give reasons for your answer.

* * * *

For material of assistance in considering this question, See *Geraty v. Carbona Products Co.*, 16 Ill.App.3d 702 (1973) holding that the unexplained absence of an attorney at trial may be grounds for indirect, but not direct contempt. See also, *People v. Marcisz*, 32 Ill.App.3d 467 (1975) where it was held that in cases of criminal contempt, a defendant is entitled to certain constitutional protections including right to notice, reasonable opportunity to defend, assistance of counsel, right to be proven guilty beyond reasonable doubt, and right not to be compelled to testify against oneself.

SURVEY OF JUDICIAL PRACTICES

Conducted by the Committee on Courtroom Procedures and Decorum

February, 1977

The following questionnaire was distributed to all Associate Judges with the registration materials for the March, 1977 Associate Judge Seminar. Of the 250 questionnaires sent out, 190 were returned. The responses to the questionnaire are provided below.

	YES	NO
1. Do you wear a judicial robe in your courtroom?	178	1
Always	160	11
Sometimes	13	1
Infrequently	3	2
2. Do you employ an impressive, formal court-opening ceremony?	142	39
At the beginning of each new day	127	24
At the beginning of each new trial	30	38
3. Do you personally welcome and orient new jury panels?	82	75
If no, does another judge of your court welcome and orient new jury panels?	79	6
Do non judicial court personnel orient new jury panels?	23	80
A court clerk?	13	35
A Jury Commissioner?	25	31
4. Do you make yourself available to answer jurors' questions pertaining to court procedures?	120	29
5. Do you distribute a juror's handbook or manual to each new juror?	67	83
6. Do you provide attractive, functional and pleasant assembly and impannelling facilities for jurors?	106	43
Do you show court-oriented documentary films or slide presentations to jurors?	0	148
Do you provide recreational reading materials?	38	97
Refreshment facilities?	78	60
Private areas for jurors?	101	40
7. Do you formally discharge and thank trial jurors for their service after a case concludes?	156	2

8.	Does your court present a certificate of service to each juror upon completion of jury service?	47	90
	Does your court issue juror identification badges to members of the jury?	94	60
9.	Do you prescribe dress standards for jurors?	4	136
	How do you make such standards known?	0	3
	By mail?	1	2
	During first day orientation?	3	2
10.	When you decide litigation from the bench, do you explain your decision to the losing litigant in a non-jury trial?	150	20
	In open court?	165	11
	In chambers?	13	32
11.	In a complex, controversial or high public-interest case, do you hold a press conference to explain your decision, rulings or trial problems?	0	157
	Do you invite local daily newspapers?	0	96
	Local radio stations?	0	97
	Local weekly newspapers?	0	96
12.	Do you prepare a "non-legalese" precis in plain, understandable language for press consumption explaining your decision/ruling?	4	149
13.	When you impose sentence in a criminal case, do you explain your sentence and motivation to the defendant in open court?	136	27
14.	Do you write articles for publication in law reviews?	17	155
15.	Do you personally instruct court personnel at regular intervals as to required standards for dress, conduct, appearance, courtesy, court procedures, public relations, relations with attorneys, jurors, litigants, witnesses?	101	77
	Do you use a printed manual or handbook in conjunction with such instruction?	9	127
16.	Are your civil trial calendars current within six months?	106	39
17.	Are your criminal trial calendars current within six months?	117	32
18.	Do you have modern court facilities, buildings and equipment?	137	48
19.	Do you observe, with appropriate courtroom proceedings?		
	LAW DAY-U.S.A.?	115	42
	Admission of new attorneys?	31	114
	Retirement of court personnel?	54	96
	Memorial services for deceased lawyers, judges, public officials?	83	69
20.	Do you plan for such ceremonies in conjunction with local bar associations?	115	51
21.	Do you encourage law schools in your area to send students to your court to work on special court projects?	59	97

22.	Do you accept speaking engagements on court administration, court objectives, court reform, court problems at Law Schools?	95	50
	Colleges?	89	38
	High or Public Schools?	118	20
	Law enforcement groups including police?	98	27
	Civic and community groups?	133	17
23.	Do you encourage court tours and other public functions to be held in your court by school and civic groups?	167	12
24.	Who conducts tours of your court?		
	A judge?	70	19
	Lawyer?	40	27
	Clerk?	67	12
	School teacher?	88	18
25.	When you sponsor a court tour by public groups, do you distribute an informational pamphlet or brochure explaining the function, organization, jurisdiction, and annual operating statistics of your court?	13	136
	How do you finance the publication of such pamphlet or brochure — with public funds?	5	25
	Local bar association funds?	2	25
	Private donations?	1	25
26.	Do you periodically inspect jail facilities in or near your jurisdiction to ascertain inmate conditions?	53	120
27.	Does your court hold press conferences to explain to the public the pressing problems of your court as they arise?	28	130
	To enlist public support for court reform?	9	55
	To procure additional needed court funds?	9	52
	Who conducts such press conferences?	2	26
	Your Presiding Judge?	48	24
	A designated media-public liaison judge?	8	28
28.	Do you have a written policy, published guidelines, or Standard Operating Procedure for the conduct of court press conferences?	3	149
29.	Do you render an annual progress report to the public on the accomplishments, goals, or deficiencies of your court?	31	115
	Do you distribute your court's annual report to the media?	24	51
	To public libraries?	13	53
	To local legislators?	12	52
	To local executives holding public office?	15	50
	To state and local bar associations?	19	50
30.	Do you write Letters-to-the-Editor to local newspapers in response to criticisms of your court or of judicial colleagues?	3	175

31.	Do you participate in TV or radio panel discussions on matters affecting the administration of justice or the courts?	37	135
32.	Have you ever been subjected to media criticism with respect to the handling of litigation or court procedures?	44	125
	With respect to sentencing?	26	94
	With respect to bail procedures?	15	106
	Have you ever been called "soft on crime"?	14	113
	Have you ever been called "tough or harsh on crime"?	18	104
33.	Does your court maintain appropriate press room and facilities inside your court building?	43	126
34.	Does your court maintain an on-going liaison with your executive and legislative branches of government?	85	69
35.	Do you think the public in your jurisdiction hold your court in high regard?	102	26
	Or in low regard?	6	32
	Or in fair regard?	53	22
36.	Do you think that the public generally throughout the country holds courts and judges in high regard?	83	92
37.	Do you believe you enjoy public confidence, respect and trust as judge in your jurisdiction?	167	6
38.	Do you think the public understands and recognizes the important and vital role a judge fulfills in society?	75	103
39.	Do you think it would be helpful to you in improving your individual performance as a judge if your local or State Bar Association secretly polled its' members with respect to your judicial qualifications, performance, and temperament and confidentially reported the poll results to you annually?	121	53
40.	Does your local or State Bar Association now poll its' members about judicial performance and conduct?	109	61

Report of Professor Vincent F. Vitullo

In certain of the sessions the bulk of the discussions concerned certain aspects of court management and administration suggested by certain (court) watcher reports as well as those aspects suggested by the response of the participants to the questionnaire circulated by the committee. The court watcher reports involved in the discussion were those provided to the committee by the Illinois Supreme Court Administrator's office.

As a threshhold matter, it was noted by the Committee and agreed to by the vast majority of the participants that the Court Watcher reports were in the main very supportive of the judiciary and very constructive in their comments and criticisms. By and large, most of those who spoke to this issue agreed that the various Court Watcher projects provided an

excellent means of communicating with the public and educating the public on various problems involved in the administration of justice. In addition, there was also a concensus that the Court Watcher reports provided a useful source of feedback whereby the judiciary could be made aware of certain problems in the administration of justice which might otherwise go unobserved.

For the sake of making the record complete, however, some of the participants reported that in a few cases the Court Watcher programs that they observed were not well organized nor well administered. The primary complaint was that in a few instances Court Watcher personnel appeared in a given courtroom for only a very few minutes and apparently made no effort to contact court personnel for explanation of court procedure or for obtaining any other information. There was a strong feeling in each of the discussion groups that such a sporadic and episodic method of court visitation did not provide an adequate basis for evaluating courtroom personnel or court procedure in general. In the same vein, it was noted that in some judicial circuits the media selected for comment only those parts of the Court Watcher reports which were critical or negative concerning the judicial system. Concern was expressed over the negative public reaction that could be created by this type of unbalanced reporting. However, the general trend of the discussion seemed to indicate that inadequate court watching procedure and distorted media reporting were the exception rather than the rule.

One of the major criticisms noted in almost all of the Court Watcher reports was that many courthouses lack adequate means whereby the public can locate and identify the appropriate courtroom or other court facilities in which they are required to appear. Strong emphasis was placed upon the necessity for adequately marking courtrooms, posting case assignments and assignments of court personnel, and providing adequate direction in large complex facilities.

A second major criticism found in most Court Watcher reports concerned the sloppy appearance and surly behavior of many court personnel. In response to this criticism it was generally agreed by the participants that more attention should be paid to the proper training and instruction of court personnel, especially in those areas where court clerks and bailiffs are not regularly assigned to the same courtrooms. It was also suggested that court personnel should wear uniforms or some distinctive form of dress so that the public could identify them easily. At the very minimum, it was suggested that court personnel should wear identification tags or badges so that litigants and the public could easily know the function and authority of the officials with whom they have to deal.

In short, most of the criticisms found in the court watcher reports could be summarized by the one word, "communications". The following specific suggestions were offered as means of better communicating with the public:

1. As a general rule, court sessions should be opened with a short, but dignified, ceremony announcing that court is in session, the name of the judge presiding and the general nature of the business to be conducted during that session, i.e. arraignments, traffic violations, etc. In addition to the obvious purpose of adding decorum to the proceedings, it was felt that such a preliminary ceremony would help inform the public of the business in a particular courtroom so that the individual members of the public could be certain that they were in the appropriate courtroom.
2. The questionnaire circulated by the Committee among the Associate Judges indicated that most judges do in fact follow the Supreme Court rule on attire and wear robes during formal court proceedings. This practice was emphasized and encouraged. However, a few judges reported that in some instances robes were not worn simply because there was no appropriate place for the presiding judge to robe himself or to leave his suitcoat or other personal belongings with any feeling of security.
3. Because many courtrooms do not have regular bailiffs assigned to them, it was recommended strongly that each circuit establish uniform standards and rules for its bailiffs and that these rules be incorporated in an instructional booklet which could be used for training such personnel.
4. Because many courtrooms lack adequate juror facilities, it was strongly recommended that identification badges be provided for all jurors so as to minimize the chances of contaminating any individual juror or panel of jurors.
5. All proceedings should be conducted with as much formality as is practical under the circumstances. Informal procedures, especially those conducted in chambers, are often misunderstood by the public and taken as a sign of inappropriate relationships or conduct between judges and lawyers.
6. In large volume courts, a system should be established whereby individual litigants are requested to check in or sign in with the clerk so that their matters may be called for hearing in proper order and so as to make certain that they are in the right courtroom.
7. Special efforts should be made to provide adequate orientation for new jurors.
8. Special efforts should be made to thank jurors at the end of their service, and under no circumstances should the judge ever express dissatisfaction with the jury's verdict.
9. Many judges recommended the use of post-service questionnaires for jurors as well as the practice of engaging in informal discussions with jurors after their service.

In spite of the seriousness of many of the matters already mentioned, the court watcher report unanimously indicated that the most serious complaint concerning the court system by members of the public was the question of continuances. By and large, the public seems to feel that continuances are too frequently granted and without adequate reason. In response to this critism, most of the participants in the discussion groups were of the opinion that Supreme Court rule 231 should be more rigorously enforced at the trial level so as to reduce the number of continuances and so as to reduce the appearance that continuances were being granted without adequate reason. It was suggested that except for certain specialized circumstances, continuances be granted only in open court and only upon the presentation of a written motion setting forth the reasons for that continuance. This practice would insure among other things that the parties litigant would be aware of the fact that the continuance was being requested by their counsel and would be aware of the reasons being offered for that continuance. It was felt that too often the blame for the continuance was improperly placed upon the judge when, in fact, the reason for the continuance was simply the convenience of the lawyers.

It was pointed out by some of the participants that in mass volume courtrooms it is simply impossible to try every case appearing in that courtroom the first time it is called. In effect, in such mass volume courtrooms the first trial call is in reality a pretrial call. In response to this problem, it was suggested that in such courtrooms the first call in the case be simply designated pre-trial so that the public is not deceived into thinking that their case will be actually heard the first time it appears on the court call. In other words, it was suggested that this problem was simply another example of a situation where proper communication with the public would eliminate a great deal of inconvenience and misunderstanding.

At various times in all of the discussion sessions it was pointed out forcefully by various participants that the objections or criticisms voiced by the Court Watchers were really not aimed at individual judges, but were rather criticisms aimed at inadequate court facilities or an inadequate number of judicial personnel. Many judges reported that they never had the assistance of a bailiff in their courtroom. Some others reported that seldom did they have a clerk in attendance during court sessions. Many courtrooms totally lack separate jury holding facilities, thus making it necessary for the jury to mingle with the public and litigants in the courtroom or in the courtroom corridors.

It was further pointed out that many of the Court Watcher criticisms appeared valid only in the mass volume courtrooms, such as traffic court, arraignment court, etc. It was strongly felt that the essential problem in these courtrooms was a matter of too few judges trying to handle too many cases. Under these circumstances all too often the convenience of the public and the appearance of justice had to be sacrificed in favor of expediency in handling a large number of cases. The concensus was that the only adequate

solution to this problem was the addition of more judicial personnel so that the appropriate time could be spent on each litigant's individual case.

One of the more interesting conclusions agreed to by most of the participants was that Court Watcher reports could be very useful in pointing out that many of the problems in the judicial system were not problems of judicial personnel, but were really problems involving lack of resources to run the system properly. Most of the participants hoped that Court Watcher reports could be of use in informing the public of the need for additional judicial facilities as well as additional judicial personnel.

Topic IV—RECENT DECISIONS

A. Summary of Advance Reading Material

Henderson v. *Foster*, 59 Ill.2d 343, 319 N.E.2d 789 (1974)

First Finance Co. v. *Pellum*, 62 Ill.2d 86, 338 N.E.2d 876 (1975)

Englewood Hospital Assoc. v. Knox, 7 Ill. Dec. 367, 364 N.E.2d 528 (1977)

Credit Thrift of Am. v. *Kittrell*, 41 Ill.App.3d 361, 354 N.E.2d 59 (1976)

Dobrowlski v. *La Porte*, 38 Ill.App.3d 492, 348 N.E.2d 237 (1976)

Outline of Recent Cases

B. Summary of Discussions

Report of Professors Richard C. Groll and Richard A. Michael

The Reporters wish to extend sincere appreciation for the creative energies and leadership provided by the Judicial Committee; towit: Hon. John W. Nielsen, Chairman; Hon. Myron T. Gomberg, Vice-Chairman plus Hon. Stephen Kernan, Hon. Arthur A. Sullivan, Jr. and Hon. Meyer H. Goldstein (Liaison).

The seminar sessions conducted at the Lake Shore Club on March 31 and April 1, 1977 were well attended and the discussion was lively and enlightening.

The topics for discussion were divided into seven (7) major areas, towit:

I. *Governmental Immunity — Garnishment*

A series of recent Illinois Supreme Court and Illinois Appellate Court cases were discussed in detail (i.e., see *Advanced Reading Materials*, 1977 Associate Judge Seminar).

There was extensive discussion of *First Finance Co. v. Pellum*, 62 Ill.2d 86, and the dissenting opinion contained therein. In essence, the Illinois Supreme Court held, in that opinion, that the Illinois Department of Mental Health was not immune from proceedings under the Wage Deduction Act.

Substantial discussion centered on the varying interpretations (i.e., majority v. minority opinions) of Ill. Rev. Stat. 127-801 (1973) wherein the legislature states: " . . . the State of Illinois shall not be made a defendant or party in any court."

Most judges in attendance expressed concern as to the definition of a "party" and agreed with the dissent in saying that an employer in a proceeding involving the application of the Wage Deduction Act should be viewed as a " . . . party in . . . Court."

The judges in attendance at the seminar sessions all felt that there should be clarification by the Illinois Supreme Court or the Illinois Legislature of the problems incident to supplementary proceedings where the judgment debtor is receiving public assistance. Those participating in the decision indicated a feeling of insecurity in dealing with these consistent problems.

The discussion of this topic ended with a disclosure of a *Federal Court* decision permitting implementation of the Wage Deduction Act as against a postal worker.

II. *Jurisdictional Problems*

As set out in the *Advanced Reading Materials*, a series of recent Illinois Appellate Court decisions were discussed. The problems and issues raised by these cases were duly recorded by the participants, but there was little discussion.

III. *Discovery Problems*

The participating judges seemed extremely interested in discussing the recent Supreme Court cases involving discovery. However, the majority of those in attendance were less than satisfied with the opinion in *Cox v. Yellow Cab Co.*, 61 Ill. 2d. 416. The participants felt that the Supreme Court had not resolved the difficult problem of defining the attorney-client privilege as it arises in personal injury-respondiat superior cases.

The cases touching upon experimental and destructive testing were discussed at great length. All in attendance agreed wholeheartedly with the appellate decisions. Several points were made, however; towit: it is assumed that the party engaged in the destructive discovery would be liable for the damage suffered in the testing, if any. Also, a court should permit such discovery so long as there is reasonable foreseeability that the results would be relevant to the resolution of the case at hand.

IV. *Motion Practice*

Kollath v. Chicago Title & Trust Co., 62 Ill. 2d. 8 (1975) was discussed. ALL judges in attendance agreed with the opinion but indicated that it might generate some hardship because of the "bad habits" of some members of the bar.

V. *Workmen's Compensation*

While the cases set forth in the Advanced Reading Materials were presented in detail, there was little discussion.

VI. *Recent Amendments to the Civil Practice Act*

Recently the Illinois General Assembly passed House Bill #3957, which was approved by the Governor on August 20, 1976. It is designated as Public Act #79-1434 and entitled: *An Act In Relation To The Regulation Of Medical Practice and Recovery for Injuries From Malpractice, Amending Certain Acts Herein Named.*

This seminar topic generated the most amount of interest and discussion. Most judges in attendance disagreed with the legislation and thought it to be unconstitutional.

The new section 21.1 drew the least of the criticism. The judges generally expressed the notion that having a "respondent in discovery" would not be a bad practice, but doubted that it would accomplish the objectives they thought the drafters of the act envisioned.

The new section 68.4 which allows a set off of up to fifty percent of a judgment in an action "against a licensed hospital or physician" based on an allegation of "negligence or other wrongful act, not including intentional torts" for one-half of all sums the plaintiff received in reimbursement for medical expenses or lost wages from "any other person, corporation, insurance company or fund" was discussed at great length. It was assumed, though the act is not explicit, that this change in the substantive rule, previously referred to as the Collateral Source Rule, would have application only in medical malpractice cases. The statute would indicate a broader application (e.g., a physician who committed personal injury while driving an automobile).

The amendment to Section 41, eliminating the showing of malice as a prerequisite to recovery was welcomed by most judges attending the seminar sessions.

Sections 58, 65.1 and 34 were discussed. The methods judges may be forced to implement in drafting new verdict forms generated many questions, alternate hypotheticals and general discussion.

VII. *Section 72 Motions*

The history behind Section 72 motions coupled with a long series of hypotheticals involving the proper interpretation and implementation of the section concluded the discussion.

Topic V—CRIMINAL LAW

A. Summary of Advance Reading Material

TABLE OF CONTENTS

TABLE OF CONTENTS

Report of Professor Terrence F. Kiely

The above sessions convered basically the same materials as the earlier Criminal Law sessions for Circuit Judges. This time, however, Judges Neimann, Stein and myself dispensed with the hypothetical questions and concentrated on very recent Illinois and federal decisions on search, seizure, sentencing and probation.

The sessions were very well attended and there was quite an interchange among the participants and the panel.

The only substantial addition to my earlier report would be to inform you that all of the participants want a statutory clarification of whether or not costs may be assessed under the new supervision statute.

Topic VI—JUVENILE LAW

A. Summary of Advance Reading Material

CONTENTS

III. Procedures Authorized Before Petition Has Been Filed
IV. Procedures Authorized Before Adjudication
V. Adjudicatory Hearing
VI. Dispositional Hearings
VII. Issues of Appeal

B. Summary of Discussions

Report of Professors Jill K. McNulty and Patrick D. McAnany

Report of Issues and Ideas Discussed at the Seminar on Juvenile Law at the 1977 Associate Judges' Seminar

Traffic cases

Several judges remarked that recent revisions in the Criminal Code and in the Motor Vehicle Code have resulted in more severe penalties for traffic offenses. This raises the question of which, if any, traffic offenses should be handled under the Juvenile Court Act in light of the language contained in Section 702-7(2). There were the following three points of view:

1. Handle all traffic offenses in Juvenile Court.
2. Handle all traffic offenses in traffic court, but punish by fine only. However, this can raise *Williams v. Illinois* problems if nonpayment results in incarceration.
3. Handle all serious traffic cases in Juvenile Court and allow the rest to be tried in traffic court.

There was some discussion as to how juvenile court judges can handle license suspension cases and avoid problems raised in the *Herrod* case. It was noted that Section 702-9(1) of the Juvenile Court Act required that the Secretary of State be notified if the juvenile has been adjudged delinquent for certain traffic offenses specified therein.

Some judges felt that a juvenile convicted of a traffic offense could be incarcerated in the Department of Corrections Juvenile Division if the judge saw fit to impose jail time.

Restitution, Costs and Public Service as a Condition of Probation

Several judges wanted to clarify restitution as a condition of probation. They noted the omission of it as a suggested condition under Section 705-3 of the Juvenile Court Act whereas it was specifically included in adult

probation conditions. Most thought that there was general authority to do so because of the omnibus clause at the end of Section 705-3(2). There was doubt about whether a youth could be held in contempt for not paying restitution; whether his parents could be made to pay; and the relationship between restitution and general liability for his acts under the law.

Costs, including costs for an attorney, were discussed. Approximately 25% indicated that they assessed court costs and attorney's fees against the parents if they are able to pay.

Public service (e.g. working for the community in some "volunteer" capacity) was used on occasion (about 15%). There was some interest in this, but a concern that this type of thing might run afoul of the *Herrod* reprimands.

Transfer Hearings (Section 702-7(3) Motions)

A difference of opinion was voiced about the need for a preliminary hearing in adult court after a full transfer hearing has been given in Juvenile Court. Several judges indicated that they thought the probable cause determination found in the juvenile transfer hearing was satisfactory for adult purposes as well, since the Juvenile Court is not a separate court, but in Cook County merely a different division of the circuit court.

Termination of Parental Rights Cases

Some judges indicated that States Attorneys are experiencing pressure from DCFS to enter termination petitions against parents immediately on filing of neglect/dependency petitions or soon thereafter without there being sufficient grounds therefor. There seems to be a shift in policy by DCFS toward earlier termination rather than extended foster care placement.

A question was raised about whether a petition to terminate parental rights could be entertained under the Juvenile Court Act prior to the minor's having been adjudged a ward of the court. Certain language in the Act would appear to preclude this possibility. A suggestion was made that it might be wise to amend the Act to permit this.

Social History Report

Now that an explicit finding that wardship is in the best interest of the minor is now required, a question was raised about the evidentiary basis for the finding. One judge indicated that he often will take an admission, but prior to finding delinquency would have a social done. After it was available he would hold a hearing at which time the social provides the evidentiary basis that wardship is in the best interest of the minor.

Clear and Convincing Evidence

Judge Costa raised the question of whether Illinois appellate courts are accurately describing clear and convincing evidence in their opinions reversing termination cases on the basis of insufficiency of the evidence. He indicated that several have used the term "reasonable doubt" in defining clear and convincing evidence, thus confusing it with the criminal standard. Either it is an effort to equate the termination standard with the criminal one (there is some leaning this way) or it may simply be a careless way of defining what the standard is.

"Physical Abuse"

Judge Costa feels that this critical language in the Juvenile Court Act is not sufficiently defined. Apart from being "non-accidental" there is no further report to define it. Because of the severe consequences that flow from a finding of neglect based on physical abuse, he thinks it should be defined more precisely.

Social Worker Privilege

Under recent Illinois case law, the statutory privilege for communication between a caseworker and parents would apply when parents are seeking help from an agency, but not when the caseworker is investigating pursuant to the Juvenile Court Act or the Abused and Neglected Child Reporting Act.

Topic VII—EVIDENCE

A. Summary of Advance Reading Material

HYPOTHETICAL PROBLEMS

1(a). Walter Dangerous, driving down the street, struck Veronica Victim, age 4, and severely injured her. At the resulting trial, defendant attempted to introduce testimony of a witness that Veronica had darted out from between 2 parked cars directly into the path of Dangerous' vehicle. Objection.

1(b). Veronica Victim sued Walter Dangerous for injuries sustained in an accident at the intersection of U.S. 41 and State Highway 10, _____ County, Illinois. Plaintiff Victim called to the stand 2 Sheriff's deputies who testified that they were riding in their cruiser

on State Highway 10, and were possibly ½ mile from the above-mentioned intersection. Suddenly a green sedan passed them at a rapid rate of speed and disappeared around a curve in the road. The deputies proceeded to the subject intersection where they saw that an accident had occurred. One of the cars involved in the accident was a green sedan. The testimony of both deputies was that the sedan was the same shade of green, and of the same model and design as the car that had just passed them. This car was driven by defendant Dangerous. One of the deputies testified that, in his opinion, the green car was traveling about 80 miles per hour when it had passed the highway patrol car. Only a few seconds had elapsed between the time that the green car passed the deputies and their arrival at the scene of the accident. Both men testified that they saw no other green car. Is the testimony set forth above admissible?

2(a). P, driver of one car, sues D, driver of another car, for injuries sustained in an intersection collision. As part of his case D presents witness W who would testify that he had observed D as a driver for thirty years and was of the opinion that D was a careful driver. Objection. What ruling and why?

2(b). An attorney sued a doctor for non-payment of the attorney's fee. While the doctor was being cross-examined he stated that his reason for not paying the attorney was because he considered the attorney to be a "dishonest and corrupt man — and I can prove this." The attorney then brought in 5 witnesses who testified as to the attorney plaintiff's good character. Was this testimony admissible?

3. S, age 17, borrowed his father's car in order to drive to a movie. On his way to the movie he ran a red light and collided with an automobile driven by P. P sues the father, alleging that the *father* is liable under *respondeat superior* and in negligently entrusting his car to an incompetent driver. P attempts to introduce evidence of 3 previous accidents of S which occurred in the last month. They were all caused by S's running a red light. Objection. What ruling and why?

4. Assume plaintiff was in a Shop & Rob (S & R) grocery store and she fell and injured herself. She files suit against S & R. During the defense case the attorney for S & R introduced the fact that she for the past 3 years had filed 8 slip-and-fall lawsuits. Assume all of them had been filed against other grocery store chains. The attorney for the plaintiff objects. What result and why?

5. "X" an elderly pedestrian sued the city for a fractured hip sustained as a result of a fall on a broken sidewalk. The attorney for the city would like to cross-examine X concerning X's 2 prior admissions to the county hospital. In the 2 years prior to the accident X had been admitted to county hospital once for an injured knee and another time for a skull fracture. Subsequent to her slip and fall, plaintiff was

involved in another accident in which she broke a finger. May the city attorney cross-examine plaintiff concerning these other occurrences?

5(a). Assume, that the cause of the prior and subsequent accidents was dizziness on the part of the plaintiff. Now may the attorney for the city cross-examine the plaintiff on these injuries?

5(b). Suppose that the attorney for the city was able to show that the prior and subsequent injuries were to the same area of plaintiff's hip as is involved in the case on trial. Now may the attorney for the city question the plaintiff concerning the prior and subsequent accidents?

6(a). P brought a suit against D for $500,000 for injuries sustained when she fell on a stairway in D's theater. She testified that while descending the stairs, the carpet slipped and as a result, she fell on her back and was severely injured. At the trial, P introduced an expert who testified that the carpet on the stairway where P fell was ½-inch thick and was loose because the tacks, which were about ½-inch long, had been loosened. Moreover, X, a witness for P, testified that 2 weeks before P's injury, he saw 2 girls fall at the same spot where P had fallen. No evidence was presented that any representative of D was told about the fact that the 2 girls fell at this spot.

6(b). D's Manager testified that the carpet had been in place for 5 years and, to his knowledge, no one had ever slipped and fallen on that carpet or any carpet in the theater. Is such testimony admissible?

6(c). Assume that there had been no prior testimony concerning other accidents on the stairway. D's Manager still testifies that no one has ever slipped and fallen on the carpet in question since it was installed. Objection. What result and why?

7. Suit for wrongful death. P attempts to introduce the fact that 10,000 Corview motor cars have defective exhaust systems, which is P's theory of the cause of death in the instant case.

8. P was driving his car when he was fatally injured in a crossing gate accident by a railroad train. P died and his wife sued the railroad for wrongful death. The engineer of the train testified that P had ignored a warning red light at the crossing, P's wife testified that P had driven across this crossing every day on his way to work and that he always stopped at the crossing, looked both ways, and then carefully crossed the tracks. Objection. What ruling and why?

9(a). Elmer Jones was indicted for the murder of Joe Henry Smith. Previous to the trial, defendant had entered a plea of not guilty, based on a claim of self-defense. The State, in proving its case, did not introduce any evidence pertaining to defendant Elmer Jones' reputation. The defendant, in presenting his evidence, offered several witnesses who testified, over objection, to Elmer's previous "good character." During cross-examination, the attorney for the State asked each witness whether they were aware that Elmer had been convicted of assault and battery some 17 years before the trial.

9(b). Next, counsel for defendant Jones called James McCoy, a friend of both defendant and the victim. Defense counsel asked McCoy, "Were you acquainted with the victim., Mr. Smith?" Answer: "Yes." Question: "Are you familiar with the deceased, Joe Henry Smith's reputation, prior to and on the date he died for being a quiet, peaceable, law abiding citizen in the community in which he works?" The State's Attorney objected again. (Assume overruled). Mr. McCoy then answered, "Yes." Defense counsel then asked, "What is that reputation?" Answer: "Smith's reputation was terrible. He was a violent, quarrelsome man." Objection. (Assume overruled).

On cross-examination, McCoy was asked the following questions: Question: "Are you familiar with the fact that Joe Henry Smith won the purple heart for bravery as a G.I. in Viet Nam?" Objection. (Assume overruled) Answer: "No." Question: "Name one particular instance of victim Smith's engaging in an act of violence." Objection. (Assume sustained).

9(c). Upon rebuttal, the State offered evidence as to defendant Elmer Jones' bad reputation for peaceableness and non-violence, which evidence consisted of the following:

(1) The personal opinion of 3 witnesses who knew Elmer Jones because each had worked with Jones for several years and had been in daily contact with him;

(2) The particular facts each witness believed demonstrated defendant Jones' bad character for peaceableness and non-violence.

(3) Rumors that each witness had learned from people who had purported to be friends of the defendant; and

(4) General reputation for lack of peacefulness and for violence of Jones in the community in which he lived just prior to victim Smith's death.

Assume the objections are timely made to (1), (2), (3) and (4). How would you rule in each instance?

10. Ralph Ranger is indicted for the armed robbery of a liquor store. At trial, State calls police officer Jack Armstrong, who testifies that he was the investigating officer in three previous armed robbery cases in which Ranger had been indicted, the last two of which resulted in convictions, and that in all three the method of operation, or "m.o.," were identical because in each previous case involving Ranger, the robber had beaten his victim with a pipe or club. Objection.

11. Walter Weird is indicted for the crime of indecent liberties committed against an 8-year-old girl, Veronica Victim. At the trial, the State attempts in its case-in-chief to introduce the testimony of four other alleged victims that they were attacked by Weird, and that in all four of these attacks, each witness would testify that the method of

operation was that Weird stopped the young girls at or near a bus stop and offered them Girl Scout cookies wrapped in a brown wrapper and then told each girl they could have more cookies if they got into the car with Weird. These four witnesses would have testified further that when Weird offered cookies to them, he was wearing Mickey Mouse ears on his head.

12. Two automobiles owned and operated by David and Lynn collided at an intersection. The accident occurred in the center of the intersection which was controlled by an automatic traffic light. There were no witnesses to the occurrence other than the two drivers, and only the respective automobiles were involved. Lynn filed suit alleging that David had entered the intersection against the traffic signal. During the course of the trial, Lynn's attorney attempted to introduce the following letter addressed to Lynn, signed by David, and dated the day after the accident:

> Dear Lynn,
>
> I'm sorry your car was damaged last night in that collision. If you wish I'll be happy to pay you $500.00 since I don't want another claim filed with my insurer. I sure wish I'd been paying more attention to the lights last night.
>
> Sincerely,
>
> David

Objection. What result and why?

13. Suppose one George had been riding with Lynn during the accident and now testifies for David. May Lynn impeach George by showing that George had compromised a claim against David?

14. Plaintiff, a 4-year-old child was injured by debris in a lot near an abandoned house, one of a number of such houses owned by the defendant steel company. It was contended that the area was an attractive nuisance and that it was neither adequately fenced off nor cleared of rubbish so as to render the area harmless to children who frequently played there. D argued that the cost of razing the buildings on the various lots and cleaning up all the yards (estimated to be a total of about $55,000) was not slight compared to the risk to the children as argued by P.

P's father offered to testify that after the accident five or six men using a truck and a bulldozer razed the building and cleaned up the yards. He estimated their working time to be about two hours and their cost to be about $100.00. Objection. What ruling and why?

15. P sues D company alleging that one of their servants ran into P with his automobile. D company denies that the tort-feasor was one of their servants and denies that they own the automobile. P offers testimony to show that D company purchased a liability insurance policy for that automobile. Objection: What ruling and why?

B. Summary of Discussions

SUGGESTED ANSWERS TO HYPOTHETICALS

Report of Professors Elliot H. Goldstein and Robert G. Spector

QUESTION 1a—MATERIALITY

This problem raises the difference between evidence that is immaterial and evidence that is irrelevant. While the two terms are often used interchangeably, immateriality is properly used when the proponent is attempting to prove a point not properly provable in the case. Materiality is determined by the substantive law, within the framework of the pleadings. Cleary, *Handbook of Illinois Evidence*, § 12.1 at 205-206 (2nd ed. 1963) [hereinafter cited as *Cleary*]. Hunter, *Trial Handbook for Lawyers*, § 33.3 at 312 (4th ed. 1972) [hereinafter cited as *Hunter*]. Thus, in the present case if the defendant was attempting to prove that Veronica was contributorily negligent, the proper objection would be immateriality. This is so because a child of four cannot, as a matter of law, be negligent. Cf. *Romine v. Watseka*, 341 Ill. App. 370, 91 N.E. 2d 76 (1950). However, if the evidence was offered to show the lack of any negligence of the defendant, then the immateriality objection disappears.

QUESTION 1b—RELEVANCY

This problem raises the issue of the relevancy of circumstantial evidence. All evidence must be relevant to be admissible; that is, it must have a tendency to render a proposition in issue more or less probable in light of logic, experience, and accepted assumptions concerning human behavior. *People v. Newsome*, 291 Ill. 11, 125 N.E. 735 (1920), *Cleary* § 12.1 at 206.

If the proffered evidence meets that standard the judge should admit it, unless the probative value of the evidence is unduly prejudicial, unduly time consuming, or distracting from the main issues. *Cleary* § 12.2 at 207; *Hunter* § 33.4 at 312. The decision is one best left to the trial court's discretion and an appellate court will not reverse a relevancy decision except for abuse of that discretion. C. McCormick, Evidence 2d § 185 at 440. [hereinafter cited as *McCormick*]

In the present case the evidence appears to be relevant. The fact that the defendant Walter Dangerous was observed one-half mile before the accident driving at 80 miles an hour renders it more probable that he was speeding at the time of the accident than it was before the evidence was

introduced. The evidence appears probative because of the short amount of time and distance between the point of observation and the point of the accident.

The plaintiff laid a sufficient foundation for the admissibility of the evidence by having the officer testify that the car that passed him was the same model and shade of green as Dangerous' car.

There is no problem in allowing the officer to testify as to the speed of the car, even though he only observed the car momentarily. *Conway v. Tamborini,* 68 Ill. App. 2d 190, 215 N.E.2d 303 (1966).

QUESTION 2a—CHARACTER TESTIMONY—CIVIL CASES

This problem raises the question of the introduction of character testimony in civil cases. Character testimony is not permitted circumstantially in civil cases. *Cleary* § 12.5 at 209. When it is suggested that a person is more or less likely to act in a certain way because of that person's character, the testimony is normally inadmissible. *Salem v. Webster,* 192 Ill. 369, 61 N.E. 323 (1901). Thus, in this case, the defendant cannot exculpate himself by showing that he is a good driver. He is asking the factfinder to infer that because he is a good driver he was not negligent on that particular occasion. This he may not do. *Hunter,* § 72.7 at 742.

This general rule should be distinguished from those cases where specific prior instances are introduced to show plaintiff's exercise of due care when there are no eyewitnesses. See Problem 8 and cases cited there.

QUESTION 2b

Ordinarily the doctor's testimony as to the attorney's character (dishonest and corrupt) should not be admissible based on relevancy. See Question 2a. A motion to strike may have been appropriate. "However, if one party's evidence opens up an issue and the other party will be prejudiced unless he can introduce contradictory or explanatory evidence he should be permitted to do so." *Herget Nat. Bank of Pekin v. Johnson,* 21 Ill. App. 3d 1024 315 N.E.2d 191 (1974). However, the rule will not permit a party to introduce evidence which should not be admitted simply because the opposite party has brought out some evidence on that subject. Thus, admission of the testimony is discretionary with the trial court judge.

In this case the trial judge would have to decide whether the attorney suffered real prejudice and whether, even if he did, five witnesses testifying as to what is basically objectionable evidence is necessary to counter the prejudice.

QUESTION 3—CHARACTER IN ISSUE

Problem three raises another aspect of the use of character evidence in civil cases. Here there are two counts in the case: respondeat superior and negligent entrustment. As to the first count, the character evidence is offered circumstantially and should be excluded as in Problem 2a. On the second count, character is in issue. That is, the plaintiff must prove that the son is an incompetent driver as an element of the case. The son's character is the issue in the case. *Consolidated Coal Co. v. Seniger*, 179 Ill. 370, 53 N.E. 733 (1899); *Cleary*, § 12.4 at 208.

Here we have a case where the evidence is admissible for one purpose but inadmissible for another purpose. The court should admit the evidence for that limited purpose. *Migdell v. Stone*, 175 Ill. 261, 51 N.E. 906 (1898). The court should then instruct the jury as to the limited purpose for which the evidence was admitted. *Chicago, R.I. & P.R. Co. v. Claih*, 108 Ill. 113 (1883). Failure to so instruct may be reversible error. *Clark v. A. Bazzoni & Co.*, 7 Ill. App. 2d 334, 129 N.E.2d 435 (1955).

QUESTION 4—SIMILAR CLAIMS

Evidence which tends to show only that the plaintiff is a chronic litigant is inadmissible to impeach a present claim since it is in the nature of general character evidence. See *McCormick*, § 196 at 466.

Here the evidence might be offered to show that the present claim is false. The relevancy is based on the premise that repeated injuries of the same kind are unlikely to happen to one person by accident. On the other hand, the evidence is prejudicial and standing alone would seldom support a finding of fraud. *McCormick* suggests that the judge, balancing probative value against prejudice, should admit the evidence only when the proponent has produced or will produce other evidence of fraud.

Of course, other injuries of the plaintiff are provable to mitigate damages if they relate to the injuries being complained of by the plaintiff. *Chicago City R. C. v. Camevin*, 72 Ill. App. 81 (1897).

With evidence of eight prior injuries, it is likely that one or more of the accidents could have caused injuries similar to the injuries in question. In that case, evidence of those specific injuries would be admissible to mitigate damages.

QUESTION 5—OTHER ACCIDENTS

In the initial fact situation it appears as if the city attorney is attempting to cross-examine the plaintiff in an attempt to show the plaintiff is accident prone or has a character trait of being careless. All this evidence tends to show is a propensity for being negligent. The general rule of

exclusion of character evidence in civil cases has been strictly applied to these types of cases, thus prohibiting this type of cross-examination. As Illinois courts have held, ". . . [c]onduct of a person on another occasion or occasions is irrelevant on the question of his conduct on the occasion in issue." *Herget Nat. Bank of Pekin v. Johnson,* 21 Ill. App.3d 1024, 319 N.E.2d 191 (1974), see also *Bevelheimer v. Gierack,* 33 Ill. App.3d 988, 339 N.E.2d 299 (1975).

In *Thornburg v. Perleberg,* 158 N.W.2d 188 at 191 (N.D. 1968), counsel for plaintiff asked defendant on cross-examination:

> "Q. As a matter of fact, Mr. Perleberg, you have a constant record of accidents and traffic violations, do you not?"

The court held this question clearly was improper. The general rule is that the commission of an act cannot be proved by showing the commission of similar acts by the same person at other times. 29 Am. Jur.2d, *Evidence,* ser. 298, p. 342.

Even proponents of the admission character in civil cases admit that accident proneness is not admissible. James and Dickinson, *Accident Proneness and Accident Law,* 63 Harv. L. Rev. 769 (1950).

QUESTION 5a

It appears as if the city attorney is attempting to show that the cause of this particular accident was dizziness on plaintiff's part, rather than defendant's negligence. Medically provable dizziness as a permanent condition would be admissible as tending to show the cause of the accident. See *Marut v. Costello,* 53 Ill. App.2d 340, 202 N.E.2d 853 (1964) aff'd 34 Ill.2d 125, 214 N.E.2d 768 (1966). However, in this case, there has been no evidence showing that the dizziness was a continuing condition. Thus, all that defendant's cross-examination tends to show is isolated prior accidents. Without further facts connecting the prior dizziness or subsequent dizziness to the accident, the cross-examination probably is irrelevant. See *Caley v. Manicke,* 29 Ill. App.2d 323, 173 N.E.2d 209, reversed on other grounds, 24 Ill.2d 390, 182 N.E.2d 206 (1961). However, the decision is probably within the judges discretion, the other accidents and dizziness being both prior to and subsequent to the accident in question.

QUESTION 5b

In this case the city attorney is attempting to show that not all of plaintiff's damages were caused by this particular accident. This is proper because there is a relevant connection between the accidents; that is, that plaintiff's injuries were caused by a prior accident and not by this accident. This falls within the guidelines concerning the relevancy of prior accidents set down in *Caley v. Manicke* cited above.

QUESTION 6a—RELEVANCY, SIMILAR OCCURRENCES

It is debatable whether evidence of prior and similar occurrences is admissible to prove the existence of a dangerous or defective condition. To be admissible, similar acts, occurrences or transactions must be related to the issues of the case on trial. See *Independent Oil Men's Association v. Fort Dearborn National Bank*, 311 Ill. 278, 142 N.E. 458 (1924). If they are not related to the issues on trial, they are not only irrelevant but are immaterial. In this case, it is unclear whether the two girls who had fallen at the same spot where P had fallen some two weeks earlier had in fact slipped on the loose rug, as had P. Before evidence of similar acts can be admitted, it must be shown that the essential condition and cause of the accident are the same. Thus, evidence of other accidents may be introduced *to prove the existence of a dangerous or defective condition* if the accident were in fact the result of a common and dangerous cause and where the dangerous instrumentality or cause was in the same condition it was in when the other accidents occurred. See *Moore v. Bloomington D & C Railroad*, 295 Ill. 63, 128 N.E. 721 (1920).

The cases are clear that evidence of similar occurrences is admissible to prove notice of an otherwise proved dangerous or defective condition. Where notice to the defendant of a dangerous condition is an issue, the fact that other accidents occurred or did not occur there is admissible to show that defendant probably had or did not have notice of such condition. See *Wolczek v. Public Service Co.*, 342 Ill. 482, 174 N.E. 577 (1930). The frequency of such similar accidents may be shown to establish defendant's knowledge of a dangerous condition. See *Welter v. Bowman Dairy Co.*, 318 Ill. App. 305, 47 N.E.2d 739 (1943). Thus, as stated in *Ray v. Cock Robin, Inc.*, 57 Ill.2d 19, 310 N.E.2d 9 (1974), evidence of sufficiently related accidents may be used to show that an owner had notice of the existence of an unsafe condition and that the unsafe condition caused other accidents. Such evidence also goes to the foreseeability of an accident.

Here the Committee questions the relevancy of a single prior incident in a public building to prove a true defect without stronger evidence of similarity. There are cases which state that the same place is sufficient for admissibility but affect the weight of the evidence. As to the notice issue, it is unnecessary to have positive evidence that defendant was told about the prior accidents. The evidence of other prior accidents made it more likely that defendant knew or should have known of the dangerous or defective condition. Generally, see *Hunter*, § 75.3 at 772.

QUESTION 6b

The defendant is entitled to show that there have been no other accidents for the purpose of showing defendant's lack of knowledge of the dangerous condition. *Campion v. Chicago Landscape Co.*, 295 Ill. App. 225, 14 N.E.2d 879 (1938).

However in order for the evidence to be admissible the defendant must show that the carpet was in the same condition throughout the five year period. *Hansen v. Henrice's Inc.*, 319 Ill. App. 458, 49 N.E.2d 37 (1943) Cf. *Smith v. City of Rock Island*, 22 Ill. App.2d 389, 161 N.E.2d 369 (1959).

QUESTION 6c

The admissibility of defendant's testimony does not depend on the evidence of prior accidents by plaintiff. The rule allowing evidence of no accidents is considered to be a corollary of the rule that plaintiff may show other accidents. See *Campion v. Chicago Landscape*, cited above. So long as plaintiff has alleged in his pleading that the carpet was dangerous, the defendant should be able to introduce evidence of a lack of accidents to show want of knowledge of the dangerous condition.

QUESTION 7—RELEVANCY, SIMILAR OCCURRENCES

The case attempts to show the similar occurrence of a defect in a large number of manufactured products to illustrate that the particular motor vehicle had a defective exhaust system which was a dangerous instrumentality and the cause of the accident. See *Vlahovich v. Betts Machine Co.*, 45 Ill.2d 506, 260 N.E.2d 230 (1970), a products liability case where the particular accident was caused by a shattering of a plastic truck light lens. Evidence of the shattering of other lenses produced by the manufacturer was admissible both to show the defect and dangerous condition and to show notice. Given the facts of 7b, the *Vlahovich* decision is controlling and the evidence is admissible. See *McCormick*, § 200 at 473. Compare *Hardman v. Helen Curtis*, 48 Ill. App.2d 42, 198 N.E.2d (1964), where the court approved admission of no other accidents in a products liability case.

QUESTION 8—HABIT

This problem involves the use of habit testimony. A habit is a particular way of doing particular things. Here P had a habit of always stopping at this railroad crossing on his way to work. Evidence of this habit would be admissible to show due care, *Casey v. Chicago Rys. Co.*, 269 Ill. 386, 109 N.E. 984 (1915), provided there are no eyewitnesses. *Hann v. Brooks*, 331 Ill. App. 535, 73 N.E.2d 624 (1947). Here the engineer of the train is an eyewitness, therefore habit testimony is inadmissible. *Barry v. Elgin J.E.R. Co.*, 132 Ill. App.2d 371, 270 N.E.2d 152 (1971).

QUESTION 9a—RELEVANCY, CHARACTER REPUTATION OF ACCUSED IN CRIMINAL CASE

The prosecution may not prove the defendant's bad character unless and until defendant has "opened the door" by first introducing evidence of defendant's good character. In other words, in a criminal case, the prosecution cannot produce evidence of defendant's bad character as part of its case in chief. It is the defendant who decides whether his character will be in issue at the trial. See *People v. Haas*, 293 Ill. 274, 127 N.E. 740 (1920) and *People v. Lewis*, 25 Ill.2d 442, 185 N.E.2d 254 (1962).

In the instant case, the prosecutor quite properly refrained from presenting any evidence of defendant's character generally, or with reference to a particular trait thereof. The defendant offered witnesses who testified to defendant's previous good character. However, the reputation that may be shown is reputation for a particular trait involved in the commission of the alleged crime; in the instant case, for example, the reputation for peaceableness and the lack of a violent disposition. Instead, defendant apparently has presented witnesses who testified as to the general reputation for being law abiding. This is not the best practice and may be in error. See *People v. Redola*, 300 Ill. 392, 133 N.E. 292 (1921). As stated in *People v. Partee*, 17 Ill. App.3d 166, 308 N.E.2d 18 (1974) the evidence of good character offered by an accused must relate to that trait of character which is involved in the crime charged so the proof of good character will render it unlikely that he would be guilty of that particular crime.

The third issue in 9a concerns the questioning by the prosecutor of defendant's reputation witnesses as to their awareness that Elmer, the defendant, had been convicted of assault and battery (a crime containing the relevant character trait at the present trial) some 17 years before the current trial. If the defendant puts his character at issue, as defendant Elmer did here by proving his good reputation for the relevant character trait, the prosecution may rebut by testing the character witness by cross-examination as to the character witness' knowledge of the reputation which he has testified about. Thus, a character witness for the defendant may be asked on cross-examination if he has actually heard the reputation for the relevant trait discussed, by whom, when and where, and even about certain reports, conversations, and/or disparaging rumors which the witness may have heard in the community and which negative the character sought to be established. See *People v. Greeley*, 14 Ill.2d 428, 152 N.E.2d 825 (1958).

A peculiar Illinois rule, however, is that the witness cannot be cross-examined as to specific acts of misconduct, nor may such acts be proved by extrinsic evidence in rebuttal, nor may a character witness be asked whether he can state under oath that the accused did not commit the alleged crime. See *People v. Greeley, supra*, and *People v. Anderson*, 337 Ill. 310,

169 N.E. 243 (1929), and *Hunter*, at Section 72.8. The distinction between questions concerning rumors and disparaging conversation, and specific instances is that in one situation, you are properly testing the reputation witness' knowledge of the character he has given sworn testimony to, but in the latter situation he would be giving specific acts that could be used circumstantially. The distinction is reduced to the character witness being properly asked "Have you heard that the defendant was arrested and/or convicted of assault and battery?", but a witness may not be asked "Did you *know* that defendant was arrested and convicted for assault and battery?". The phrase in the particular problem here "were you aware", seems to be more like "did you know" than "have you heard" the rumor. Therefore, the Committee believes cross-examination by prosecutor herein is objectionable in Illinois. See generally, *McCormick*, at Section 191, and Federal Rule of Evidence, 405(a).

QUESTION 9b—RELEVANCY, CHARACTER OF THE VICTIM IN A CRIMINAL CASE

The first paragraph in 9b presents the issue of the defendant offering testimony concerning the bad character of the victim of a crime, to circumstantially prove the innocence of the defendant. In a normal situation, the character of a victim of a crime is usually irrelevant and therefore generally inadmissible. In some cases, however, the character of the victim is probative of an important issue of the case. For example, after defendant has given evidence that he acted in self-defense at a trial for homicide, the accused may prove the general reputation of the deceased was that of a quarrelsome, vindictive or violent man, *and* that such reputation had come to defendant's knowledge prior to the incident. This evidence must be in the form of reputation (not specific violent acts of the victim) and is admissible to show defendant acted upon a reasonable belief that his physical well-being was in danger. As stated in *People v. Davis*, 29 Ill.2d 127, 193 N.E.2d 841 (1963), evidence of a violent disposition is admissible as tending to show the circumstances confronting the defendant, the extent of his apparent danger and the motive by which the defendant was influenced.

With reference to the manner of proof, defendant must lay a foundation for such proof by giving evidence that he acted in self-defense, and that his victim committed an aggressive act. *People v. Adams*, 25 Ill.2d 568, 185 N.E.2d 676 (1962). Where there is no proof of self-defense or that the alleged assaulted person was the aggressor, evidence of the victim's character is not admissible. In a homicide case, prior threat or misconduct by the decedent directed toward the defendant, as well as character evidence of the decedent's alleged violent disposition, is admissible only where the defendant relies upon self-defense and preliminary testimony establishes an act of aggression by the decedent. *People v. Adams, supra.* Specific acts of misconduct by the decedent are not admissible, however, if they were

directed at someone other than the defendant. See *People v. Hill*, 97 Ill. App.2d 385, 240 N.E.2d 373 (1968).

Thus, in the question presented, if preliminary testimony has established an act of aggression, the questioning by counsel for the defendant of James McCoy would appear to be proper, although the usual question would be with reference to the violent disposition and not a negative as stated in the problem.

With reference to the second paragraph of question 9b, the objection was properly sustained. The first question posed asked for knowledge of a specific incident, and thus does not test the witness' knowledge of the reputation of the victim for a relevant trait of character. Moreover, even if the question concerned reputation, the winning a purple heart would not prove that the victim had a peaceable disposition. As to the second question, this of course, asked for knowledge of a specific incident. See *People v. Greeley, supra.*

QUESTION 9c—RELEVANCY, CHARACTER OF DEFENDANT IN A CRIMINAL CASE

Subsection 1 calls for the personal opinion of witnesses concerning the character of the defendant, and would be inadmissible in Illinois where only reputation witnesses are allowed. Section 2 asks for particular facts through the general character which is also not allowed as evidence in Illinois. Question 3 is equally inadmissible since it calls for each witness to recite rumors dealing with relevant character traits rather than the reputation in the community. The only admissible testimony would be those witnesses who responded to question 4 in the prosecution's rebuttal case. See *People v. Celmars*, 332 Ill. 113, 163 N.E. 421 (1928) and *Hunter*, at Section 72.3. However, see F. R. Evid. 405(a) for a contrary position, and the Advisory Committee's Note, on the value of admitting opinion testimony.

QUESTION 10

The basic rule is that when a person is charged with one crime, evidence of his other crimes or misconduct is inadmissible if such evidence is offered solely to establish a criminal disposition. The danger that the jury may convict a defendant because of past crimes rather than because of his guilt of the offense charged mandates exclusion. However, evidence of other crimes or misconduct is admissible if these acts are relevant to some issues other than defendant's character or disposition to commit the crime charged. Evidence of prior bad acts is admissible to show such things as: plan or motive for the crime; knowledge; intent; identity; opportunity or access; preparation or common scheme or plan; guilty knowledge; absence of

accident or mistake; and lastly, disposition to commit sex crimes such as indecent liberties. See *McCormick*, at Section 190, at pp. 449-450.

In the area of other crimes so nearly identical in method as to earmark them as the handiwork of the accused, much more is demanded than the mere repeated commission of crimes of the same class such as repeated burglaries or thefts. The device used, as stated in *McCormick*, at Section 190: "must be so unusual and distinctive as to be like a signature." Here, beating a victim with a pipe or club is not sufficiently unique to come within this exception to the general rule against admission of prior bad acts or misconduct. Therefore, the Committee would not admit this evidence of the three previous armed robberies.

QUESTION 11—RELEVANCY, PRIOR BAD ACTS USED TO SHOW METHOD OR OPERATION, NOT BAD CHARACTER

This problem presents the situation where the prior bad acts are so unique that they are like a signature, to use McCormick's language. The Committee would admit the testimony of the other four alleged victims even though there is no proof that there were arrests or convictions resulting from these alleged attacks.

QUESTION 12—COMPROMISE

An offer to compromise a disputed claim is not admissible in Illinois. *Hill v. Hiles*, 309 Ill. App. 321, 32 N.E.2d 933 (1941). This is because the offer may not really admit guilt, and because the law encourages out-of-court settlements. *Pauline v. Houser*, 69 Ill. 312 (1872). However, the rule excludes only the offer of compromise. Admissions of fact made in the course of compromise negotiations are admissible. *Edward Edinger Co. v. Willis*, 260 Ill. App. 106 (1931). The rule is the same even in criminal cases. See *People v. Kilbridge*, 16 Ill. App.3d 820, 206 N.E.2d 879 (1974).

QUESTION 13—COMPROMISE

This variation of the problem involves a conflict between the policy of excluding compromises and the policy of allowing impeachment of a witness by bias. In *Fenberg v. Rosenthal*, 348 Ill. App. 510, 109 N.E.2d 402 (1952), the court decided that the compromise policy prevailed and the evidence was excluded. The same holds true here. The result is otherwise in all other jurisdictions. See *McCormick*, Section 274 at 664.

QUESTION 14—SAFETY MEASURES

Normally safety measures taken after an accident occurs are inadmissible to show negligence. *Hodges v. Percival*, 132 Ill. 53, 23 N.E. 423 (1890). However, if the evidence is offered for another purpose it may be admissible. *Taylorville v. Stafford*, 196 Ill. 288, 63 N.E. 624 (1902). In this case the evidence is offered to show feasibility of precautionary measures and therefore is admissible. *Dallas v. Granite City Co.* 64 Ill. App.2d 409, 211 N.E.2d 907 (1965). See *Hunter*, Section 69.20 at 673.

QUESTION 15—INSURANCE

Evidence of automobile liability insurance is inadmissible if offered to show fault. *Smithers v. Henriquez*, 368 Ill. 588, 15 N.E.2d 499 (1938). However, it may be admissible if offered for impeachment, or, as here, to show agency. *Cleary*, Section 10.28 at 179.

REPORT

OF THE

TWENTY-FOURTH ANNUAL

ILLINOIS JUDICIAL CONFERENCE

CONTINENTAL PLAZA HOTEL, CHICAGO

September 7, 8 and 9, 1977

ILLINOIS SUPREME COURT

Hon. Daniel P. Ward
Chief Justice

Hon. Robert C. Underwood
Hon. Joseph H. Goldenhersh
Hon. Howard C. Ryan
Hon. William G. Clark
Hon. Thomas J. Moran
Hon. James A. Dooley

ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS

Hon. Roy O. Gulley
Director

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Mel R. Jiganti, *Vice-Chairman*

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Henry Lewis
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VI
CONTEMPT

Richard J. Fitzgerald, *Chairman*
Earl Arkiss
Nathan M. Cohen
John P. Shonkwiler

AGENDA

OF THE

TWENTY-FOURTH ANNUAL

ILLINOIS JUDICIAL CONFERENCE

WEDNESDAY, SEPTEMBER 7, 1977

11:00 A.M. - 3:00 P.M.	*Registration* (Consulate Rooms — 2nd fl.)
3:00 P.M.	*Opening Session* (Cotillion Room — 2nd fl.)
	Presiding: Hon. Frederick S. Green, Chairman, Executive Committee, Illinois Judicial Conference
	Invocation: Rev. Byron Papanikolaou, Greek Orthodox Diocese, Chicago
	Opening Remarks: Hon. Daniel P. Ward, Chief Justice, Illinois Supreme Court
	Report of the Committee on Memorials
	Report of the Supreme Court Committee on Jury Instructions in Civil Cases, Harold Baker, Chairman
	Report of Study Committee on Jury Selection and Utilization, Hon. Wayne C. Townley, Chairman
	Report of Study Committee on Bail Procedures, Hon. Peter Bakakos, Chairman
	1977-78 Regional Seminar Series Program, Hon. Mel R. Jiganti, Chairman, Sub-Committee on Judicial Education
3:45 P.M.	Panel Presentation on Judicial Ethics: Hon. Roy O. Gulley Dean John E. Cribbet Richard T. Dunn, Esq.
5:30 P.M.	*Reception* Honoring the Illinois Supreme Court and Attorney General Scott (Cotillion Room — 2nd fl.)
6:30 P.M.	*Dinner* (Wellington Ballroom — 2nd fl.)
	Address: Hon. William J. Scott, Attorney General of Illinois

THURSDAY, SEPTEMBER 8, 1977

7:00 A.M. - 9:00 A.M.	*Breakfast* (Cotillion Room — 2nd fl.)
9:30 A.M. - 12:00 Noon	*Seminar Session I:*
12:00 Noon	*Luncheon* (Cotillion Room — 2nd fl.)
	Program Honoring Retired Judges and Introducing New Judges
	Presiding: Hon. Thomas J. Moran, Justice, Illinois Supreme Court

2:30 P.M. - 5:00 P.M.	*Seminar Session II:* (If Cotillion Room is stamped above, please note that your session [Contempt] will not commence until 3:00 P.M.)
5:30 P.M.	*Social Hour* (Buckingham Room — 2nd fl.) No dinner or evening session.

FRIDAY, SEPTEMBER 9, 1977

7:00 A.M. - 9:00 A.M.	*Breakfast* (Cambridge Room — 2nd fl.)
9:30 A.M. - 12:00 Noon	*Seminar Session III:*
12:00 Noon	Conference Adjourned

REPORT OF PROCEEDINGS

The Illinois Judicial Conference held its twenty-fourth annual meeting on September 7, 8 and 9, 1977 at the Continental Plaza Hotel, Chicago. A total of 418 judges were in attendance.

Judge Frederick S. Green, Chairman of the Executive Committee of the Conference, called the meeting to order.

The Rev. Byron Papanikolaou, Pastor of Saints Constantine and Helen Greek Orthodox Church, delivered the invocation.

OPENING ADDRESS BY THE HONORABLE DANIEL P. WARD, CHIEF JUSTICE ILLINOIS SUPREME COURT

My distinguished Chairman of the Executive Committee, Justice Fred Green, Reverend Byron Papanikolaou; all of the distinguished judges and other guests on the dais, and the distinguished judiciary of Illinois before the dais, the judiciary of our State is convened pursuant to the command of our constitution, that there shall be an annual judicial conference, to consider the work of the courts and to suggest improvements in the administration of justice. I suggest that there will be no more important assembling in Illinois this year than this convening. We are going to consider subjects of obvious and great professional import — criminal law, recent developments in the civil law, evidence, motion practice, contempt, and these are, as I have said, obviously topics of first importance.

But I would suggest too that as a topic for individual reflection, we think in terms of judgeships; we think in terms of the awesome authority that has been conferred on the office of judge.

More importantly than considering the authority, we should consider the great and sensitive responsibility that is imposed on the judiciary of this State. It may be trite and commonplace, but it is indubitably correct to say that without this group assembled here, the judiciary, there could be no organized society in this great State.

I think it is important that each of us renew, in a sense, our oath of office each time we consider a matter before us. I think it is important that we always be conscious of the fact that the judiciary in the United States, as we know it now, was shaped by centuries of devoted work by courageous and learned men.

We are judges. We hold an office for months, for years, if we are fortunate. But we are but tenants. The office is something that will continue after we personally have ceased to occupy it. But the office will go on as a requirement of organized society in this great State of ours.

I said that we are but tenants, but in another sense when we serve as judges, we serve as inheritors of a great historical past. Every advanced civilized society recognizes that the judiciary must be independent; it must be free to render its own judgments and even, if you will, to render its own erroneous judgments and make its own mistakes.

The judiciary in which we serve developed its tradition of independence, of course, in the early 17th Century, when Lord Cook acted in conflict with James the 1st. And he declared that as a common law judge, and in particular as the Chief Justice of the King's Bench, he had the common law authority to declare royal proclamations void. And, of course, this made possible continued development of the common law, the continued development of judicially made law in England, and later here in the United States.

And it was the same Cook, when in Dr. Bonham's Case, declared that there was a common law authority to declare void the acts of Parliament. And it was our ancestors, the colonial lawyers and judges, who adopted the argument from Dr. Bonham's case and contested and challenged writs of assistance, and, of course, from all of that developed finally what we know today to be the great Doctrine of Judicial Review, which exists in practically every civilized country.

And in our own country, of course, it culminated in John Marshall's *Marberry* versus *Madison.* So we are, as I say, inheritors in a different way, simply tenants and each time we act, I think we should act with a consciousness of the terribly great authority and the terribly great responsibility each of us bears. And this is certainly to be read not out of any vanity of ours, or worse, any arrogance of office, but rather as a constant reminder that we have responsibilities to administer justice, which is the highest of all purely human callings.

It is widely observed that judges are not as a class popular. And that is not remarkable. You will recall that Lerned Hand said that there were

three things that he feared tremendously. One was death. The other was deadly disease and the third would be being named as a party in a lawsuit. Lawsuits, which are the affairs of judges, bring anxiety, expense, sorrow. So as I say, it is unremarkable that judges as a group should not be particularly popular. But that is as it should be. Certainly there are more important goals and more appropriate goals for judges. Goals such as learning and judgment and courage and integrity. These are the goals of the judges and not aspiring to popular acclaim.

In fact, it was long ago observed by Lord Mansfield in a case in 1784, *Rex* versus *Shipley*, popularity is something to be avoided on the part of the judge.

One quotation or one part of the opinion of Mansfield, and the case is celebrated — he said to be free is to live under a government of law. And generations of lawyers and law students prided themselves in reading that. But deeper in the opinion he remarks that the temptation for judges is not influence from the King or his ministers, because, he observed, they were independent of that, but rather the temptation for judges is the popularity of the day. And he agreed with Justice Forrester in another case, who had written, a popular judge is an odious and pernicious character, and, of course, from that we know that Mansfield meant that the judge be truly independent, independent of public favor; should be courageous and possess to the fullest of integrity.

The goal, I submit, of judges, should be the winning and the holding of the respect of the legal profession and in particular, the respect and, yes, the admiration, professional admiration of lawyers who practice before you and me.

Those are really the worthwhile goals of the judge.

Lord Acton, the English historian, is remembered principally for his famous dictum that power tends to corrupt, and absolute power corrupts absolutely.

However, more applicable to us may be another observation of his, which was that men should set for themselves the highest of standards. And though they may not be able always to meet them, they can in striving to do so reach heights they otherwise would never have known. And I submit that is a worthy objective for each of us as individuals and for us collectively as the judiciary of Illinois to set standards so high that we will always be conscious of them and conscious of our important responsibilities and thereby each of us will be able to reach a level of attainment that otherwise we would not have done.

Ladies and Gentlemen of the Judiciary, I welcome you in behalf of our court, to the Judicial Conference, and all of the members of the Supreme Court and our conference hope it will be pleasant and enriching.

REPORT OF THE COMMITTEE ON MEMORIALS

Hon. John Daily, Chairman

Mr. Chairman, Chief Justice Ward and Justices of the Supreme Court, Justices of the Appellate Court and members of the Judicial Conference — Judge Irving W. Eiserman, Judge Ivan L. Yontz and myself have the honor to present to this Conference resolutions honoring the memories of our fellow judges, both sitting and retired, who have departed this life since the last Judicial Conference held in 1976.

We so honor these Illinois Judges.

The Honorable Richard B. Austin, Judge of the United States District Court, Northern District of Illinois; the Honorable Hobart S. Boyd, Judge of the Fulton County Court, retired; The Honorable Wilbert F. Crowley, Judge of the Circuit Court of Cook County, retired; the Honorable Joseph J. Druker, Justice of the Appellate Court of Illinois, First District; the Honorable Herbert A. Ellis, Judge of the Circuit Court of Cook County; the Honorable Paul Farthing, Justice of the Supreme Court of Illinois, retired; the Honorable Albert E. Hallett, Justice of the Appellate Court of Illinois, First District, also Second District, retired; the Honorable John C. Hayes, Justice of the Appellate Court of Illinois, First District; the Honorable Robert E. Higgins, Judge of the Circuit Court, 12th Circuit; the Honorable Robert J. Immel, Judge of the Circuit Court, 12th Circuit; the Honorable Joseph A. Solon, Judge of the Circuit Court of Cook County; the Honorable Chalmer C. Taylor, Judge of the Circuit Court, 11th Circuit, retired.

Your committee has prepared the appropriate commemorative resolutions for each of the named judges and presents them to you for your adoption.

Their loss can only be recompensed in the heritage of their faithful judicial service for all of us to emulate.

Mr. Chairman, I move that the Memorial Resolutions for each of our departed judges be made a part of the permanent records of the Conference, and that copies thereof be sent to their nearest relatives and to the Clerks of the respective courts over which they presided, to be spread upon the records of said courts.

HON. FREDERICK S. GREEN: Thank you, Judge Daily.

You have heard the Resolution. Is there a second? (Second)

HON. FREDERICK S. GREEN: It has been moved and seconded. Any discussion?

All those in favor signify by saying Aye. (Aye)

HON. FREDERICK S. GREEN: Those opposed by the counter sign? The Resolution is carried and they will be executed.

RESOLUTION

In Memory Of

The Honorable Richard B. Austin

The Honorable Richard B. Austin, a Judge of the U.S. District Court for the Northern District of Illinois Eastern Division died on February 7, 1977, leaving surviving his wife Louise; three sons, Richard, Robert and David and eight grandchildren.

Judge Austin was born on January 23, 1901 and lived in Flossmoor Illinois since 1930.

Judge Austin graduated from the University of Chicago Law School in 1926. He was an assistant and acting State's Attorney of Cook County 1933-1948; He was special Prosecutor for the State's Attorney, Cook County 1951-1952.

Judge Austin was a Judge of the Superior Court of Cook County 1953-1961 and Judge of the United States District Court 1961-1977.

Judge Austin as a practicing attorney, prosecutor and as a Judge was involved in many important cases involving the Administration of Justice and human rights.

The Illinois Judicial Conference of 1977, with great respect, acknowledges the many contributions by Judge Austin to the cause of Justice and the legal profession and extends to his family its sincere expressions of sympathy.

RESOLUTION

In Memory Of

The Honorable Hobart S. Boyd

The Honorable Hobart S. Boyd, retired County Judge of Fulton County, observed his 100th birthday on October 17, 1976, and departed this life on December 19, 1976. Judge Boyd was elected County Judge of Fulton County in 1910, and reelected for two consecutive terms. He was a Senior Counselor of the Illinois State Bar Association and a son of one of the founders of the I.S.B.A. His father, Thomas A. Boyd of Lewistown, was one of 88 Illinois lawyers who attended the organizational meeting of the Illinois State Bar Association on January 4, 1877, in Springfield.

Judge Hobart S. Boyd received his law degree from the University of Illinois and commenced the practice of law in 1900, and continued until 1949 when he and his partner since 1922, E. L. Weber, both retired. Judge Boyd was active in community affairs, serving on various public boards, and enjoyed a long and useful career of public service.

Judge Hobart S. Boyd is survived by one daughter, Mrs. Glenn (Margaret) Truax, and two sons, Robert Boyd and Dr. Hobart Boyd, Jr. Judge Boyd lived his entire life in and around Lewistown and was interred in Oak Hill Cemetery, Lewistown.

The Illinois Judicial Conference of 1977, with great respect, extends to the family of Judge Boyd its sincere expressions of sympathy.

RESOLUTION

In Memory Of

The Honorable Wilbert F. Crowley

The Honorable Wilbert F. Crowley, a retired Judge of the Circuit Court of Cook County died on October 2, 1976, leaving surviving his wife Mary; three sons Wilbert F. Jr., Peter and Patrick and three daughters Miriam, Catherine and Mrs. Rita Velten.

Judge Crowley was born in Chicago on October 5, 1899. He attended Loyola University Law School and graduated in 1920. He was admitted to the Illinois Bar in February 1921.

Judge Crowley had a long and distinguished career in the practice of law and in public life. He was an Assistant Public Defender of Cook County 1930 to 1933; Assistant State's Attorney, Cook County, 1933 to 1947; Judge of the Superior Court of Cook County 1947 to 1964; Judge of the Circuit Court of Cook County 1964 to date of retirement, December 31, 1975.

The Illinois Judicial Conference of 1977, with great respect, acknowledges the many contributions of Judge Crowley to the cause of Justice and the legal profession and extends to his family its sincere expressions of sympathy.

RESOLUTION

In Memory Of

The Honorable Joseph J. Drucker

The Honorable Joseph J. Drucker a retired Justice of the Illinois Appellate Court, First District, died on November 11, 1976 leaving surviving his wife Joy; two sons, Donald and Alan and two grandchildren.

Justice Drucker was born in Chicago on August 11, 1900. He attended the University of Chicago and De Paul University School of Law from where he graduated in 1923. He was admitted to the Illinois Bar in February 1923.

Justice Drucker was engaged in the private practice of law for many years. He was an Assistant City Attorney of Chicago 1931-1932; Assistant Attorney General of Illinois 1932-1934; Judge of the Municipal Court of Chicago 1934 to 1959; Judge of the Circuit Court of Cook County 1959 to 1964; Justice of the Appellate Court of Illinois 1964 to date of retirement in 1976.

The Illinois Judicial Conference of 1977, with great respect, acknowledges the many contributions of Justice Drucker to the cause of Justice and the legal profession and extends to his family its sincere expressions of sympathy.

RESOLUTION

In Memory Of

The Honorable Herbert A. Ellis

The Honorable Herbert A. Ellis, a Judge of the Circuit Court of Cook County, Illinois died on April 26, 1977, leaving surviving him two sons, Richard and Robert, six grandchildren; his Mother Sarah, five brothers and two sisters.

Judge Ellis was born in Chicago on August 28, 1907. He attended Crane Junior College and Chicago Kent College of Law and graduated there in 1929. He was admitted to the Illinois Bar in October 1929.

Judge Ellis was engaged in the practice of law for many years. He was an Assistant Corporation Counsel of the City of Chicago. He was appointed a Magistrate of the Circuit Court of Cook County on July 17, 1967 and later served as Judge of the Circuit Court of Cook County until the date of his death.

Judge Ellis was active in his community and among his many activities he was President of Congregation Sinai of Rogers Park.

The Illinois Judicial Conference of 1977, with great respect, acknowledges the many contributions of Judge Ellis to the cause of Justice and the legal profession and extends to his family its sincere expressions of sympathy.

RESOLUTION

In Memory Of

The Honorable Paul Farthing

Paul Farthing was born in Odin, Illinois, on April 12, 1887, and died on the 5th day of December, 1976, at the age of 89 years. His accomplishments, in the face of adversity due to blindness caused by a hunting accident at the age of 12, are great and many.

Justice Farthing, a resident of Belleville, Illinois, served as a Justice of the Supreme Court of Illinois, from 1933 to 1942, and as County Judge of St. Clair County from 1930 to 1933. After being admitted to the bar of Illinois, Mr. Justice Farthing practiced law with his brother, Chester H. Farthing, both before and after his elevation to the judiciary, until he retired in 1966. Justice Farthing served as Chief Justice of the Supreme Court of Illinois for two years.

He was married to Harriet Helen Garrigues, who survives with two daughters, Mrs. Sarah Kanaga and Mrs. Edna McKinley, a son, William Farthing, nine grandchildren and nine great-grandchildren.

The Illinois Judicial Conference of 1977, with great respect, acknowledges the many contributions by Justice Farthing to the cause of justice and extends to his widow and family its respective and collective sincere expressions of sympathy.

RESOLUTION

In Memory Of

The Honorable Albert E. Hallett

The Honorable Albert E. Hallett, a Justice of the Illinois Appellate Court died on March 18, 1977 leaving surviving him his Wife Helen; two daughters, Mrs. Marilyn Hoadley and Mrs. Judith McWhirter; six grandchildren and a sister Mrs. Elizabeth Nedwed.

Justice Hallett was born in Oak Park, Illinois on March 5, 1906. He attended the University of Illinois, graduated 1929; Yale Law School, graduated 1931. He was admitted to the Illinois Bar in September, 1931.

Justice Hallett was engaged in the practice of law for many years, and had a long and distinguished career. He served as an Assistant Attorney General of Illinois; he was a Lieutenant Colonel with the Judge Advocate General's Office during World War II. He lectured at Northwestern University.

Justice Hallett was elected to the Superior Court of Cook County in 1962 which later became the Circuit Court of Cook County and remained a Circuit Court Judge until his Appellate Court Appointment in 1973. He served as an Appellate Court Justice until he retired on November 30, 1976.

The Illinois Judicial Conference of 1977, with great respect, acknowledges the many contributions of Justice Hallett to the cause of Justice and the legal profession and extends its sincere expressions of sympathy.

RESOLUTION

In Memory Of

The Honorable John C. Hayes

The Honorable John C. Hayes, a Justice of the Illinois Appellate Court died on February 24, 1977 leaving him surviving his sister Mary Audy.

Justice Hayes was born in Chicago, Illinois on September 5, 1909. He attended Georgetown University, graduated 1931; Loyola University graduate School and Loyola University School of Law, graduate 1937. He was admitted to the Illinois Bar in 1938.

Justice Hayes served as professor of law and dean of the Loyola Law School from 1959 to 1967.

Justice Hayes was appointed Appellate Court Justice by the Supreme Court of Illinois in September 1972 and was assigned to the Second Division of the First District in Chicago, where he served until his death.

Justice Hayes was a gifted teacher, a respected Judge and Scholar.

The Illinois Judicial Conference of 1977 with great respect acknowledges the many contributions of Justice Hayes to the cause of Justice and the legal profession and extends to his family its sincere expressions of sympathy.

RESOLUTION

In Memory Of

The Honorable Robert E. Higgins

The Honorable Robert E. Higgins, Judge of the Cuircuit Court of the Twelfth Judicial Circuit, departed this life on July 25, 1976, at St. Joseph Hospital, Joliet, Illinois, leaving surviving his widow, Helen, and a son, Edward.

He was born on July 29, 1903 at Joliet, Illinois, and graduated from Joliet Township High School and Loyola University School of Law. He was admitted to the Illinois Bar in April, 1931, and served as assistant state's attorney of Will County from 1958 to 1964. He was President of the Will County Bar Association in 1957. He was elected Circuit Judge in 1966 and served as same until his death.

The Illinois Judicial Conference of 1977 extends to the family of Judge Higgins its sincerest expression of sympathy.

RESOLUTION

In Memory Of

The Honorable Robert J. Immel

The Honorable Robert J. Immel, Circuit Judge of the Twelfth Judicial Circuit, departed this life on March 4, 1977, at Watseka, Illinois, leaving surviving his wife, Lieselotte, and four children, Robert, Jr., Steven, John and Kristina.

He was born on April 13, 1918, at Chicago, Illinois, and attended and graduated from Campion High School, Prairie du Chien, Wisconsin, DePaul University and Loyola University School of Law. He was admitted to the Illinois Bar in January, 1949.

He served as Associate Judge for a short while prior to his election as Circuit Judge and at the time of his death was completing his tenth year as a Judge of the Twelfth Judicial Circuit.

The Illinois Judicial Conference of 1977 extends to the family of Judge Immel its sincerest expression of sympathy.

RESOLUTION

In Memory Of

The Honorable Joseph A. Solan

The Honorable Joseph A. Solan, Judge of the Circuit Court of Cook County departed this life on August 22, 1977 at the age of 56 years, leaving surviving his wife, Alice, two sons, Joseph M. and Patrick D., and a brother, William P. Solan.

Judge Joseph A. Solan was a graduate of the DePaul University Law School and was admitted to the Illinois Bar in 1959. He was in the U.S. Air Force in World War II, received the Distinguished Flying Cross, the Air Medal with Ten Oak Leaf Clusters and two Presidential Unit Citations.

Judge Joseph A. Solan has had a distinguished career of public service, having served as attorney for the County Clerk of Cook County, an Assistant Public Defender and since 1964, an Associate Judge and Judge of the Circuit Court to the date of his death. His untimely death cut short a life of devotion to his family, his community and his nation.

The Illinois Judicial Conference of 1977, with great respect and feeling of extreme loss, extends to the family of Judge Joseph A. Solan its most sincere and deepest sympathy.

RESOLUTION

In Memory Of

The Honorable Chalmer C. Taylor

The Honorable Chalmer C. Taylor, a retired Circuit Judge of McLean County together with his wife, Aenid, met their untimely deaths in the crash of two chartered jets on the Canary Islands in March, 1977. Judge Taylor served as a Circuit Judge in the Eleventh Judicial Circuit.

Judge Chalmer C. Taylor was born at Arrowsmith, Illinois on March 26, 1898, and was admitted to the bar in 1923. He attended the law schools at the University of Michigan and the University of Illinois, graduating from the latter in 1923. In addition to his judicial service, he was a member and for a time chairman of the Illinois Liquor Control Commission, was an Intelligence and Legal Officer for the U.S. Army Air Force in World War II, and a member of the McLean County, Illinois State and American Bar Associations.

Judge Chalmer C. Taylor retired in 1969 and at the time of his death was living in Rancho Bernardo, California, a retirement community. Both as a lawyer and judge, Judge Taylor was active in the law and participated in the affairs of the community.

The Illinois Judicial Conference, with great respect, extends to the family of Judge Chalmer C. Taylor its deep and sincerest sympathy.

REPORT ON THE ILLINOIS PATTERN JURY INSTRUCTIONS

Harold A. Baker, Esq.

Mr. Chief Justice, Justices of the Supreme Court, all the Judges of the realm; thank you, Judge Fred for your kind introduction, and thank you all for inviting me here to report on the work of the Supreme Court Committee on Jury Instructions.

It is with a great deal of pleasure and some pride and even more relief, that we are able to deliver to you with your packages the 1977 supplement to the Illinois Pattern Jury Instructions, 2nd Edition. The supplement, as you have undoubtedly discovered from your examination, covers the two fields of strict liability and tort and implied indemnity.

The work product is the result of the efforts of the 17 members of the committee, made up of lawyers and judges and professors drawn from the State of Illinois.

I especially want to give my thanks to your colleagues, Leonard Hoffman and John C. Fitzgerald, who is now retired from the bench, and to Mel Jiganti, for their contributions to the work of the Committee.

I also should mention to you especially the work of the committee members who made up the Publications Committee, John Firert from Carbondale, Leonard Green from Chicago and Professor Victor Stone from the University of Illinois, College of Law, who was the Reporter of the Committee.

The Publications Committee took the manuscript; polished it; worked with the galley pages and page proofs and produced that final product you now have in your possession.

The committee in its work in producing this supplement adhered to the precepts that the pattern jury instruction committee has followed since its first formation in 1957. We have produced as near as we are able as human beings, jury instructions which are simple, brief, impartial and free from argument.

These were the, this was the guiding star, these precepts, for our work on the committee. We have tried to maintain the conversational, the understandable, unslanted and accurate tone of the instructions in this 1977 Supplement.

We have also backed up each instruction, as you see, with notes on use and comments, with an exhaustive brief, which supports the instruction and gives legal precedent for everything that is in the instruction.

We recommend again, as we have in the past, that certain instructions not be given, and we have tried to steer away from negative instructions or

CONTINUED

1 OF 3

instructions which single out evidence, or instructions which are unique instructions and offer only situations that will arise on rare occasions, and the inclusive instructions on such topics which might lead to error.

The committee has tried to give and produce even general instructions which do not offer particularities and to assist the Court to state the law fairly and generally to the jury, and to leave the advocacy to the lawyers, and to make a team between the Court and counsel of fairly advising the jury what the law is in a particular case.

I emphasize to you that these instructions are pattern instructions. They are not absolutes. We invite variations to fit particular evidence and the pleadings in the case, and I invite to your attention, to the notes I use, particularly 400.01, which suggest how this should be done and in what cases you may want to do it.

The work of the committee, as I mentioned, is centered on strict liability and indemnity.

Very quickly passing over some of the highlights of the decisions of the committee as it related to strict liability, we set to rest the question, we hope, subject to final review by the courts and the Supreme Court, the question of misuse as a defense, which you will see from your examination of materials, we take the position that misuse is not a defense, but merely a denial of the issues of probable cause and unreasonably dangerous.

We maintained the term, unreasonably dangerous, in the instructions. We debated the use of not reasonably safe and other subsitutes that we might have put forward, instead of using the term, unreasonably dangerous. But we stayed with the term in 402-A. We felt we had to, because of the Supreme Court's continued use of that term, and the firm basis in the Illinois decisions, which embrace this concept of unreasonably dangerous.

We discussed breaking it down into its component parts of unsafe and foreseeability, but decided this might go beyond the direction given to the committee by the court, to try to draft instructions within the realm of existing law, and we might be creating policy development from the Court's decisions, which use the term, unreasonably dangerous.

We again recommend not using certain instructions. Failure to warn instruction, 407, and comments on particular items of assumption of the risk, which is 405.

In the indemnity instructions we probably have made the greatest departure from tradition. The question of implied indemnity, prepared instructions on implied indemnity, presented the committee with the most difficult task it encountered in the 20 years of its existence.

We had to begin, of course, with the rule against contributions among joint feasors, and always relate back to that item in considering the instructions. We had to try and draft instructions which would give the jury some means of being able to fault, a way in deciding where there were rights of indemnity, where there were not, in a case. We projected, as you

can see from looking at the materials, the terms active and passive negligence, and there is a voluminous, extensive brief in support of our position in rejecting those terms in the instructions and we adopted instead or recommend to you the use of the terms, major fault and freedom from major fault.

The instructions on indemnity we have divided into different categories, those dealing with negligence, FELA and strict liability, and we have tried to suggest to you the four different procedural variations that might be employed in approaching an implied indemnity case.

The work of the Supreme Court Committee on Jury Instructions, I hope, will go on.

I would suggest that the main bound volume, IPI 2nd, needs to be reviewed and updated. The wrongful death, damage instructions, the owners and occupier of land instructions, the instructions which deal with agency, the question of the Allen charge or deadlocked jury instruction need to be revised.

In doing that I hope the Court will see fit to continue the work of the committee. I hope that the new committee will continue to adhere to those standards that I mentioned at the beginning, that the instructions will be fair, unslanted, and that they will continue to be general in nature and supported by adequate authority, and that the work level of the committee will be maintained.

I appreciate the opportunity to be here and speak to you, and I hope that you all approve of the instructions and that you use them to good advantage.

Thank you very much.

REPORT OF THE STUDY COMMITTEE ON JURY SELECTION AND UTILIZATION

Hon. Wayne Townley

Thank you, Mr. Chairman, Mr. Chief Justice, Justices of the Supreme Court.

During 1977 members of the committee were Judge Maurice Pompey, vice chairman, of Chicago; Daniel Coman of Chicago; Philip Fleischman past chairman of Chicago; Richard Curry of Chicago. We also had Liaison officers, Joseph Butler and, most recently, James A. Geroulis of the Executive Committee.

I certainly would be remiss if I didn't recognize the work of Mr. Brent Carlson of the Administrative Office, who kept us on the track during the course of the year, and Professor Leroy Thornquist, Associate Dean of the

Loyola School of Law, who has been one of our principal workers during the course of the year.

During the past year our committee has had as its primary goal the revision of the jury handbook, which has been approved in the past for use by grand juries and petit juries in both civil and criminal cases.

Our committee has completed the revision of the handbook for petit juries. These are now combined into one pamphlet applicable to all cases. No work was done on the grand jury pamphlet, because of its less frequent use than in the past.

The revised pamphlet has been approved by the Executive Committee of this Conference and by our Supreme Court. Unlike Mr. Baker's committee, we were unable to have the new pamphlet printed and given to you in your materials. The availability of this revision is a matter for production and of funding within the Administrative Office and I am unable to tell you when you may expect them.

One of the most frustrating problems we had during the course of the year was the need for jury commissions in counties with fewer than 40,000 inhabitants. While any such county may elect to have a jury commission, it is not required.

The committee will be continuing its work in this area with consideration of how to solve the problems of these small counties.

During the course of the year we had received through the Administrative Office a number of suggestions and proposals for changing our methods of selecting juries. All such suggestions are welcome and will be looked into for possible future reports to you.

Thank you.

REPORT OF THE STUDY COMMITTEE ON BAIL

Hon. Peter Bakakos

Good Afternoon, Chief Justice Ward, Justices of the Supreme Court and my colleagues in the judiciary.

It is a pleasure and an honor for me to have the opportunity to speak with you on this subject. I hope that I can be as brief as the speaker who preceded me.

The Study Committee on Bail Procedures is really a committee of the Associate Judges Seminar, appointed last year and was later funded through a grant by the, through the Supreme Court Committee on Criminal Justice Programs.

The members of the committee are Judge Al Kargerman of Oregon, Illinois; John Cunningham of Rock Island, Illinois; Daniel Coman, Dave Shields and myself of Cook County; Judge Harry Strouse of the 19th Judicial Circuit in Waukegan and Robert Burns, Reporter; and Judge Joseph Goldenhersh as our Liaison.

The committee — I think that I am going to speak not as a report, but what is uppermost on my mind and limit my remarks to a few words of thanks to the Chief Circuit Court judges of Illinois, and then just a few brief statements on the pre-trial release manual.

We just had occasion to travel around the State of Illinois and to meet with judges and court personnel throughout the State in connection with this project.

The Study Committee conducted 13 fact-finding sessions in April, from April 28, 1977 through August 18, 1977. There were two meetings in Cook County and other sessions in the 1st, 2nd, 6th, 7th, 10th, 13th, 14th, 17th, 18th and 20th Judicial Circuit Courts.

More than 325 people representing judges and prosecutors and public defenders and sheriffs, deputy sheriffs and Circuit Court clerks were present at these meetings, where we discussed bail procedures. This, I think, is our most important resource. The committee could not have done it on its own. The Chief Circuit Court judges, acting in cooperation with the Administrative Office of the Courts, made those meetings possible.

As one of its projects the committee prepared a manual for use by law enforcement agencies having to do with bail procedures in traffic and misdemeanor cases.

The Conference of Chief Judges last year convened a Committee to Revise Article 5 of the Supreme Court Rules that deal with procedures in misdemeanor, traffic, and ordinance violation cases.

That committee did revise the rules and recommend them for adoption by the Supreme Court. The Supreme Court adopted those rules and they became effective outside of Cook County in April, April 1, and in Cook County on July 1, 1977.

Our committee felt that it was an appropriate time to prepare some sort of manual that police authorities could use on the street to better understand the Supreme Court rules. And that is the pre-trial release manual that has been distributed here this afternoon.

Thank you.

REPORT OF THE COMMITTEE ON JUDICIAL EDUCATION

Hon. Mel R. Jiganti

Justices of the Supreme Court, fellow members of the Conference and guests, I have been given this opportunity to briefly discuss the role of the Sub-Committee on Judicial Education generally, the upcoming 1977 and 1978 Regional Seminar series specifically.

In April of 1975 the Executive Committee, in recognition of the ever-increasing educational opportunities and obligations of the Illinois Judicial Conference, appointed a Sub-Committee on Judicial Education.

The purpose of that Sub-Committee was to review the judicial educational efforts in other States; analyze the informational needs of the Illinois Judiciary and arrive at a progressive judicial educational program under the Illinois Judicial Conference.

And currently I have the pleasure of serving as the Chairman of that Sub-Committee and I would like to introduce the other members of that Committee.

They are Judge Harry Comerford, Dick Mills, Harry Strouse and George Unverzagt.

In addition to that we have had the very, very able and valuable assistance of Professor Vincent Vitullo of the University of DePaul Law School.

During the two and a half years of its existence, the Sub-Committee has reported regularly to the Executive Committee and had been assigned two main responsibilities.

The first responsibility of the Committee stems from its initial charge, to assess the educational needs and capabilities of the Conference and to arrive at a practical report of recommendations. And at this time the Sub-Committee has nearly completed the initial phase of that work, and will in the near future present to the Supreme Court a comprehensive plan for judicial education in Illinois.

The second main activity of the Sub-Committee on Judicial Education has become, since February of last year, the planning and coordination of all regional seminars.

As you will recall, prior to 1976, committees on civil law, criminal law and juvenile problems planned and conducted a number of very successful programs. Last year the Executive Committee concluded that the Sub-Committee should be responsible, in light of its continuing charge, to assess educational capabilities in Illinois for developing a comprehensive annual regional seminar program.

The Executive Committee focus on the regional seminar concept, I believe, reflects its conclusion that under our current capabilities, the regional seminar concept is our prime educational resource.

The Sub-Committee on Judicial Education was given the task of building on the very substantial achievements of various individual seminar committees, which had forged the path of acceptance for the regional seminar concept.

During 1976 and 1977, the Sub-Committee organized its first series of seminars. Six regional seminars were conducted in Rockford and Collinsville during the period of October, 1976 through April, 1977. An expanded format was employed, which called for two and a half days of seminar sessions involving evening programs and a minimum of 14 hours of actual discussion and presentation time.

Programs on civil remedies, criminal law and criminal procedure were conducted at the upstate and downstate sites. 302 judges, slightly less than half of the entire judiciary of the State, attended the programs.

Based on the responses we solicited from the attendance, we would like to think that last year's program was successful. We recognize the assistance of the chief judges who had the ultimate responsibility of authorizing attendance from their respective circuits and assuring the opportunity to attend to interested judges.

The same basic format will be continued in 1977 and 1978.

In attempting to utilize the maximum educational resources available, the Sub-Committee has added a 7th seminar program to the civil remedies, civil procedure and criminal law topics, to be again presented at an upstate and downstate site.

This year's additional program will be on the subject of juvenile law and will commence the regional seminar series in October in Springfield. Every judge of the State was mailed an informational letter and schedule, the sites and dates of each of the 7 seminar programs, and a registration form ten days ago.

We encourage you to carefully consider the schedule and inform your chief or presiding judge of your interest in attending any session, because we are limited to approximately 50 attendance at each seminar program. Please register your request at your earliest convenience.

The Sub-Committee earnestly solicits your suggestions and ideas. I purposely introduced my colleagues on the Sub-Committee at the beginning of my remarks, so that you may have the opportunity to personally buttonhole them and me, during the course of the next two days, and present your suggestions.

Only if we have your comments can the Sub-Committee on Judicial Education provide the truly relevant and beneficial programs, which we sincerely believe you deserve.

Thank you.

ADDRESS BY THE HONORABLE WILLIAM J. SCOTT, ATTORNEY GENERAL OF ILLINOIS

Thank you very much, Judge Underwood. Justice Green, members of the judiciary, may it please the Court:

I certainly appreciate not only having the honor to be invited tonight, but the nice remarks. It put into focus in my job something that happened to me in the State building one day. Bill, you remember our office on the 9th floor and one of those windy, cold days and the fellow was up there washing the windows, and I was looking out thinking, Gee, I sure would hate to have his job, swinging back and forth today. He climbed in the window and said, Gee, Mr. Scott, he said, I'd hate to have your job; everybody yelling at you all day long.

And I particularly appreciated those nice remarks, because I was telling my daughter, who just had her 18th birthday yesterday and my son, that I was going to be here with so many of my classmates, and felt a little bit like the failure of the class, when we started realizing that the new Supreme Court Justice, Thomas Moran, was in our class. Our very dear friend who we lost, Judge Massion, Judge Holzer, Judge Grupp. We were beginning to feel for awhile there like when they talk about the Republican party being founded in the little red school house, that since our class also had Dick Ogilvie, who became governor, and Chuck Percy, who was our most successful dropout and became a United States Senator — that maybe that little school house they were talking about was Chicago Kent. But luckily Jim Londrigan and Art Hamilton have become judges. So it was more of a bipartisan flavor. Judge Roberts, of course, was in that class. Esther was there, President of the Chicago Bar Association.

And I did have to reminisce a little bit while I was sitting here tonight, and thinking that of all the things that have happened in those years since Tom Moran and I sat in front of each other in law school, realizing that just this week, when we picked up the paper, we read about Voyager One on its journey, being launched to Jupiter and Saturn; thinking back in those few years since we have been in law school, of all the changes that have happened in the world. Not only rockets to the moon and to Jupiter and to Saturn, but space stations that could orbit around the earth 16 times a day; computers that could solve all of the tough mathematical problems, like how do you bring back a crippled space ship from outer space?

We have seen the whole Atomic Age come in, from just those few short years. Tremendous technological and scientific advances in every field and along with these advances, some very serious problems and some very serious challenges.

The same space station that is orbiting over our heads 16 times a day is orbiting over the heads of people in Africa and India, that are wondering if they are going to have enough food to feed their children; over slave traders

in the Arabian Peninsula; headhunters in the South Pacific; people in our own State and our own nation that can't get along with somebody of a little different shade of skin or a little different religion.

And in the same few years since we went to law school, Reggie, it's hard to realize that mankind has poured more poison and filth and pollution into the environment than all the millions of years that he existed on this planet.

You can couple that with another thing that Judge Underwood left out of my introduction and that is the fact that I had the good fortune of serving for four years as Treasurer of the Judicial Retirement System, and during that time I worked with Judge Burke, who did a magnificent job of representing you men and women in the Legislature, trying to get a decent retirement system, trying to get it properly funded, and trying to alert the Legislature of the important role that the judiciary plays in our society.

And I think that the two factors do go together. All of these tremendous changes and the fact that right now in this session of the Legislature, there is a bill pending that would be the vehicle for trying to get some kind of realistic salaries for the members of the judiciary and for a whole system of justice.

I happen to feel very strongly about it and I think that the speaker that you had last year — maybe it was the year before — former United States Justice Goldberg, who pointed out that this nation spends less on its whole system of justice than the cost of the new bomber that they are trying to develop for this nation, the cost of just one of those bombers. That it puts into focus a very real problem that you are all aware of, that I think that too many people in this nation and particularly in this State tend to forget, and that is just what a tremendous bargain we have in our system of justice, and the men and women who put their time and treasures and talents into protecting the rights of their fellow citizens.

You know, it is kind of hard to pick up the paper as we did, Justine, at the time of the ABA Convention, and to read the figures that one of the newspapers had taken in their survey of the salaries of the lawyers, and to read that there are over 10,000 lawyers in Illinois that make more money than any of the judges or governmental servants in this room. So that there isn't one person here today that couldn't make much more for their family and for their children in the practice of law, than in this very lonely and very tough and very crucial job of administering our system of justice.

But I don't think that we have done the job. I think that is collectively, of letting the 12 million people of this State know, not only how crucial our system of justice is to their wellbeing; the fact that you are in this very vital job; that undoubtedly the most crucial time in all of history. I say that very advisedly.

You know, it is hard to put a price tag on people's rights. You can't put a price tag on somebody's human rights. Certainly we can't put a price tag

on their environmental rights, the air and water that they depend on for their very life and existence.

It is hard even to put a price tag on protecting people's rights to be free from violence, their right not to be cheated out of their hard-earned tax dollars, or their life savings.

But I think that when you realize what is happening, what has happened in the world in the field of science and technology, and that we are now faced with the very real possibility that the only thing that may stand between the destruction of the human race and differentiate from the benefits of society, of the fantastic, scientific changes that have happened, may very well be the judicial system and the men and women in this room.

The Pulitzer Prize winning reporter in New York wrote an article in 1970, that a very unique experiment was being conducted here in Illinois. It was being conducted in our courts of law. He went on to say that that experiment may very well determine whether or not we are going to be able to save our environment.

The men and women in this room made that experiment work. Now think back to nine years ago. That time people in this nation just weren't aware of the dangers in environmental pollution and Bill Clark was one of the first people in this country to talk about the dangers of pollution.

That time Judge McGloon was one of the leaders in the legislature. If you remember, your Honor, you went to the legislature and tried to get $80,000 in an appropriation for Justice Clark. At that time people were saying, oh, there isn't any pollution problem, and we couldn't even get $80,000 for the Legislature to establish an environmental division.

And yet just a year or two later they started to realize what had happened in these few years. Scientists told us that we had eight or nine or ten years to save Lake Michigan, a lake that 7 million people depended on for their recreation, for their health and perhaps their very lives.

You know, when they sent the rocket to the moon, it dramatized very vividly that we all share a very limited environment and we started to see on our television screens the empty, barren, lifeless surface of the moon and it brought home dramatically that there wasn't any place that we could go for a new supply of air or water, if we should start to run out of it; that we all shared this very limited environment, that sustained the only known life in the universe.

We started to see the effects of air pollution when they had temperature inversion in Donora, Pennsylvania, and it hung on for five days and 7,000 of the 14,000 people in that town were hospitalized, even though it was a small community. But the temperature inversion trapped in the zinc sulfate fumes and half the town was hospitalized.

We saw it happen in London when temperature inversion there trapped in the fumes and 4,000 more people died in one weekend than ever before in history.

And yet we didn't have the tools necessary to protect people's rights, to protect their right to not only free air and pure water, but the right to live and work and raise their families in a decent environment.

One of the first cases in the nation, involved a case in front of Judge Cohen here in Cook County, American Asphalt Company. At that time there were no environmental laws that gave the Attorney General the right to sue anybody in Cook County. There was no State EPA, no Federal EPA, and yet in that case Judge Cohen ruled that there was a common law right of the Attorney General to be able to protect people's health and welfare.

That same ruling was crucial in our ruling before the United States Supreme Court in the Milwaukee case, that established that there was a Federal common law that gave us the right to insist that one of the largest cities in the Great Lakes not put their manure and urine and typhoid germs and bacteria and virus into the water our people were swimming in and that people depended on for their drinking water.

The crucial thing is the case that Judge Dahl decided against South Works of United States Steel and spent many, many long hours in the negotiations, was that our system of justice could deal with the problems, utilizing an impartial tribunal, court of law, to find out what the facts were, as to what was happening, and more important as to what could be done.

Judge Dahl took the position that we aren't expecting to ship it to the moon or drill a hole and put it into the center of the earth, but let's take advantage of this scientific know-how that we have in the nation, a nation that can build a hydrogen bomb, that can send a rocket to the moon, that we certainly ought to be able to manufacture steel without destroying the lake that we all depend on for our environment.

So the significant thing in that case wasn't the fact that a steel mill that was built in the 1880's, that was employing 10,000 people, could be refitted, totally recycle all of their waste water and not put one drop into Lake Michigan or into any other river or stream. The fact that we could utilize our system of justice to deal with a problem that didn't even exist at the time that we were in law school.

And so we have turned the direction. We didn't have to wait until there was a temperature inversion over Tokyo or London or New York or Chicago or East St. Louis. We were able to develop the tools in our system of justice to deal with a problem that affected all of the people of our planet.

Last year for the first time every beach in Lake County was open. They are starting to catch fish again off the government pier. Bill, you and your son will enjoy that. Just like my father used to take me there and you can take your children fishing, knowing that it's going to be there. But most of all it proved that our system of justice can work; that it can deal with the problems. Just as in the case that Judge Woodward spent many, many long months in DuPage County, trying to help reorganize the Equity Funding Company, Insurance Company, so that not one policyholder would lose one cent.

It proved that our system of justice could deal with a whole new area of crime, the financial crime with sophisticated computers that were located out in the Avenue of the Stars in Beverly Hills, California, that cheated people with manipulations by some very shrewd and ruthless young men, out of somewhere between two and three billion dollars worth of their life savings.

We can talk about the areas of price fixing, consumer fraud, any of these new vital areas, where our system of justice here in Illinois has developed the concepts that can protect people's rights, and any one of them justify the increase in the salaries.

There isn't any of the giant newspapers or television stations in this State that complain about pay raises, that don't pay their lawyers more than any judge in this room makes. There isn't anybody that can question the importance of having a system of justice and order, and how priceless that is to our business community and you could give a million reasons, but I think the most crucial is the one that we haven't solved yet. And why I said that you men and women have got the responsibility of protecting the future destiny of not only your friends and neighbors and other people of the State and nation, but future generations. Because in the last few years we have seen some very startling developments in the field of science and technology. The development of the exotic or deadly substances that can either benefit mankind or destroy it.

And so the greatest challenge that we are all going to have in our system of justice is whether or not we are going to be able to develop the tools that can enable mankind to benefit from these things, or whether or not we are going to miss it and not get a handle on it and face some problems that are of a magnitude that are almost hard for us to comprehend.

I mentioned that we went to Chicago Kent. We have all become alumnae of the Illinois Institute of Technology. So I went down to their alumnae dinner recently and listened to Jonas Salk, who was working with genetics, DNA's and what are probably the most exciting developments in the field of science, and that is to create living organisms that may possibly destroy cancers, or that can open up whole new fields, and it has got a great potential of benefiting mankind.

The frightening thing in listening to it is you realize that it's also got the potential of destroying it. Salk was talking about the change in the ethics that have happened in the last few years, and so he related the population explosion to the S-curve that we see in many fields of science. For example, in the use of antibiotics against bacteria. And he talked about one of the phenomenon that we have seen in the last few years since we have gotten out of school, and that is the population explosion.

You know, it took from the beginning of time down to the year 1850 to produce a billion people in this planet. Now we are producing a billion people every 25 years.

What has happened, of course, is that that S-curve took off. It finally leveled off and we are now into that turning point where the industrialized world's population growth has stabilized, and in doing that it sets up two completely new sets of ethics, one for the first part and one for the second.

I will make it quick, because I am going to be held in contempt of Court if it is too long.

And they affect all the judicial things, as well as our ethics in our State. One of the factors, for example, is the first period death control was very crucial, to try to deal with some of these diseases. Now the question is birth control, to try to deal with the population. They are group expression in the first half as against individual expression. The key thing was in talking with Salk, as to when did that time come, that time of the great changes in all of history. He said it came in the 1960's. It came at the time of the turmoil on the campuses. It came at the time of many of the problems that we saw in our judicial systems, that you men and women have had to deal with.

So based on their genetic curve, and that you have been living at a very crucial time in society, we have seen the whole shifting and now we see it where all of a sudden, we are talking now about these DNA's or PCB's or polychlorinated biphenols and everything else. But we are really talking about whether or not there are going to be children born with birth defects, with brain damage or die of cancer, or whether or not some of these things are going to get out of hand and maybe have the effect that the plague had when it wiped out one out of every four people on the face of this earth. Because as they deal with DNA's, for example, they put them in the human and testing type of an environment, that if it does create a new bacteria, that we have an immunity to and it does escape, what will we do?

And so that the challenge that we are going to have in these next few years in the legal system, and I know you have all got more business than you can handle; we have four hundred habeas corpus cases for every one we had nine years ago — so we aren't looking for business — but the question that you are going to be facing in your court rooms, just as we faced it in these questions of air pollution or water pollution, is whether or not we can get a handle in our system of justice in dealing with the fact that Illinois has become the dumping ground for the rest of this nation on deadly, hazardous wastes.

We are the largest nuclear dumping ground in the world right near Morris. They have been bringing in the deadly chemicals from all over the nation, because there aren't too many places where they can store it. We have the testing grounds for much of the DNA research and we have no laws at all to deal with it.

And so again, while there is, Congress is working on it, the legislatures are working on it, the problem exists as of today in our State.

And so you people who are on the front lines of protecting people's rights and perhaps their very existence are worth every cent that we can

get you, in the way of a pay raise, and I certainly hope that you won't be shy in joining with us in trying to let the people of this State, and particularly the members of the Legislature, know how essential it is that we are able to retain men and women of the caliber of the people here in this room, who really have given their time and their treasures and their talents to make this a better world for their fellowman.

Thank you.

PROGRAM IN HONOR OF NEW JUDGES AND RECENTLY RETIRED JUDGES

Hon. Thomas J. Moran, Justice Illinois Supreme Court

Mr. Chairman, Judge Jiganti, fellow judges:

It is my pleasure to preside at this luncheon today, and it is a tradition of the Conference to honor those judges who have retired from judicial service in previous years, and also to introduce to you the new circuit and reviewing court judges.

In reviewing the names of the judges to be honored and introduced, I could not help be impressed by the fact that this year's program would be an extra-ordinary one. Today's luncheon program you will find is an extraordinary one both for the number of judges to be introduced and the individual qualities of the retirees we seek to honor.

Since last September 49 circuit and reviewing court judges have left the bench; 96 new judges have been elected or appointed. The new judges who I will now introduce, I would like to say, I would like to encourage you to continue the hard work, and long hours and the commitment to the administration of justice that made you successful practitioners and associate circuit judges. You are also presented with the opportunity today to reflect on the characterization of the numerous outstanding judicial retirees that have made those gentlemen the subject of the enduring respect of their colleagues.

It is with my best wishes for a career of service and achievement that I now introduce the newly elected and appointed judges. The new judges are sitting here in front of the dais, and there are, of course, two new judges — I'll use the word "new," quote, unquote — who you met last evening, one of them could not be with us, but, first of all, one of our new judges in our court, Judge James A. Dooley. (Applause)

The Appellate Court has ten new members elected and appointed in the last year. Most of them are not new judges but merely new to the Appellate Court. They are seated at the table directly in front of me here, and I ask

that they stand as their name is read. Not all of them could be here, but I will name all that have been appointed or elected.

Nicholas J. Bua, elected from the 1st District.

David Linn, elected from the 1st District.

James Mejda, elected from the 1st District.

Helen McGillicuddy, elected from the 1st District.

Maurice Perlin could not be present.

Philip Romiti, elected from the 1st District.

Kenneth Wilson is with us; elected from the 1st District.

Downstate, we have Richard Mills from the 2nd District, and appointed, we have James Boyle from the 2nd District, and Lawrence Pusateri from the 1st District — both appointed.

(The named judges arose and there was applause)

I am going to skip much of the prepared speech that I had for you gentlemen because of the lack of time, and I would like to get to the names of those new judges on the circuit bench. I will hurriedly go through them, and would you, please, stand just so everybody can see you and after standing then be seated. May I also ask that you hold all your applause. I'll go around the list as hurriedly as I can.

D. D. Bigler from the 1st Circuit.
Bill F. Green from the 1st Circuit.
Robert S. Hill from the 2nd Circuit.
Robert W. Whitmer from the 2nd Circuit.
Robert J. Steigmann from the 6th Circuit.
James T. Londrigan from the 7th Circuit.
Charles P. Connor from the 12th Circuit.
John F. Michela from the 12th Circuit.
David DeDoncker from the 14th Circuit.
Jay M. Hanson from the 14th Circuit.
David Mason from the 14th Circuit.
Marvin D. Dunn from the 16th Circuit.
Philip G. Reinhard from the 17th Circuit.
John J. Bowman from the 18th Circuit.
Helen C. Kinney from the 18th Circuit.
Roland A. Herrmann from the 19th Circuit.
Patrick J. Fleming from the 20th Circuit.
(The named judges arose and there was applause)

From Cook County — and, again, we will follow the same procedure.

Vincent Bentivenga.
Marion E. Burks
Philip J. Carey
Thomas P. Cawley
Arthur J. Cieslik
Sylvester C. Close
William Cousins
Robert J. Dempsey
Brian B. Duff
Thomas R. Fitzgerald

Charles J. Fleck, Jr
Allen A. Freeman
Charles E. Freeman
Marion W. Garnett
Lawrence I. Genesen
Joseph Gordon
Albert Green
James L. Griffin
Arthur N. Hamilton
Lawrence P. Hickey
Edward C. Hofert
Mary J. Hooton
Thomas J. Janczy
Donald E. Joyce
Aubrey F. Kaplan
Marilyn R. Komosa
Jerome Lerner
Francis J. Mahon
George M. Marovich
John H. McCollom
John A. McElligott
Mary Ann McMorrow
Howard M. Miller
John J. Moran
Harold M. Nudelman
Thomas J. O'Brien
Romie J. Palmer
Richard J. Petrarca
William E. Peterson
R. Eugene Pincham
John F. Reynolds
Monica D. Reynolds
Richard L. Samuels
Gerald L. Sbarbaro
Anthony J. Scotillo
Robert L. Sklodowski
Raymond C. Sodini
Adam N. Stillo
Theodore M. Swain
James Traina
Joseph R. Spitz
Ben Miller
John W. Russell
Edward B. Dittmeyer
Robert L. Dannehl
Harold D. Nagel
John A. Leifheit
Charles R. Norgle
John S. Teschner
Robert K. McQueen
Stephen M. Kernan
Thomas P. O'Donnell
Walter B. Bieschke
John M. Breen
Calvin C. Campbell
Robert E. Cusack
Myron T. Gomberg
Thomas J. Maloney
Anthony S. Montelione
Paul A. O'Malley
Dom J. Rizzi
Jerome C. Slad
Arthur A. Sullivan
Lucia T. Thomas

And applause for all.

(The named judges arose and there was applause)

Now, I'd like to turn our attention, if we can, ladies and gentlemen, to the retired colleagues. And as I look at the list of the 49 judges who have left our ranks in the past year, I wish that there was sufficient time to note the individual achievements of each. I know, however, that the introduction of these gentlemen by name only is sufficient to cause each of us to recall personally the service they have performed and the valued experiences they have left with us.

An astonishing figure reflects the magnitude of the efforts of the retirees we honor today. The retirees have provided the people of the State of Illinois with a cumulative total of 1,098 years of judicial service. Suffice it to say that the service rendered by these ladies and gentlemen to the

administration of justice here in Illinois is immeasurable, but we are grateful for the opportunity to have worked with you over these many years.

I would ask that the retired judges as their names are called, please, stand. And, again, I say, some of them could not be with us; and, so, again, I will rapidly go down the list with all due respect, ladies and gentlemen.

Everett Prosser from the 1st Circuit, 25 years of service.

Paul Reese from the 1st Circuit, 27 years of service.

Dorothy Spomer from the 1st Circuit, 26 years of service.

John Gitchoff from the 3rd Circuit, 6 years of service.

We have with us Jacob Berkowitz, 40 years of service. (Applause)

Birch E. Morgan, 6th Circuit, 34 years. (Applause)

I don't believe that Paul Verticchio from the 7th Circuit is here. 12 years.

William Conway, 7th Circuit, 18 years.

We do have with us Victor Cardosi, 12th Circuit, 16 years.

David Oram couldn't make it. He's from the 12th Circuit with 18 years.

We do have Glenn Appleton from the 14th Circuit.

We also have with us the former Appellate Court judge way out in the western part next to the Mississippi, Dan McNeal from the 14th Circuit, 23 years of service.

A recent retiree, James Vincent from the 15th Circuit, 18 years, could not be here.

John Petersen from the 16th Circuit with 19 years could not be here.

From the 17th Circuit, Seely Forbes is with us, 30 years.

James Fitzgerald, the 18th Circuit, with 11 years.

LaVerne Dixon from the 19th Circuit, with 14 years.

Bill Gleason is with us from the 19th Circuit, with 10 years.

Robert L. Gagen from the 20th Circuit, with 5 years.

(The named judges arose and there was applause)

We also have these retirees from Cook County.

Joseph Butler, 25 years of service.

We have with us Dan Covelli, 37 years.

I don't think William Daly could be with us. 38 years.

George Dolezal, 8 years.

Robert Dunne is with us. 44 years.

Norman Eiger, 13 years.

Samuel Epstein, 43 years.

I don't believe Saul Epton is here. He had 16 years.

We do have Hyman Feldman with 21 years with us.

John C. Fitzgerald who has 12 years.

We have Richard Harewood with 14 years.

Harry Hershenson could not be with us. 24 years of service.

Robert Meier, III could not be with us. 12 years of service.

Emmett Morrissey is here, with 28 years.

Joseph Power, 21 years.

Harry Stark with 23 years.

Eugene Wachowski with 22 years.

Minor Wilson with 9 years.

(The named judges arose and there was applause)

Seven members of the Appellate Court have retired in the year since last September, and we are honored to have several of them with us at the head table. I will just again mention their names.

Thaddeus Adesko, who couldn't be with us, 26 years of service.

We have a distinction in the next gentleman, Joseph Burke, 54 years on the bench. (Great Applause) You broke the record, Joe. And there is something that Joe should be recognized for, and I don't know if you know this or not, but of the 54 years, thirty-eight years have been on the reviewing court, and according to the ABA records, that is a national record. (Applause)

We are also fortunate to have with us that vacationer retired sun lover, Henry Burman, 45 years.

John Dempsey could not be with us. 25 years.

We do have Charlie Barrett here. 14 years.

Walter Dixon couldn't be here. I really have to refer to Walter Dixon as being from the 2nd and 3rd District because he was on the Appellate Court bench, and down in the 3rd District with 30 years.

Then, Leland Simkins from the 4th District, 15 years.

(The named judges arose and there was applause)

We are honored to have with us at the head table here three former Justices of the Supreme Court who retired last December. I would certainly be remiss if I did not take this opportunity to briefly recount some of the events in the outstanding careers of these leaders of our judiciary.

Justice Caswell Crebs was born in Carmi, Illinois in 1912. He received his elementary, high school, and undergraduate education in California. Then, in 1936 Justice Crebs graduated from the University of Illinois College of Law as a member of the Order of Coif. From 1941 to 1945, he served as an Assistant Attorney General of Illinois, and then he was elected a circuit judge in the Second Judicial Circuit in 1945 where he served until his retirement. I am speaking of the first retirement, 1964.

During this time, he served as Chief Judge in that circuit. Since his retirement in 1964, Justice Crebs served on assignment from retirement in the circuit and appellate courts through 1969, and in 1969, he was assigned to the Supreme Court to fill the vacancy caused by the death of Justice House. In 1971, he was appointed to the Fifth Appellate District. In October of 1975, Justice Crebs was again assigned to the Supreme Court to fill the vacancy caused by the resignation of the late Charles Davis.

With Justice Crebs' return to retirement in 1976, he has provided over 24 years of judicial service in the circuit, appellate and supreme courts of the State of Illinois.

Would you join me in a hand.

(Justice Crebs arose and there was great applause)

Justice Thomas E. Kluczynski. Justice Kluczynski was born and educated in Chicago, and graduated from the University of Chicago Law School cum laude. He engaged in the general practice of law from 1927 to 1948 when he was appointed a commissioner of the Illinois Industrial Commission.

In 1950, Justice Kluczynski was appointed to the Circuit Court of Cook County, and while in the Circuit Court from 1950 to 1963, he served as chief judge of the Criminal Court, presiding judge of the Family Court, Chief Justice of the Circuit Court, assignment judge, motion judge, and chancellor. But in 1963 Justice Kluczynski was assigned to the First District Appellate Court, where he served until 1966 at the time he was elected to the Supreme Court.

Justice Kluczynski served as a judicial officer for nearly 26 years. His extensive practical experience as a trial lawyer, a trial judge and reviewing court justice provided the Court with a unique appreciation of administering to the practical considerations of our judicial system.

Would you join with me in honoring Justice Kluczynski.

(Justice Kluczynski arose and there was great applause)

Justice Walter V. Schaefer. Justice Schaefer was born in Grand Rapids, Michigan in 1904. He attended Hyde Park High School in Chicago, and received his college and legal education at the University of Chicago. Following his admission to the bar in 1928, he engaged in private practice in Chicago. He was one of the principal draftsmen of the Illinois Civil Practice Act of 1933.

Justice Schaefer served as a professor of law at Northwestern University School of Law from 1940 until 1951. He served as chairman of the Illinois Commission to Study State Government, known as the "Little Hoover Commission," from 1949 to 1951.

In 1951, Justice Schaefer was appointed to the Illinois Supreme Court, and has served in that capacity as Chief Justice in 1953 to 1954 and again in 1960 to 1961. During his nearly 26 years on the Court, Justice Schaefer

initiated the annual judicial conference concept which, of course, is now constitutionally mandated.

As we are all aware, Justice Schaefer has an international reputation as a jurist. His papers have been published in many law reviews. He has presented the Oliver Wendell Holmes Lecture at Harvard Law School, the Benjamin N. Cardozo Lecture before the Association of the Bar of the City of New York, and the Ernest Freund Lecture Series at the University of Chicago. In 1969, Justice Schaefer received the American Bar Association Medal, the ABA's most distinguished award.

Most recently, the American Judicature Society awarded Justice Schaefer its Herbert Harley Award for distinguished service to the State of Illinois and to the nation. And this past June, the Illinois State Bar Association awarded Justice Schaefer the Award of Merit for Service to the Profession.

All Illinois judges, present and future, have been honored to have Justice Walter V. Schaefer serve on our Supreme Court.

Would you help honor Justice Schaefer?

Topic I—EVIDENCE

A. Summary of Advance Reading Material

CONTENTS

D. Medical Malpractice
E. Obscenity
F. Medical Evidence
G. Polygraph and Voiceprints

Part Three: Who Is An Expert

I. Preliminary Evidence of Competency
II. Land Valuation
— General Rule
— Necessity of Prior Knowledge
— Necessity of Prior Experience with Similar Property
III. Machines and Processes
— General Rule
— Existence of Defect or Safe Way of Proceeding
— Cause and Effect
IV. Trade Usage and Value of Personal
— General Rule
— Examples
— Special Area: Attorney's Fees
V. Medical Testimony
— Generally
— Opinions by Non-Medical Personnel
— Effect of Licensing
— Malpractice Suits

B. Summary of Discussions

The Evidence topic was presented in lecture form, based on the following outline.

1977 ILLINOIS JUDICIAL CONFERENCE

September 7-9, 1977

EVIDENCE

PART ONE

THE LAY WITNESS AND THE RULES AGAINST OPINIONS

(Prepared by Professor Robert E. Burns)

> "Our language can always be rendered less inexact, but it can never become quite exact." Bertrand Russell, An Inquiry into Meaning and Truth. 1940

I. The Lay — Fact — Opinion Witness

An Opinion — a belief, view, attitude, sentiment, judgment, conclusion, notion, impression, inference or a formal statement by a judge or court of the reasoning and the principles of Law used in reaching a decision of a case.

A Fact — 1. That which actually exists; reality. 2. Something known to exist or to have happened. 3. A truth known by actual experience or observation; that which is known to be true. 4. Something said to be true or supposed to have happened.

Source: Random House Unabridged Dictionary, 1966

II. Law

Witnesses should state facts and not mere inferences; conclusions and opinions should be confined to experts. *Butler v. Mehrling*, 15 Ill. 488 (1854).

III. Exceptions

In General: Indescribable facts; collective or composite facts.

Exceptions:

In Particular — Appearance, health, mental condition, speed of vehicles, age, sanity, intoxication, value, time, reputation, handwriting. See Cleary, Chapter XI, Hunter, Chapter LVIII.

IV. Approach

Walz — Cases on Evidence:

DEGREES OF (1) DECISIVENESS AND (2) GENERALITY

In other words, we always have many degrees of decisiveness shading back from the decisive statement that "The Plaintiff (or defendant) should prevail." As against these degrees of decisiveness we have many degrees of generality of statement. The admissibility of any opinion depends upon two factors: (1) its degree of generality and (2) its decisiveness of the case. A witness may make a very general statement (an opinion) and have it called a statement of fact if it is not decisive of the case or does not approach decisiveness of the case. He may not make a very specific statement if such statement is capable of being made more specific and is decisive of the case or approaches such decisiveness. . . .

The danger point is on the statement of greatest generality in a case where such a statement is decisive of the case, — that is, where the opinion is on an ultimate issue. The courts usually say that such a statement "invades the province of the jury."

Federal Rules of Evidence:

Rule 701 Opinions limited to those (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Rule 704 Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rules 404, 405, (A) 608 (a) Opinion evidence of character trait or character generally permitted.

PART TWO

SUBJECTS OF EXPERT TESTIMONY: WHEN IS IT NECESSARY OR APPROPRIATE TO ALLOW THE USE OF THE TESTIMONY OF EXPERTS?

(Prepared by Professor Elliott H. Goldstein)

I. Introduction

A. "Litigation always entails the use of persons with specialized knowledge . . . . [Lay] witnesses . . . are specialists of a sort. They are usually produced because they are familiar with certain aspects of a legal dispute that are unknown to the trier of fact. No special showing is needed to qualify the ordinary witness. So long as the witness has firsthand knowledge of relevant information, competence is presumed." Lempert and Saltzberg, *A Modern Approach to Evidence* at p. 932 (West, 1977). As noted under the previous topic, lay witnesses may sometimes give opinions.

B. Some witnesses, however, play a special role in litigation. These are the "experts". They are able to aid the fact finder, "not because they have fortuitously observed events which are relevant to the jury's inquiry, but because they have specialized skills or training which enables them to perceive and interpret events in ways that ordinary laypeople cannot." Lempert and Saltzberg, *A Modern Approach to Evidence, supra.* Experts, of course, are called to give *opinions* on data, based on their expertise.

C. When a party contemplates the use of an expert, the initial inquiry is whether the facts of the case require expert testimony. Expert testimony is that testimony related to some science, profession, business, or occupation beyond the scope of knowledge or experience of the average layperson. Cleary, McCormick on Evidence, 2d Edition, at §13, pp. 29-30 (West, 1972).

II. The No-Expert-Needed, Common Knowledge Rule:

A. This rule originally provided it was *reversible error* to receive the opinion of experts on that which was common knowledge. See *Linn v. Sigsbee,* 67 Ill. 75 (1873); *Hoffman v. Tosetti Brewing Co.,* 257 Ill. 185, 100 N.E. 531 (1913), and King and Pillinger, *Opinion Evidence in Illinois* at 41 (1942). The rule was based upon the fact that such testimony wasted time in the trial, invaded the province

of the jury, and might confuse the trier of fact where there was no need for expert aid. Legal writers criticized the rule. See King and Pillinger *supra.* and Burns, "The Rule of Reconstruction Experts in Witnessed Accident Litigation" 22 DePaul L. Rev. 7 (1972). The no-expert-needed, common knowledge rule has largely been eroded; later cases (*infra.*) have tended to hold that the admission of expert testimony on matters of common knowledge is harmless error or that such admission is discretionary, subject to review only for abuse. (But see Accident Reconstruction, *infra.*).

B. The applicable cases.

1. *Armstrong v. Chicago & W. I. R. Co.*, 350 Ill. 426, 183 N.E. 478 (1932). (Admission of witness' opinion as to whether freight cars on storage track would have rolled onto running track had brakes been set, held harmless; such testimony concerned matters of common knowledge.)

2. *Stanley v. Board of Education*, 9 Ill. App. 3d 963, 293 N.E. 2d 417 (1st Dist. 1973). Trial Court did not abuse its discretion in personal injury case arising when an eight-year old boy was struck by a baseball bat in a playground, in permitting a witness with extensive training and experience in playground supervision and game safety to testify as an expert on issue of dangerousness of the area where the accident occurred. As noted by the Court:

> "We think, therefore, the better rule would give a trial judge a wide area of discretion in permitting expert testimony which would aid the triers of fact in their understanding of the issues even though they might have a general knowledge of the subject matter."

See *Pritchett v. Steinker Trucking Co.*, 108 Ill. App. 2d 371, 247 N.E. 2d 923 (4th Dist. 1969). See also *Miller v. Pillsbury Co.*, 33 Ill. 2d 514, 211 N.E. 2d 733, 734 (1965). *Cf. Mahlstedt v. Ideal Lighting Co.*, 271 Ill. 154 110 N.E. 795 (1915).

3. *Carlson v. Hudson*, 19 Ill. App. 3d 576, 312 N.E. 2d 19 (3d Dist. 1974). Although testimony of an expert is inappropriate when it relates to matters of common knowledge,

> "We are unable to say that the expert's testimony falls within that category in the context of this case. Even if such were the case, the trend of decisions is that an expert may testify as to matters of common knowledge where the expert's testimony would be helpful to the jury."

4. *Phillips v. Shell Oil Company*, 13 Ill. App. 3d 512, 300 N.E. 2d 771 (5th Dist. 1973). Expert witness proffered to testify as to defects in design of a gasoline service station, including the location and identification of a step and a door. The trial court

held such testimony unnecessary, as being within the common knowledge of the jury. The appellate court sustained the trial court, noting that while there is a trend to admit expert testimony as to matters of common knowledge and understanding where difficult of comprehension and explanation, there was no abuse of discretion by denying expert testimony on the subject.

III. Opinions on Ultimate Issues and the Prohibition against Invading the Province of the Jury.

The objection that an expert was giving an opinion on an "ultimate issue" or that an expert's opinion could not "invade the province of the jury" received what one writer (Spector, "*People v. Ward*: Toward a Reconstruction of Expert Testimony in Illinois", 26 DePaul L. Rev. 284 (1977)) terms a "final death knell" in *Merchants National Bank v. Elgin, J. & E. Ry.*, 49 Ill. 2d 118, 273 N.E. 2d 809 (1971). In *Merchants*, the Supreme Court allowed expert testimony on the question of whether a railroad crossing was safe. The Court noted that since the trier of fact is not required to accept the expert's opinion, the opinion could not possibly invade the province of the jury. Thus, for example, in a malpractice case it is now perfectly correct for an expert to testify that the defendant's acts constituted negligence. *McCallister v. del Castillo*, 18 Ill. App. 3d 1041, 310 N.E. 2d 474 (4th Dist. 1974). Accord, *Coleman v. Illinois Central Ry.*, 13 Ill. App. 3d 442, 300 N.E. 2d 297 (4th Dist. 1973). (Opinion testimony of expert that railroad grade crossing at which accident occurred was inadequately protected was not directed toward ultimate issue of whether or not railroad was liable and did not invade the province of the jury for wrongful death.)

IV. When Expert Testimony Is Appropriate.

A. The law in this area is quite well known, requiring that expert testimony be admissible when the subject matter is of such character that only persons of skill and experience in it are capable of forming correct judgments as to any facts connected therewith. Application of the rule to particular fact patterns shows wide variations in Illinois.

1. The applicable cases.

a. Accident Reconstruction Testimony.

1) *Miller v. Pillsbury Co.*, 33 Ill. 2d 514, 211 N.E. 2d 733 (1965). There were no eyewitnesses to the accident involved and the question was which driver was over the center line. Testimony of an accident reconstruction expert was received in evidence. The Supreme Court held that expert testimony on reconstruction of an automobile accident should be admissible where it

is necessary to rely on knowledge and application of principles of physics, engineering and other sciences beyond the ken of the average juror. They stated that such evidence does not usurp the province of the jury since the jury does not have to accept the expert's opinion.

2) *Thomas v. Cagwin,* 43 Ill. App. 2d 336, 193 N.E. 2d 233 (2d Dist. 1963). An investigating police officer with experience in accident investigation was permitted to express an opinion as to the point of collision of automobiles, within the "trial court's sound discretion".

3) *Diefenbach v. Pickett,* 111 Ill. App. 2d 80, 248 N.E. 2d 840 (5th Dist. 1969). Illinois State policeman who had considerable experience in investigating automobile collisions allowed to state his opinion as to the point of collision although there was also eyewitness testimony in the case. Admissibility rested within the sound discretion of the trial judge.

4) *Deaver v. Hickox,* 81 Ill. App. 2d 79, 224 N.E. 2d 468 (4th Dist. 1967). The sole basis of the appeal was the action of the trial court in admitting over objection the expression of an opinion by a State Trooper as to the speed of the vehicles prior to the collision. The court found the testimony to be in error because the evidence demonstrated an insufficient basis from which the opinion could be stated. It appeared that the officer was basing his opinion as to speed upon the damage resulting to the vehicles.

5) *Abramson v. Levinson,* 112 Ill. App. 2d 42, 250 N.E. 2d 796 (1st Dist. 1969). This decision affirmed the refusal of a trial court to permit an expert to reconstruct an accident, where the sole issue was which of two parties was southbound on Lake Shore Drive at the time of the accident. The objection to the expert's testimony at trial was made and sustained on the ground that since there were eyewitnesses the expert's testimony was inadmissible. The Appellate Court stated that the test of admissibility or inadmissibility rests not on whether there is eyewitness testimony, but whether or not it is necessary to rely on knowledge and the application of principles of physics, engineering or other sciences which are beyond the normal ken of the average juror; and further, by whether or not there is sufficient undisputed physical

evidence to provide the basic data needed for the application of principles of physics, engineering or other sciences. The Court also listed four factors that must be demonstrated to the trial judge before expert reconstruction testimony and opinion can be received, as follows:

i. The expert has the necessary experience as a result of education, training, and experience in the specific area about which he expresses an opinion.

ii. The area of inquiry should require the employment of principles of physics, engineering or other science or scientific data beyond the ken of the average juror.

iii. The opinion of the expert cannot be naked, but must come clothed in evidentiary facts in the record, the inferences reasonably arising therefrom and must be elicited by hypothetical questions containing substantially all of the undisputed facts in evidence relating to the issue about which an opinion is sought, and

iv. There must be a need apparent from the record in the case for scientific knowledge, expertise, and experience which will aid the jury to a correct and just result.

6) *Plank v. Holman,* 46 Ill. 2d 465, 264 N.E. 2d 12 (1970). The Supreme Court found that under the circumstances present the plaintiff could have been considered to be an eyewitness although she did not see the entirety of the events leading to the collision. The Court reiterated its statement in *Miller v. Pillsbury Co., supra.* that:

> "We are of the opinion that expert testimony on reconstruction of an automobile accident should be admissible where it is necessary to rely on knowledge and application of principles of physics, engineering and other sciences beyond the ken of the average juror."

In classification of the "availability of an eyewitness" aspect of the rule, the Court went on to say that:

> ". . . reconstruction testimony may not be used as a substitute for eyewitness testimony where available. Whether it may be used in addition to [eyewitness] testimony is determined by whether it is necessary to rely on knowledge and application of principles of science beyond the ken of the average juror."

7) *McGrath v. Rohde,* 53 Ill. 2d 56, 289 N.E. 2d 619 (1972). In this case, the Supreme Court reiterated the rule of *Plank v. Holman* and held that reconstruction testimony was unnecessary since the questions confronting the jury (whether plaintiff struck defendant after hitting an abutment, or defendant rear-ended the plaintiff) did not require a scientific knowledge beyond their ken. Moreover, the court held that the plaintiff's choosing to call the defendant, who could not otherwise have given testimony because of the Dead Man's Act, as an adverse witness did not eliminate or diminish the standards of admissibility for reconstruction experts when plaintiff sought to introduce such testimony to rebut defendant's eyewitness testimony.

8) *Stiltman v. Reeves,* 131 Ill. App. 2d 960, 269 N.E. 2d 728 (4th Dist. 1971). The Appellate Court, in reliance upon *Abramson v. Levinson, supra.,* rejected the use of an opinion of a reconstruction expert if the determinative facts are otherwise established by credible physical or eyewitness evidence. The issue was whether a taillight on a tractor was lit and working at the time of the accident collision. Credible eyewitness testimony said it was, but the expert gave his opinion that the light was not. The fact of whether or not the taillight was working prior to the collision was held not to be a subject beyond the ken of the average juror and the admission of the reconstruction expert's opinion was reversible error. See also *Gutkowski v. Stover Bros. Trucking Co.,* 42 Ill. App. 3d 257 (1st Dist. 1976).

9) *Geisberger v. Quincy,* 3 Ill. App. 3d 437, 278 N.E. 2d 404 (2d Dist. 1972). In *Geisberger,* the plaintiff claimed that the trial court erred in admitting opinion testimony of a police officer amounting to the reconstruction of the accident. Plaintiff and defendant were the only eyewitnesses and they gave contradictory descriptions of the impact from the location of the debris in the street. In reversing the case for a new trial on other grounds, the court stated that the officer's opinion as to the place of impact should be excluded because "his testimony as to factual findings upon arrival at the scene as to location of debris and the vehicles . . . will better serve the purpose of arriving at a just verdict than will his expression of opinion."

10) *Payne v. Noles,* 5 Ill. App. 3d 433, 283 N.E. 2d 329 (2d Dist. 1972). In *Payne,* a critical question was based upon which side of the center line did a motorcycle and an automobile collide. The vehicle operators testified on this point. The plaintiff automobile driver called as an expert witness a physicist who did not testify as to point of impact but gave an academic discussion as to the stability of motorcycles and as to the location of the center of gravity and its effect on the motorcycle immediately prior to the collision. The Court concluded that expert testimony has no place if the determinative facts are otherwise established by the credible physical or eyewitness testimony.

11) *Dauksch v. Chamness,* 11 Ill. App. 3d 346, 296 N.E. 2d 592 (5th Dist. 1973). In this case, the Appellate Court undertook an exhaustive analysis of the admissibility of reconstruction testimony, and found that the admission of an Illinois State Trooper's opinion as to point of impact was in error, but in addition found that the trooper's opinion that the accident occurred in the northbound lane stated only the obvious, and was merely cumulative. Thus, the Court found the error to be harmless. The Court rejected the claim of the defendant-appellee that distinctions should be made between an academically trained expert such as a physicist and an experienced investigating police officer who "merely states an opinion" as to the point of impact. The Court notes that "whatever the basis or type of the expert reconstruction testimony or opinion, the test of admissibility is that of necessity." The Court found no necessity for the trooper's opinion in this case.

12) *Tipsword v. Melrose,* 13 Ill. App. 3d 1009, 301 N.E. 2d 614 (3d Dist. 1973). The Court suggests that the case of *Abramson v. Levinson, supra.,* imposed too stringent a test for the use of reconstruction testimony, and, if applied without deviation, would bar nearly all testimony of this type by the investigating police officer. Instead, it followed the rule announced in *Diefenbach v. Pickett,* and rejected by the Fifth District Appellate Court in *Dauksch v. Chamness, supra.* The Court held that reconstruction testimony rests largely within the sound discretion of the trial judge, which discretion will not be disturbed on appeal in the absence of the abuse of such discretion.

13) *Dobkowski v. Lowe's Inc.*, 20 Ill. App. 3d 275, 314 N.E. 2d 623 (5th Dist. 1974). In this wrongful death action, it was error to admit opinion of an Illinois State Trooper that the collision between a northbound van and a southbound tractor trailer occurred in the northbound lane. The opinion was not based on the application of principles of physics, engineering or other sciences, but merely upon his personal observation of the physical evidence at the scene of the accident. This opinion was not necessary, but under the facts of the case, was harmless error.

14) *Diederich v. Walters*, 31 Ill. App. 3d 594, 334 N.E. 2d 283 (2d Dist. 1975). An investigating police officer who was not an eyewitness, was not qualified to give testimony as an expert concerning the use of a "nomograph" to obtain the speed of defendant's automobile based on the length of the skid marks where the officer had no special skill or training in operation of the "nomograph". Even if the officer was an expert in the use of the "nomograph", the testimony would have been inadmissible, where there were two eyewitnesses at the scene who could estimate speed.

B. Other expert opinion (not found to be reconstruction of the accident) is appropriate as beyond the ken of the average juror:

1. INTOXICATION.

a. *Craft v. Accord*, 20 Ill. App. 3d 231, 313 N.E. 2d 515 (4th Dist. 1974). Dram shop case. Trial court properly exercised its discretion in permitting a physician to testify as expert as to the oxidation rate of alcohol in a male 5'9" in height and weighing approximately 155 pounds who has consumed six to eight twelve-ounce bottles of beer. Testimony was in hypothetical form and was predicated on admissible evidence in the record. Appellate Court found that trial court properly permitted the expert to express an opinion on the ultimate fact that patron would not have been intoxicated at the time of the subject altercation as a result of alcohol originally consumed in the defendant's tavern.

b. *Nystrom v. Bub*, 36 Ill. App. 2d 333, 184 N.E. 2d 273 (2d Dist. 1962). Dram shop case. No need for expert as to oxidation of alcohol in the blood of alleged intoxicated driver where eyewitnesses could smell alcohol on the person's breath. The question of the qualification of an expert rests largely on the discretion of the trial court.

c. *People v. Krueger*, 99 Ill. App. 2d 431, 241 N.E. 2d 707 (1st Dist. 1968). (The competency of the officer who had ad-

ministered a breathalyzer test to defendant is largely within the trial court's discretion. For discussion of Breathalyzer and admissibility of the results of breathalyzer tests, see *People v. Crawford,* 23 Ill. App. 2d 398, 318 N.E. 2d 743 (4th Dist. 1974). See also *People v. Benoit,* 6 Ill. App. 3d 1031, 287 N.E. 2d 85 (1st Dist. 1972) (No-Expert-Needed); *People v. Boyd,* 17 Ill. App. 3d 879, 309 N.E. 2d 29 (5th Dist. 1974) (Evidence of a defendant's refusal to take the breathalyzer test inadmissible); *People v. Leffew,* 33 Ill. App. 3d 700, 338 N.E. 2d 480 (2d Dist. 1975) (the provisions of 95½ Ill. Rev. Stat. 501, relating to the admission of evidence of chemical analysis apply to all charges that arise out of operation of an automobile, not just DWI.) and *People v. Clifton,* 11 Ill. App. 3d 112, 296 N.E. 2d 48 (1973) (Standards of State Department of Public Health must be introduced through testimony, not judicial notice.).

2. RAILROAD CROSSING INADEQUATELY PROTECTED.
   Coleman v. Illinois Central Ry., 13 Ill. App. 3d 442, 300 N.E. 2d 297 (4th Dist. 1973).

3. ELECTRICAL ENGINEER whose opinion was traffic intersection improperly illuminated. *Baran v. City of Chicago Heights,* 43 Ill. 2d 177, 251 N.E. 2d 227 (1969).

4. BRAKES.
   Retired Railroad fireman and engineer — Railroad train brakes and distance properly operating brakes needed to stop train. *Noe v. Chicago Great Western Ry.,* 71 Ill. App. 2d 347, 219 N.E. 2d 111 (1st Dist. 1966). Accord, as to automotive service manager and braking efficiency of braking system of type of van involved in accident. *Galluccio v. Hertz Corp.,* 1 Ill. App. 3d 272, 274 N.E. 2d 178 (5th Dist. 1971).

5. BRAKING DISTANCES.
   Jamison v. Lambke, 21 Ill. App. 3d 629, 316 N.E. 2d 93 (1st Dist. 1974). Court rejected defendant's argument that minimum braking distance of an automobile was accident reconstruction, and found the admission of such testimony well within the "wide area of discretion" permitted the trial judge in admitting expert testimony which would aid the triers of fact in their understanding of the issues "even though they might have a general knowledge of the subject matter."

6. BARRICADES.
   Professional Engineer's opinion that barricades shown in pictures placed by city on the curve in front of a utility pole were improperly placed to adequately protect oncoming traffic.

French v. City of Springfield, 30 Ill. App. 3d 584, 334 N.E. 2d 181 (4th Dist. 1975). Citing *Merchants National Bank v. Elgin J. & E. Ry., supra.* The court notes that lack of eyewitnesses is a prerequisite for an expert opinion *only* when the expert testimony is used to reconstruct what happened at the time in question, for if eyewitnesses were present, they can supply this information. The opinion then rejects the argument that the hazards of the placements of traffic barricades are within the ken of the average juror, but instead finds the question of construction and placement of traffic barricades is complex and expert opinion would be helpful to the jury. *Merchants* is thus dispositive of the case.

7. FARM MACHINERY.
Opinion of an expert on the availability of standards for safety shields which were promulgated to familiarize farm implement manufacturers with safety shields for exposed rotating power shaft; the admissibility is within sound discretion of the trial judge. *Hardware State Bank v. Cotner,* 55 Ill. 2d 240, 302 N.E. 2d 257 (1973). Accord as to admissibility of standards. *Merchants National Bank v. Elgin J. & E. Ry., supra.,* and *Scott v. Dreis & Krump Mfg. Co.,* 26 Ill. App. 3d 971, (1st Dist. 1975).

8. CUSTOM AND USAGE IN TORT.
Use of scaffolding of one trade by members of another as custom and usage among contractors and their employees may be proved by expert testimony. *Fetterman v. Production Steel Co.,* 4 Ill. App. 2d 403, 124 N.E. 2d 637 (1st Dist. 1954).

9. HANDWRITING.
Expert opinion of a purported signature of vendor of real estate, where no actual eyewitness. *Miles v. Graham,* 7 Ill. App. 3d 17, 286 N.E. 2d 497 (4th Dist. 1972).

10. TREE TRIMMING.
Cause of Plaintiff's fall, expert was a tree trimmer, whose testimony found to be helpful to jury, although related to matters of common knowledge. *Carlson v. Hudson,* 19 Ill. App. 3d 576, 312 N.E. 2d 19 (3d Dist. 1974).

11. SMELLS.
People v. Jenkins, 20 Ill. App. 3d 727, 315 N.E. 2d 269 (1st Dist. 1974). (Police officer-testimony as to the smell of marijuana permissible.)

C. STRICT PRODUCTS LIABILITY. Expert witness in products liability action was properly permitted to give his opinion as to defectiveness of product in question even though such defectiveness was ultimate fact for jury's determination. *Matthews v. Stewart Warner Corp.,* 20 Ill. App. 3d 470, 314 N.E. 2d 683 (1st

Dist. 1974). Accord, *St. Paul Fire & Marine Ins. Co. v. Michelin Tire Corp.*, 12 Ill. App. 3d 165, 298 N.E. 2d 289 (1st Dist. 1973). (Expert opinion that the product was defective and that the evidence negates alternative causes allowed. This evidence contradicted by Defendant's experts did not warrant finding that blowout of tire was caused by measurably dangerous conditions existing in tire when it left manufacturer's control.)

D. MEDICAL MALPRACTICE. The general rule in medical malpractice cases is that the burden is upon the plaintiff to prove by expert testimony the proper standard of care imposed upon defendant, and then to prove by affirmative evidence the unskilled or negligent failure to comply with such professional criterion, such acts or omissions thus resulting in injury to the plaintiff. The exception to the rule is where the conduct of the doctor is so grossly negligent as to fall within the common knowledge of the layperson. *Montgomery v. Americana Nursing Centers, Inc.*, 39 Ill. App. 3d 315, 349 N.E. 2d 516 (4th Dist. 1976). Accord, *Estell v. Barringer*, 3 Ill. App. 3d 455, 278 N.E. 2d 424 (4th Dist. 1972) and *McCallister v. del Castillo*, 18 Ill. App. 3d 1041, 310 N.E. 2d 474 (4th Dist. 1974).

E. OBSCENITY. *Hambling v. U.S.*, 418 U.S. 87 (1974). Experts concerning the relevant community standard permitted.

F. MEDICAL EVIDENCE.

1. *People v. Lewis*, 14 Ill. App. 3d 237, 302 N.E. 2d 157 (1st Dist. 1973). (Expert opinion is not required to establish what is or is not a hypodermic needle or syringe.
2. *People v. Gillespie*, 24 Ill. App. 3d 567, 321 N.E. 2d 398 (2d Dist. 1974). Frequency of blood types among segments of the population, by race permitted.
3. *Matter of Wellington*, 34 Ill. App. 3d 515, 340 N.E. 2d 31 (1st Dist. 1975). Ward Psychologist not properly qualified.
4. *Dallas v. Granite City Steel Co.*, 211 N.E. 2d 907 (5th Dist. 1965). and *Boose v. Digate*, 107 Ill. App. 2d 418, 246 N.E. 2d 50 (3d Dist. 1969). Eye injuries. Sufficient Evidence on record so opinions not guess or surmise.
5. *Scott v. Hernon*, 3 Ill. App. 3d 172, 278 N.E. 2d 259 (1st Dist. 1972). Cancer: Insufficient evidence to allow opinion as to probable development; medical opinion would be conjecture and surmise.
6. *People v. Kline*, 41 Ill. App. 3d 261, 354 N.E. 2d 46 (2d Dist. 1976). (A chemist is permitted to analyze a small amount of a substance and give an opinion as to the whole.)

G. THE POLYGRAPH AND VOICEPRINTS.

1. Skolnick, "Scientific Theory and Scientific Evidence: An Analysis of Lie Detection," 70 Yale L. J. 694 (1961).
2. Tarlow, "Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System," 26 Hast. L. Rev. 917 (1975).
3. Sevilla, "Polygraph Evidence: The Case for Admissibility and Suggestions for Introduction" 2 Crim. Defense (April, 1975).
4. *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923). (Where expert testimony rests on a scientific principle or on a process validated by a scientific principle, the opinion testimony is admissible only if the scientific technique or device is sufficiently established to have gained general acceptance in a particular field.) This contrasts with the general rule which requires only that the testimony not be common knowledge and that the expert testimony be likely to aid the jury in its deliberations.
5. *People v. Berkman,* 307 Ill. 492, 500-01, 139 N.E. 91, 94-5 (1923) which terms "preposterous" reliance on ballistics evidence. Evidence from a properly qualified ballistics expert is of course now admissible. See *People v. Fisher,* 340 Ill. 216, 172 N.E. 743 (1930) and *People v. Fiorita,* 339 Ill. 78, 170 N.E. 690 (1930). Compare *People v. Garrett,* 62 Ill. 2d 151, 339 N.E. 2d 753 (1975).
6. Jones, "Danger — Voiceprints Ahead," 11 Am. Crim. L. Rev. 549 (1973).
7. Comment, "Voiceprints — The Admissibility Question: What Evidentiary Standard Should Apply?" 19 St. Louis L. J. 509 (1975).
8. *United States v. Addison,* 498 F. 2d 741 (D.C. Cir. 1974). (Voiceprint excluded under Frye test.)
9. Compare *United States v. Ridling,* 350 F. Supp. 90 (E.D. Mich. 1972) with *United States v. DeBetham,* 348 F. Supp. 1377 (S.D. Cal.), aff'd, 470 F. 2d 1367 (9th Cir. 1972), *Cert. denied,* 412 U.S. 907 (1973). (In *Ridling,* polygraph allowed; In *DeBetham,* polygraph testimony rejected.)
10. ILLINOIS: USE OF LIE DETECTOR (POLYGRAPH) TESTS PROHIBITED. The results of a polygraphic examination are inadmissible as evidence either of guilt or innocence of the accused, and similarly the mere fact that one was given is inadmissible for to admit such evidence would only tend to confuse not to enlighten the jury. *People v. Nicholls,* 44 Ill. 2d 533, 256 N.E. 2d 818 (1970). A defendant in a criminal trial

does not have the right to have a State's witness submit to a polygraph test. Such tests are inadmissible and there is no error in denying defendant's motion to have himself and an officer submit to such a test, even though he stipulated that the results would be admissible at the trial. *People v. Sanders,* 56 Ill. 2d 241, 306 N.E. 2d 865 (1974).

11. Decker and Handler, "Voiceprint Identification Evidence: Out of the 'Frye' Pan and into Admissibility" 26 American L. Rev. 314 (1977).

PART THREE:

WHO IS AN EXPERT

(Prepared by Professor Robert G. Spector)

Preliminary Evidence of Competency

I. *General Rule*: The proponent of the expert must elicit data from the witness indicating that the witness has the requisite knowledge or experience in a particular field. *People v. Jennings,* 252 Ill. 534, 96 N.E. 1077 (1911).

   A. It is proper for the expert to expand on his background in order to acquaint the factfinder with the depth of his expertise. Citizens' Gas-Light and *Heating Co. v. O'Brien,* 118 Ill. 174, 8 N.E. 310 (1886). However, the trial judge may limit the examination. *Decatur Park Dist. v. Becker,* 368 Ill. 442, 14 N.E.2d 490 (1937).

   B. During the qualification of an expert, the attorney may inquire into texts written by the expert, and patents held by the expert. *Prout v. G. Gordon Martin Inc.,* 160 Ill.App. 11 (1911).

   C. The expert must not disclose that he has been appointed by the court in the case. *Dept. of Bus. and Econ. Devlp. v. Bauman,* 56 Ill.2d 382, 308 N.E.2d 580 (1974).

   D. In certain situations a trial judge may take judicial notice of the witness' expertise. *Ed. Hines Lumber Co. v. Village of Villa Park,* 34 Ill.App. 3d 711, 340 N.E.2d 339 (2nd 1976). But in some cases this may be error *People v. Godbout,* 45 Ill.App.3d 1001, 356 N.E.2d 865 (1st 1976)

II. *General Rule*: The sufficiency of the witness' qualifications rests within the discretion of the trial court judge. *Abbott Laboratories v. Bank of London,* 351 Ill.App. 227, 114 N.E.2d 585 (1953); *Craft v. Acord,* 20 Ill.App.3d 231, 313 N.E.2d 515 (4th 1974)

III. The above rules apply whenever an expert opinion is being offered even though a witness may not be present. *Hastings v. Abernathy Taxi Association,* 16 Ill.App.3d 671, 306 N.E.2d 498 (1st 1973).

Land Valuation

I. General Rule: In order to give an opinion on valuation, the witness must have more than the ordinary knowledge of a layperson.

A. Thus, a mere landowner is not an expert. *Chicago, M. Electric Ry Co. v. Mawman,* 206 Ill. 182, 69 N.E. 66 (1903).

B. Neither is a mere homeowner. *Chicago E.R.Co. v. Hall,* 8 Ill.App. 621 (1881).

C. However, a landholder familiar with the property in the area is an expert. *Cannell v. State Farm Fire & Gas Co.* 25 Ill.App.3d 907, 323 N.E.2d 418 (2nd 1975)

D. It is not necessary that he be engaged in buying and selling land. *Dept. of Pub. Works & Bldgs. v. Divit,* 25 Ill.2d 93, 182 N.E.2d 749. (1962).

II. Necessity of Prior Knowledge of the Land.

A. Earlier cases held the expert must have prior knowledge of the land in the area before being allowed to testify. *City of Elmhurst v. Rohmeyer,* 297 Ill. 430, 130 N.E. 761 (1921); *City of Chicago v. Lehman,* 262 Ill. 468, 104 N.E. 829 (1914); *City of Lake Forest v. Buckley,* 276 Ill. 38 114 N.E. 572 (1916). If the expert was not familiar with the land, he could not testify as to its value, *Frederick v. Case,* 28 Ill.App. 215 (1888). However, even if the expert did not know the land in question, he could testify to certain background factors. Thus it is acceptable for an expert to testify to those factors that would make it likely the land would be rezoned. *Board of Jr. Coll. Dist. #515 v. Wagner,* 3 Ill.App.3d 1006, 279 N.E.2d 754 (1st 1971). However, before such an expert will be permitted to testify, the court must make a preliminary determination of the probability of rezoning. *Stanley v. Board of Education,* 9 Ill.App.3d 363, 293 N.E. 2d 417 (1st 1973); Park Dist. *of Highland Park v. Becker,* 60 Ill. App.2d 463, 208 N.E.2d 621 (2nd 1965); *Dept. of Pub. Works & Bldgs. v. Rogers,* 78 Ill.App.2d 141, 223 N.E.2d 177 (2d 1967).

B. Modern approach is that it is not necessary for an expert to have prior knowledge of the land in the area. It is sufficient if he knows the real estate business and has inspected land in question. *Dept. of Pub. Works & Bldgs. v. Oberlaender,* 42 Ill.2d 410, 247 N.E.2d 888 (1969); Sanitary *Dist. of Chicago v. Pitts, Ft. W. & C. Ry. Co.* 216 Ill. 575, 75 N.E. 248 (1905)

C. In some more recent cases some courts have held that it is not necessary for the expert to examine or study the property in question, so long as he is able to form an intelligent judgment about the property. *Village of Westchester v. Williamson,* 61 Ill.App.2d 25, 208 N.E.2d 879 (1st 1965). *Central Ill. Light Co. v.*

Porter, 96 Ill.App.2d 338, 239 N.E.2d 298 (3rd 1968); *contra Drainage Dist. #1 v. Purdy*, 39 Ill. App.3d 862, 350 N.E.2d 865 (2d. 1976)

III. Necessity of Prior Experience With This Type of Property

A. Normally prior experience with the type of property in question is not necessary, so long as the expert is knowledgeable about it. *Kankakee Park Dist. v. Heidenreich*, 328 Ill. 198, 159 N.E. 298 (1927) *Sanitary Dist. of Chicago v. Pitt. Ft. W. & Co. Ry. Co.*, 216 Ill. 575, 75 N.E. 248 (1905); *Dept. of Pub. Wks. & Bldgs. v. Oberlaender*, 42 Ill.2d 410, 247 N.E.2d 888 (1969)

B. Exception: If a building has an extra ordinary use, an ordinary real estate appraiser may not be competent to evaluate it. *City of Chicago v. George F. Harding Coll.*, 70 Ill.App.2d 254, 217 N.E.2d 381 (1st 1965).

Machines and Processes

I. *General Rule*: The expert must show some knowledge of the product or process before testifying as to its defects, operation, or whether the defect or operation has caused an injury.

A. The precise area of the witness' expertise must be carefully determined. Thus an expert in repairing a furnace may not be an expert as to its market value. *Frederick v. Case*, 28 Ill.App. 215 (1888)

B. If the witness has no knowledge beyond the ordinary layperson he may not testify. *North Kankakee St. Ry. C v. Blatchford*, 81 Ill.App. 609 (1898).

C. Mere familiarity with or use of a product does not itself make one an expert in its use. *Schlesinger & Mayer v. Scheunermann*, 114 Ill.App. 459 (1904) However, familiarity with the operation of a breathalizer is sufficient to allow an officer to testify that the machine is accurate. *People v. Harges*, 87 Ill.App.2d 376, 231 N.E.2d 650 (1st 1967); *People v. Krueger*, 99 Ill.App.2d 431, 241 N.E.2d 707 (1st 1968).

II. Existence of a defect or Safe Way of Proceeding

A. A person with knowledge of the product or process may give an opinion as to the product or process.

B. Actual experience with the product or process is not an indispensable requirement.

1. A person who has read and studied about coal fumes can testify that they are unhealthy. *Citizens Gaslight & Heating Co. v. O'Brien* 19 Ill.App. 231 (1885).

2. A chemist can testify as to the defect in an exploding boiler, even if all this expertise was gained under laboratory conditions. *Koslinski v. Ill. Steel Co.* 213 Ill. 198, 83 N.E. 149 (1907).
3. A machinist mine worker may testify that the tools used for cutting steel are unsuitable for that purpose, even though he had never cut steel. *Vogt v. Southern Coal, Coke & Mining Co.*, 210 Ill.App. 620 (1918).
4. A mechanic with thirty years of experience is competent to give an opinion of a defect at the time of manufacture. *Wolczak v. General Motors*, 34 Ill.App.3d 773 340 N.E.2d 684 (4th 1976)
5. A mechanic can testify that the steering mechanism was defective even though he had not examined this particular steering mechanism. *Bollmeier v. Ford Motor Co.*, 130 Ill.App.2d 844, 265 N.E.2d 212 (5th 1970); *Nowakowski v. Hoppe Tire Co.*, 39 Ill.App.3d 155, 349 N.E.2d 578 (1st 1976).

C. A person may qualify as an expert by practical training or by education.

1. Education: Professor of Agriculture Engineering can testify as to what guards should be on certain types of farm machinery. *Hardware St. Bank v. Cotner*, 55 Ill.2d 240, 302 N.E.2d 257 (1973). A Ph.D. in Chemical Engineering can give an opinion as to how a factory producing sodium hypochlorite should have been constructed. *People ex. rel. Scott v. Steelco Chemical Corp.* 22 Ill.App.3d 582, 317 N.E.2d 729 (1st 1974).
2. Training: Former Workman could give an opinion on safety of area where scrap iron was dropped. *Supolski v. Ferguson-&-Lange* Foundry Co., 272 Ill. 82, 111 N.E. 544 (1916). The cause of a fire can be testified to by a person with twenty-five years of experience, even though he had taken no college level courses. *Davis v. Marathon Oil Co.* 28 Ill.App.3d 526, 330 N.E.2d 312 (4th 1975).

D. There is no "locality" rule in determining who is an expert in this area. *Sheldon Livestock Co., v. Western Engine Co.*, 13 Ill.App.3d 993, 301 N.E.2d 485 (2d 1973).

III. Cause and Effect

A. *Observation:* The courts seem to be stricter in qualifying experts to testify on whether a defect caused certain injuries. Some courts seem to require that the witness be knowledgeable in both the product where the defect occurred and that which was injured.

B. *One test* used by appellate courts is whether "the expert discloses sufficient knowledge of his subject matter to entitle his opinion to go to the jury."

C. Examples where expert testimony has been upheld:

1. A chemist is competent to testify as to the causal connection between the density of a wheel and its likelihood of destruction. *Taylor v. Carborundum,* 107 Ill. App.2d 12, 246 N.E.2d 988 (1st 1969).
2. An acquatics professor may testify that the force of a person coming off a pool slide could cause them to hit a floating chair, and hitting a floating chair could cause plaintiff's injuries. *Becker v. Acquaslide* 'N' Drive Corp, 35 Ill.3d 479, 341 N.E.2d 364 (4th 1975).

D. Examples where expert testimony has been disapproved:

1. An industrial engineer who is familiar with fire pots cannot testify as to whether a fire pot could ignite bluejeans because he was not an expert in the combustibility of materials. *Gibson v. Healy Bros. & Co.,* 109 Ill.App.2d 342, 248 N.E.2d 771 (1st 1969).
2. A person who has serviced vending machines for fifteen years could not testify as to whether the glass ball on the vending machine broke when the plaintiff hit it or whether it broke when it came into contact with a wall. The expert had no experience with the tinsile strength of glass globes. *Hagerman v. National Food Stores,* 5 Ill.App.3d 439, 283 N.E.2d 321 (2d 1972).
3. A hair dresser cannot testify as to whether a "flammable" warning should have been placed on a can of hair spray because he did not know the chemical ingredients of hairsprays. *Hardman v. Helene Curtis Industries,* Inc., 48 Ill.App.2d 42, 198 N.E.2d 681 (1st 1964).

Trade Usage and Value of Personalty

I. *General Rule:* Any person familiar with the trade can testify to the general practice in such trade. Any person generally familiar with personal property can testify to its value.

II. *Observation:* The courts seem more liberal here than in the preceeding areas. Only a minimal showing of familiarity with the field seems to be necessary.

III. Examples:

A. An architect may give an opinion of the cost of repairing a roof. A roofer is not necessary. In this case the trial court's ruling excluding the expert was reversed. *Frazen v. Dunbar Builders Corp.,* 132 Ill.App.2d 701, 270 N.E.2d 118 (1st 1971).

B. Fruit wholesalers may give an opinion of the wholesale price of fruit in another state, even if they have never been there. *J.J. Jackson & Sons v. N.Y. Central & H.RR. Co.*, 167 Ill.App. 461 (1912).

C. The vice-president of a meat-buyers firm is competent to give an opinion as to the custom of taking the temperature of meat. *Oakland Meat Co. v. Railway Exp. Agency*, 46 Ill.App.2d 176, 196 N.E.2d 361 (1st 1964).

D. The president of a company can testify to the value of its destroyed products. *Flight Kitchen Inc. v. Chicago 7-Up Bottling Co.*, 22 Ill.App.3d 558, 317 N.E.2d 663 (1st 1974).

E. Any car owner may testify to the value of his car even if he is not in the business of buying and selling cars. *Adams v. Ford Motor Co.*, 103 Ill.App.2d 356, 243 N.E.2d 843 (5th 1968).

F. A physical education instructor can testify as to the safe distance between a "fastpitch" baseball game and other playing youngsters. *Stanley v. Board of Education*, 9 Ill.App.3d 963, 293 N.E.2d 417 (1st 1973).

IV. Special Area: Attorney's Fees

A. Only attorneys living in the area where the services were performed can testify to their value. *Sullivan v. Fawver*, 58 Ill.App.2d 37, 206 N.E.2d 492 (2d 1965).

B. Thus an insurance claims agent may not give such an opinion. *Bowman v. Ill. Cent. R.R.*, 9 Ill.App.2d 182, 132 N.E.2d 558 (1st 1956).

Medical Testimony

I. A person who is medically trained may testify as an expert to a medical problem, so long as they have some familiarity with the medical area. *Barnes v. Danville St. Ry & Light Co.*, 235 Ill. 566, 85 N.E. 921 (1968). *Neiner v. Chicago City Ry. Co.*, 181 Ill.App. 449 (1913).

A. It is not required that the doctor have a specialty in the area.

1. Thus, an ordinary doctor may express an opinion on sanity, *People v. Geary*, 297 Ill. 408, 131 N.E.2d 97 (1921); *People v. Chism*, 6 Ill. 2d 262, 128 N.E.2d 729 (1955).

2. The doctor, who is not a pathologist may testify that the deceased died of arsenic poisoning. *Siebert v. People*, 143 Ill. 571, 32 N.E. 431 (1892).

3. A doctor, who is not an ear, nose, and throat specialist may testify as to hearing loss. *Shang v. Johnson*, 29 Ill.App.3d, 330 N.E.2d 265 (2nd 1975). The fact that he was not a specialist goes to the weight of his testimony.

B. *Exception:* If the doctor admits that he knows nothing about the area, his testimony should be refused. *Panepinto v. Morrison Hotel, Inc.* 71 Ill.App.2d 319, 218 N.E.2d 880 (1st 1966); *Sesser Coal Co. v. Industrial Comm.*, 296 Ill. 11, 129 N.E. 536 (1920).

II. Non-medical personnel may be qualified to give an opinion on medical questions.

A. A coroner may testify as to the onset of *rigor mortis. Hocher v. O'Klock*, 16 Ill.2d 414, 158 N.E.2d 7 (1959).

B. An X-ray technician may testify that the X-ray is that of the patient. *Krauss v. Ballinger*, 171 Ill.App. 534 (1921).

C. A clinical psychologist may give an opinion on the existence of an organic injury. *Buckler v. Sinclair Refining Co.*, 68 Ill.App.2d 283, 216 N.E.2d 14 (5th 1966). The court used the following test: "To render an opinion an expert need only possess special skill or knowledge beyond that of the ordinary layman."

D. A medical assistant may testify as to how a wound should be dressed. *Piacentine v. Bonnefil*, 69 Ill.App.2d 433, 217 N.E.2d 507 (1st 1966).

E. A chiropractor may testify to a spinal injury. *Voight v. Industrial Comm.* 297 Ill. 109, 130 N.E. 470 (1921).

F. A chemist can testify to the amount of wood alcohol in the stomach and whether that amount is sufficient to kill a person. *People v. Cox*, 346 Ill. 111, 172 N.E. 64 (1930).

G. A Ph.D. in organic chemistry may testify as to how long it would take a drug to induce a coma and how long it would take someone to die of carbon monoxide poisoning. *People v. Richards*, 120 Ill.App.2d 313, 256 N.E.2d 475 (2d, 1970).

H. *Exception:* A psychologist has been held incompetent to give an opinion on sanity. The court said only a psychiatrist could do so. *People v. Gillam*, 16 Ill.App.3d 659, 306 N.E. 352 (3d 1974) *People v. Felton*, 26 Ill.App.3d 395, 325 N.E.2d 400 (3d 1975).

III. Effect of Licensing

A. An intern who at the time of the examination is not qualified to be licensed in Illinois may give an opinion as to cause of death. *People v. Heissler*, 338 Ill. 596, 170 N.E. 685 (1930).

B. However, a psychologist who does not meet the qualification to receive a license in Illinois may not give an opinion as to whether a person should be committed. *Matter of Wellington*, 34 Ill.App.3d 515, 340 N.E.2d 31 (1st 1975).

IV. Malpractice: It has not been decided whether the plaintiff's expert must have the same degree of specialization as the defendant. However, it is not error to allow a doctor with a specialty to testify against a general

practitioner. *Stogsdill v. Manor Convalescent Home, Inc.* 35 Ill.3d 634, 343 N.E.2d 589 (2d 1976).

Topic II—RECENT DEVELOPMENTS IN CIVIL LAW

A. Summary of Advance Reading Materials

Part I (Cases)

I. Negligence Status
- Definition of Categories and Duties
- Trespassers, Invitess, Public Officers
- Abandonment of Categories

II. Punitive Damages
- Functions
- When Appropriate
- Double Recovery
- Complicity Rule

III. Automobile Guest Statute
- Burden of Proof
- Recovery by Guest
- Standard of Care
- Guest or Passenger

IV. Wrongful Death
- Generally
- Recoverable Damages
- Contributory Negligence

V. Negotiable Instruments
- Consideration
- Confession of Judgment
- Delivery
- Creditors/HDC
- Rights of Parties
- Bona Fide Purchasers

VI. Domestic Relations
- Fault in Divorce
- Custody & Support
- Collusion
- Contempt
- Post-Decree

VII. Alimony & Property Dispositions in Divorce

VIII. Landlord — Tenant
- Injuries — Failure to Repair
- Injuries — Negligence in Repair
- Latent Defects
- Duties to Third Persons
- Damages

IX. Structural Work Act
- Purpose of Act
- Person Having Charge
- Definitions of Scaffold, etc.
- Who is Protected
- Contributory Negligence

X. Questions for Discussion

Part II

XI. Revised Jury Instructions (Strict Liability) — Questions

XII. Revised Jury Instructions (Indemnity) — Questions

B. Summary of Discussions

Report of Professors Richard C. Groll and Donald H. J. Hermann

The Professor/Reporters wish to acknowledge the leadership and contributions of the members of the Committee on Recent Developments in Civil Law. Especially, we wish to thank Hon. E. Harold Wineland, Chairman, and Hon. Harold L. Jensen, and the Hon. William F. Patterson. Judge Jensen fulfilled the responsibilities of Vice-Chairman, when Hon. Benjamin S. Mackoff was unable to attend the Judge Seminar. The Hon. Henry Lewis served as Liaison Officer.

The development of the advanced reading materials, and the time spent at the actual seminar sessions, consisted of a division into two general subject categories. The first part described and digested a series of recent cases which were thought to be of significance. In order to stimulate discussion and analysis of these cases, a series of problems were written by the Professor/Reporters and used extensively for purposes of discussion. The recent cases were in the following substantive areas: Status of invitees, licensees and trespassers in relation to premises tort actions; punitive damages; problems relating to the status of a guest in an automobile; wrongful death and survivorship rights; negotiable instruments; domestic relations, custody and divorce; landlord-tenant; and the Structural Work Act.

For purposes of discussion at the seminar sessions, primary emphasis was placed upon status questions in tort law, including premises torts, automobile accident cases and landlord-tenant.

The second half of the advanced reading materials and one-half of the discussion at the actual seminar sessions were devoted to the Illinois Pattern Jury Instructions — Civil, recently drafted in the areas of *Strict Liability* and *Indemnity.* A complete set of the new IPI instructions in these areas was supplied to all judges in attendance by the West Publishing Company and provided the basis for a stimulating and sometimes heated debate.

SEMINAR DISCUSSION AND ANALYSIS:

(1) Status of Invitees, Licensees and Trespassers: After extensive discussion of a rather elaborate problem set forth in the reading materials, it seemed reasonably clear that the majority of the judges in attendance were completely familiar with the classic common law analysis upon which a visitor on the premises could (and when he could not) claim relief. A substantial percentage of those in attendance, however, expressed the notion that the classical distinctions between a "business invitee" and "a licensee" and the different standard of care owed by the occupant according to these classifications should be abolished. Most took the position that justice would be better done if both categories of visitors were treated in the same way — i.e., the occupier of the land owed a duty of ordinary care to the visitor which would render the occupier liable if he was negligent in the maintenance of the property and that negligence proximately caused injury.

While the judges found it easy to state the law relative to the status of public servants (e.g., firemen), it was found to be more difficult to uniformly apply that law to the resolution of a complicated fact situation. The central problem appeared to be the resolution of what risks a fireman should reasonably anticipate (e.g., the fire) and that risk a fireman would not anticipate (e.g., an open elevator shaft) and hence be able to recover as against the land occupier. This area should be reinserted at future seminar sessions.

(2) Punitive Damages: A rather clear and straightforward discussion of this area was conducted at each of the three seminar sessions. There was a good clear understanding of the case law and a sense of confidence that most problems were dealt with in this area. One problem area, however, presented itself: if an underlying judgement is rendered against a defendant and there is a prayer for punitive damages, when and how does the trial judge handle the capacity of the plaintiff to introduce evidence of the net worth of the defendant? Many judges expressed the belief that it was prejudicial to the defendant to introduce (or permit the plaintiff to intro-

duce) evidence of the defendant's net worth until the jury had rendered a verdict for the plaintiff. In this bifurcated trial approach, the jury after verdict/judgment would be permitted to hear evidence on the question of punitive damages, including evidence on the net worth of the defendant.

In addition, some judges felt that if the net worth of a defendant was a relevant factor for the jury's determination of the amount of punitive damages, if any, then the plaintiff ought to be able to introduce, at the post-verdict moment, the fact that the underlying judgment was paid by insurance. Or, if the introduction of the concept of insurance was considered so very against Illinois public policy that at least the plaintiff ought to be able to say: "Notwithstanding the judgment, the defendant has a net worth of____. . . ." This latter language in essence saying the amount of monies available solely for the purpose of satisfying any award of *punitive damages*. Without this capacity, the fear was that the jury would add the underlying judgment to a potential award of punitive damages determined by an estimate of the net assets of the defendant including an estimate of insurance coverage which may or may not be included in the defendant's portfolio.

Clearly, clarification of the method of handling claims for punitive damages is in order. While the case law or black letter principles are understood by the judges, the mode of implementation at the trial court level is not.

(4) Landlord-Tenant: There was a considerable discussion of the circumstances under which a landlord would be liable, in tort, for consequential damages arising from an injury suffered by a tenant, a tenant's guest, or a member of the tenant's household. There was an extensive discussion of the classic common law rules which center on the notion of *caveat emptor*. This was analyzed in light of recent cases which apply the classic differences between a latent and a patent defect. The common law rule renders a landlord liable for injuries suffered by a tenant as a result of a latent defect existing on the demised premises at the commencement of the lease term where the landlord had actual or constructive notice, but insulates the landlord where the defect was patent (i.e., could have been discovered by the tenant upon making a reasonable inspection of the premises).

Some judges in attendance expressed the notion that since the Illinois Supreme Court has created a higher standard of care via *Spring v. Little* (i.e., in relation to the liability to pay rent, the landlord must turn over to the tenant premises which are in substantial compliance with applicable building codes) that this high obligation should also govern tort liability. It was expressed that if a defect on the demised premises is such that the premises are *not* in substantial compliance with applicable building codes then whether the defect is latent or patent, tort liability should be imposed upon the landlord should the defect be the proximate cause of injury to the tenant, a guest or a member of his household.

In addition to the foregoing, there was a discussion of the instances where a landlord will be liable for the injuries sustained by a tenant on a common passageway (i.e., straight tort concept) and where a landlord voluntarily undertakes repairs but discharges them negligently.

Finally, there was considerable discussion of *Stribling v. Chicago Housing Authority,* 34 Ill. App. 3d 551 (1975) wherein a duty was imposed upon a landlord for security within a multi-unit residential building. The landlord having notice of the presence of uninvited guests was held liable for subsequent burglaries. Many in attendance felt that this case placed on unreasonable burden upon a landlord as the potentiality for a constantly escalating duty would necessarily be created.

(5) *Renslow v. Mennonite Hospital* (August 8, 1977): At each seminar session, there was a brief discussion of this most recent case. The judges were fascinated by its revolutionary holding that a child could potentially recover for injuries (i.e., pre-natal) inflicted upon the mother prior to the conception of the child. In the case, doctors infused a 13 year old with blood of an inappropriate RH factor more than 8 years prior to the conception of the plaintiff. The subsequently born plaintiff suffered malady by reason of this conduct. The Illinois Supreme Court, in a series of opinions, held that if the conduct was not consistent with accepted practices at the time of the transfusion and it could be reasonably foreseen that the conduct would cause injury to a subsequently born (even though not yet conceived) child, then the defendant could be liable.

The majority in attendance felt that this case would have to be studied — and, studied more — before they would have the ready capacity to apply it outside of the confines of the basic facts of the case. In general, there was an expression that it should form the basis of a future seminar discussion, perhaps, one that centered on the tort ramifications in new biology and the like.

(6) Structural Work Act: At each session there was a brief discussion of a complicated problem in this area. Most judges displayed an understanding of the basic problems encountered in a case predicated upon the act; however, as always, two matters seemed to be confused. What is a scaffold? And, what degree of control of supervision is required for liability?

ILLINOIS PATTERN INSTRUCTIONS—STRICT LIABILITY

In general, the judges expressed appreciation that instructions in this area had been drafted and felt somewhat relieved that they would be in a better position to handle cases based upon strict liability because of their existence. A series of problems were discussed at great length and a substantial percentage of the judges were critical of the summation of the case law set forth in the commentary to the Instructions and certain crucial decisions with respect to the Instructions.

(1) "Unreasonably dangerous": The authors of the new instructions chose to describe the condition of a product which would be the basis of a cause of action as one which is unreasonably dangerous. While some prior decisions refer to products which are "not reasonably safe" as possessing those attributes sufficient to warrant recovery, the authors decided that the two terms were the same. A substantial number of those in attendance believed they were not. Indeed, many felt that the words chosen (i.e., unreasonably dangerous) established a significantly greater amount of proof by the plaintiff than convincing a jury that the product in question was not reasonably safe.

At the conclusion, at best the judges felt that there was advantage in the consistent use of one term, but were under the belief that this language represented a potential tightening of the ability to recover.

The language is, of course, a departure from the classic definition established by Dean Prosser of a "defective product." In that sense, it has definite advantages. The instruction would more clearly conform to the state of the case law that not only are defective (i.e. bastard) products included but design and problems involving a failure to appropriately warn are covered by the concept.

(2) Affirmative Defenses: The decision by the drafters that misuse is not an affirmative defense, but rather is an integral part of the basic elements of the plaintiff's cause of action (i.e., are incorporated as part of the definition of what is, or constitutes, an unreasonably dangerous product) was not viewed as either wise or appropriate by many members of the judiciary in attendance.

Having made the decision relating to misuse, the instructions now envision that only assumption of the risk is an affirmative defense (i.e., one where the defendant has the burden of proof).

(3) Misuse: There was some discussion on the basic definition of an unreasonably dangerous product in what the use which generated the injury must be evaluated in light of the "nature and function of the product." Many judges have become quite accustomed to language which refers to the producers "intended use." Most felt that evaluation of the use which generated the injury should not be controlled by whatever was intended by the manufacturer and, hence, the language of the IPI was much to be preferred.

There was, however, considerable discussion centering upon the decision not to include a separate instruction defining misuse. While opinions were mixed, many felt uncomfortable. It was the view of many that trial attorneys (especially defense counsel) will seek to include a definition and no standard provision is agreed upon.

(4) Assumption of the Risk: The most heated discussion involved the decision not to include a definition of the affirmative defense. While there is some language which makes reference to assumption of the risk (see:

400.05), there is not clear definition (e.g., if you prove the following, the defendant has established that the plaintiff assumed the risk and, therefore, no liability).

Most judges expressed the view that defense counsel, especially in cases where this defense is crucial, will insist upon a definition and none is present.

The problem envisioned stems from the analysis of the authors of the IPI which indicate, quite correctly, that the standard for determining whether a product is unreasonably dangerous is objective (i.e., reasonable man) while criteria for determination of assumption of the risk is subjective. This being the state of the case law, how is it possible for the jury to render verdicts consistent with the law without an adequate explanation. Most judges felt that there was nothing mysteriously sacred about the words "assumption of the risk."

ILLINOIS PATTERN INSTRUCTIONS — INDEMNITY

Discussion in this area occupied the least of the seminar time. There was a general feeling that the instructions in the area were appropriately drawn and were clear cut. The principle discussion centered upon the new definitions and use of the term "major fault," and the abandonment of the "active" and "passive" conduct distinctions. Some concern was expressed that the subject matter of "Pre-tort" relationship," which is not covered in the instructions since it is a matter of law to be ruled on by the court, was not as fully explained in the commentary as it should be since the commentary will to some extent be regarded as providing a "restatement of the law."

Further concern was voiced that the problem of fault weighing continues as long as indemnification remains the only way of resolving questions of liability between tort feasors. The qualitative rather than quantitative distinction is not made any more easily understood by these instructions or commentary. Most judges expressed the hope that comparative negligence will become the law in Illinois and reduce the need for further refinement of the law of indemnification.

Topic III—CRIMINAL LAW

A. Summary of Advance Reading Material

Contents

XII. Pretrial Identification
XIII. Pre-Indictment Delays
XIV. One Incident, Two Criminal Offenses
XV. State's Burden of Proof
XVI. Testimony Regarding Prior Convictions
XVII. Judicial Notice
XVIII. Hearsay Testimony
XIX. Use of Testimony From Preliminary Hearing
XX. Surprise Rebuttal Witness
XXI. Variance Between Charge and Proof

B. Problems for Discussion

PROBLEMS FOR DISCUSSION

Problem 1

People of the State of Illinois v. Zisk

On May 8, 1977 bus officials observed the defendant, Billy Zisk, and Manny Buckner unload a large brown footlocker from a bus storage compartment. Their suspicions were aroused when they noticed that the trunk was unusually heavy for its size, and that it was leaking talcum powder, a substance often used to mask the odor of marijuana. The officials called the police and the department sent down its special two person drug enforcement team, which was accompanied by Benji, a police dog trained to detect marijuana. While Zisk and Buckner paused for a cup of coffee Benji sniffed the locker and signalled the presence of a controlled substance inside. Zisk then pulled his auto to the loading area and he and Buckner loaded the locker into the trunk of the car. At that point, while the trunk of the car was still open and before the engine had been started the officers placed Zisk and Buckner under arrest.

The car and the locker were both brought down to police headquarters. Without asking permission and without obtaining a warrant the officers forced open the locked locker (finding the marijuana) and then conducted a search of the vehicle. Pursuant to Police Department policy the officers opened the glove compartment — which was closed but not locked — and found there a small quantity of cocaine. At the appropriate pretrial time the

defendants challenged the seizure of the two items, and also challenged the amount of bail which had been set for them. Both challenges were unsuccessful due to the forceful arguments made by Assistant States Attorney Frank Herman. Immediately thereafter Buckner decided to cooperate with the authorities and advised them that Zisk was the true moving force behind the criminal endeavor. He also told them that he would testify against Zisk at trial, but only if he received an around-the-clock guard as "Zisk is a tough and dangerous guy." Such protection was provided, at a cost of $9500.00.

The case against Zisk was then set for trial. The public defender was appointed to represent Zisk. The deputy assigned to the trial was Frank Herman, who had taken the job one week earlier. Immediately prior to trial two important events took place. First, Zisk asked for a private attorney stating that the public defender would not do a good job for him as the lawyer worked for the government and was not a private lawyer. Second, during the opening argument of Herman for the first time the sufficiency of the indictment was called into question. The trial judge said he would consider the matter later, as witnesses were waiting. After the prosecution presented its case, the judge agreed with Herman that there was a defect in the indictment, but refused to say that the government could not dismiss the case and file a new indictment. After the new indictment was filed the case proceeded to trial.

Zisk offered one main defense at the jury trial, that Buckner owned the locker and that Buckner had planted the cocaine in the car. Buckner disputed this testimony. Defense counsel requested the following instruction with respect to Buckner's testimony:

> "Where a witness says he was involved in the commission of a crime with the defendant, that testimony of that witness is subject to suspicion, and should be considered by you with caution. It should be carefully examined in light of other evidence in the case. It should also be carefully examined in light of lack of other evidence in the case."

The prosecution objected to the proposed instruction but indicated that it would be willing to have I.P.I. Criminal No. 3.17:

> "An accomplice witness is one who testifies that he was involved in the commission of a crime with the defendant. The testimony of an accomplice witness is subject to suspicion, and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case."

The defense lawyer objected to this instruction as well. The final result was that no specific accomplice instruction was given, but the jury was instructed to judge the credibility of witnesses generally. The jury convicted the defendant on both drug counts.

On appeal the defendant has preserved every issue which could be raised, will he win on any of these issues?

QUESTIONS TO CONSIDER

1. Was there probable cause for the arrests of Zisk and Buckner?
2. Was the search of the car, resulting in the seizure of the cocaine, lawful?
3. Was the search of the footlocker, resulting in the seizure of the marijuana, lawful?
4. Would your answer to 3 change if the defendants were arrested after they had driven away and the footlocker searched on the road at the time of the arrests?
5. Would your answer to 3 change if the footlocker had been put in the back seat of the car rather than the trunk?
6. Can the city police successfully recover the $9500.00 from Zisk?
7. Was it error for the trial court to allow Herman, the deputy public defender, to represent Zisk?
8. If there was error in 7, was it harmful error without any specific showing of prejudice to the defendant?
9. Did the judge violate the double jeopardy rights of the defendant by allowing the case to proceed to trial after the indictment had been dismissed subsequent to the presentation of the government's case?
10. Did the trial judge err in not giving the defendant's instruction? Did he err in giving no accomplice instruction at all?

Problem 2

People v. Dan Defendant

Dan Defendant has been indicted for Aggravated Kidnapping (ch 38 § 10-2). At his trial the prosecution wishes to admit a testimony regarding an oral admission by Defendant and testimony that the kidnapped child was found in Defendant's apartment building. The facts are as follows:

On June 1, 1977, three year old Billy Smith went to play in the front yard of his home while his mother remained inside doing housework. Shortly thereafter, Judy Jones, a 4 year old child who lived next door, rang the doorbell. She told Mrs. Smith that she had just seen Billy drive away with a man and she wanted to know if he would be back to play that afternoon. After quickly checking outside to see if she could find Billy, Mrs. Smith called the police.

After an hour of looking at photographs in the police station, Judy Jones said that Dan Defendant looked like the man she saw drive off with Billy.

The police found Dan at his apartment and promptly put him under arrest. They searched the apartment, his car and the common area of the apartment building, but they found no trace of Billy.

They gave Dan the *Miranda* warnings and asked if he would waive his rights. He responded: "I want to see my attorney, Nate Netherlands." Police Detective Wojak, who was in charge of the investigation, told him he could see his lawyer at the station. There were no further discussions at this time.

At the police station, Dan Defendant was "booked" as having been arrested for kidnapping. At this time, Defendant was allowed to call his lawyer, Nate Netherlands. The attorney told Defendant to "keep his mouth shut." Attorney Netherlands talked over the phone with Detective Wojak and told him that he couldn't be there for 3 hours and that he did not want Defendant interrogated until then.

Detective Wojak decided to have Judy Jones, the neighbor, verify her identification. He brought Defendant into a small interview room where Judy and Mrs. Smith were waiting. Judy said, "he's the one," and Mrs. Smith began crying hysterically.

Detective Wojak then took Defendant to a cell. He said: "If you had any decency left in you, you would make sure the little kid got back alive. The little boy didn't hurt anyone and if something happens to him it will go hard on you. I'll be back in 15 minutes, think about it."

When Wojak returned, Defendant said he wanted to talk. Detective Wojak then read him the full *Miranda* warnings. Defendant stated that he understood his rights and he signed a standard waiver form. He then told Wojak that the child was tied to a bed in the apartment next to his. (His neighbor had gone away for the week and left a key with Defendant).

The police found Billy in the apartment; he was exhausted but otherwise unhurt. Unfortunately, being only 3, the child's statement is rather vague and the contested items seem necessary to support a conviction.

What ruling should be made on the statement or the location of the child?

Issues

1. Was there probable cause for arrest?
2. What is the obligation of police under *Miranda* when a defendant requests a lawyer?
3. Did the booking procedure constitute a basis for finding that there is independent right to counsel problem here?
4. Was there any "interrogation" of Defendant?
5. Did the last warning-waiver constitute a sufficient waiver of fifth and sixth amendment rights in view of the earlier events?

6. If Defendant's statement is excluded, must police testimony regarding the location of the child be suppressed as the "fruit" of a fifth or sixth amendment violation?

Problem 3

Discussion Topic — The Illinois Death Penalty Statute

On June 21, 1977 the Governor signed into law a statute allowing the imposition of the death penalty in certain cases. The new law amends Chapter 38 Sec. 9-1, Chapter 38; Sec. 1005-5-3; and Chapter 38, Sec. 1005-8-1A. Copies of the provision will be distributed separately.

There will be a discussion of the way in which the statute will operate in an individual case and a brief comparison of the law with prior cases. *Some points* to note about the changes to the murder statute: (1) the provision allows for the death penalty only for murder convictions; (2) the sentencing jury or judge may consider aggravating and mitigating circumstances not listed in 9-1 (b) & (c) *but* the sentencing body must find that one of the listed aggravating factors in subsection (b) is present or the death penalty may not be imposed; (3) there is a separate sentencing hearing at the request of the state to consider imposition; (4) the hearing may be before the same jury, a new jury or the judge as listed in subsection (d); (5) the existence of the aggravating factors listed in subsection (b) [which are prerequisites to imposition of the death penalty] must be proven beyond a reasonable doubt *and* in accord with the rules of evidence at criminal trials; (6) the sentencing Jury (if there is a jury) controls the imposition of the sentence; (7) the jury must be unanimous to impose the sentence; (8) the finding of either the jury or judge must include a finding that a section (b) aggravating circumstance exists and that there is no mitigating factor sufficient to preclude the sentence; (9) there is automatic review by the Illinois Supreme Court; (10) appropriate changes are made to the Unified Code of Corrections.

Discussion of the statute will include a brief discussion of the constitutional principles involved. In 1976 the Supreme Court of the United States upheld three statutes which allowed for the discretionary imposition of the death penalty where there were objective standards and rules to control the discretion of those charged with imposing the penalty, Profitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960 (1976); Jurek v. Texas, 428 U.S. 262, 96 S. Ct. 2950 (1976). Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909 (1976). The Court struck down statutes which had mandatory death sentences for certain crimes. Woodsen v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978 (1976); Roberts v. Louisiana, 428 U.S. 325, 96 S. Ct. 300 (1976). These cases were not decided with a majority opinion. Justices Brennan and Marshall voted to strike down the death penalty under the Eighth Amendment prohibition against cruel and unusual punishment. Chief Justice Burger and

Justices White, Blackman and Rehnquist voted to uphold the use of the death penalty in all five cases. Justices Stewart, Powell and Stevens voted to allow the discretionary systems in the first three cases but to invalidate the mandatory systems. It was these three "swing" votes who accounted for the differing results.

The Supreme Court of Illinois invalidated our last death penalty statute in *People ex rel. Rice v. Cunningham*, 61 Ill. 2d 353 (1975). That statute (1005-8-1A) was found to violate the judicial article in the creation of 3 judge courts and appeals of these cases to the appellate court; the court also held that there were insufficient guidelines for determining the existence of mitigating factors under the statute.

Note: For the most recent cases on the death penalty see the outline.

Problem 4

People of the State of Illinois v. Bobick

The defendant, Wayne Bobick, was convicted in Circuit Court of aggravated battery and obstructing a police officer, in violation of sections 12-4(b) (6) and 31-1 of the Illinois Criminal Code. The court entered judgment on both verdicts, but only sentenced the defendant for the offense of aggravated battery, issuing a sentence of 3-9 years. The pertinent facts follow: On December 13, 1976 two police officers, Frazier and Foreman, were called to the Manila Bar by the owner to investigate a brawl between a number of patrons. As they arrived at the scene, they saw two women fighting in the parking lot — while trying to break up the fight, Frazier was hit from the rear with "a heavy object". He never saw the assailant. Foreman did not get a good look at the assailant, but saw him well enough to give the following description: "White male in his mid-twenties, dark skin, about 5'9", weighing about 165 pounds". After the incident, Foreman took Frazier to the hospital where he was treated for severe lacerations.

The following day the two officers came back to the bar to try to find out the name of the assailant. The bartender did not see the assailant, but gave the officers the names of two persons who might have. Both these persons said they did see the assailant, but would only give information to the officers if, as one put it, "I do not have to testify, because I am afraid." The first witness, a young woman, stated that she did not know the assailant, but that he was "about 5'9" tall, medium build, and he had a dark complexion." The second witness, an older man, told the officers that the assailant was Wayne Bobick, and further gave the officers Bobick's home address. The officers immediately went to the address, which was a large apartment house, and had the landlord open Bobick's door with his master key. There was no one in the living room, so they went into the bedroom where they

found the defendant (who fit the description) sleeping on his bed. They woke the defendant, and placed him under arrest. They also seized from the bureau next to the bed, a heavy blunt object referred to as a "black jack."

Prior to trial defendant moved to quash the arrest and suppress the black jack. The defense position was that the arrest was either without probable cause, or was invalid because it was not made pursuant to an arrest warrant. The motion was denied and the case went to trial. The chief defense offered at trial was that Bobick suffers from an illness known as psychomotor epilepsy. Bobick has a long history of violent attacks, and indeed was convicted on separate occasions of involuntary manslaughter and aggravated assault. Substantial evidence in the form of testimony of a psychiatrist was offered to show that Bobick suffers from the disease and that the disease prevents the conscious mind from controlling the actions of the sufferers. In sum, Bobick conceded that he did assault the officer, but contended that his act was not a knowing act, hence was not voluntary. In response to this argument the trial court instructed the jury on the insanity defense, Illinois Pattern Jury Instructions, Criminal No. 24.01 (1968), over the defendant's objection. The jury convicted the defendant on both counts.

On appeal the defendant has preserved every objection raised below. Will he prevail on appeal?

QUESTIONS TO CONSIDER

1. Was there probable cause to make the arrest?
2. Would the probable cause issue be easier for the state if it is shown that the male informant had previously given reliable information which led to a conviction?
3. Is the fact that the two witnesses were "citizen-informants" sufficient to establish probable cause?
4. Was the arrest lawful, did the police have to get an arrest warrant prior to entering the apartment? Would they if they stopped the defendant in the parking lot?
5. Would the answer to 4. change if the officer had been struck in the head by the butt of a gun rather than an unknown "blunt object"?
6. Was the seizure of the black jack lawful?
7. Would the answer to 6. change if the black jack was found in the kitchen? In the living room?
8. Is the defendant's objection to the insanity defense valid, should a separate instruction have been given as to the involuntary act defense? Are the two the same?
9. If the defendant is correct, did he waive his claim by failing to tender a correct instruction?

10. Can the defendant be convicted of both aggravated battery and obstructing a police officer?

Problem 5

People v. Bumm

Bill Bumm is going to trial on a charge of attempted theft and burglary. The prosecution wishes to introduce testimony concerning three statements made by Bill, the facts are as follows:

At 8 p.m. on April 1, police officer Tom Tribe was patrolling in his squad car when he saw Bill Bumm, who he suspected of being involved in a series of burglaries in the neighborhood. Tribe stopped Bill and asked him if he would come to the station to discuss the robbery of two local gas stations that had taken place the previous night. Bill responded, "Sure, why not. I'm no armed robber." Bill then got in the squad car and went to the station with Tribe.

At the station Officer Tribe did not advise Bill of any rights and the two got in a wide ranging conversation. In the course of this conversation Bill stated that he had spent the entire evening with Clyde Chum. [This is the first statement.]

During the discussion Tribe got a phone call from his captain, Mike McNeil, who said to him: "I've just heard you have Bill Bumm in there with you — good work! I have gotten a tip that he and Clyde Chum burglarized Calabrezi's Drug Store tonight and got away with a large supply of drugs. You had better arrest him." Officer Tribe thereupon told Bill he was under arrest but he did not specify a charge.

Tribe than gave Bumm the full *Miranda* warnings. Bill agreed to waive his rights and signed the standard waiver form. Bill's first statement was: "You're making a big mistake, Tribe. I didn't knock over any damn gas station." Officer Tribe replied: "We didn't arrest you for that. Here comes the Captain with your buddy Clyde Chum. We know you guys burglarized Calabrezzi's tonight."

Captain McNeil was bringing Clyde into the squad room in hand cuffs. When Bill saw this he said: "It's all his fault, he talked me into it. Give me a break and I'll help you get him on the other jobs he's pulled." [This is the second statement.]

This case was assigned to an assistant states attorney, Peter Prosecutor. Mr. Prosecutor was not very pleased when he learned that McNeil had the arrests made solely on the basis of an anonymous tip. Realizing that there were some problems with the case, he had Bill Bumm summoned to appear before the grand jury one week later. (Bill had been released on bail following his appearance before a judge at which time the public defender

was appointed to represent him.) In the grand jury proceeding Bill was not given the *Miranda* warnings at any time. After an hour of being asked about a series of burglaries and robberies in the neighborhood, Bill said: "I was only involved in one burglary in my life — the one you guys got me on with Chum." [This is the third statement.]

Are any or all of Bill's statements admissible?

Issues For Discussion

1. Did Officer Tribe need any cause for having Bill come to the station?
2. Was Officer Tribe required to give Bill the *Miranda* warnings initially?
3. Is the arrest valid?
4. If the arrest was invalid do the warnings and waiver make the second statement admissible?
5. Should Bill's remark come under the Miranda rule at all — was there "interrogation" here?
6. Was Prosecutor required to warn Bill of his rights before the grand jury?

C. Summary of Discussions

Report of Professors John E. Nowak and Paul Marcus

Problem No. 1

On appeal the defendant has preserved every issue which could be raised, will he win on any of these issues?

QUESTIONS TO CONSIDER

1. Was there probable cause for the arrests of Zisk and Buckner?
2. Was the search of the car, resulting in the seizure of the cocaine, lawful?
3. Was the search of the footlocker, resulting in the seizure of the marihuana, lawful?
4. Would your answer to 3 change if the defendants were arrested after they had driven away and the footlocker searched on the road at the time of the arrests?

5. Would your answer to 3 change if the footlocker had been put in the back seat of the car rather than the trunk?
6. Can the city police successfully recover the $9500.00 from Zisk?
7. Was it error for the trial court to allow Herman, the deputy public defender, to represent Zisk?
8. If there was error in 7, was it harmful error without any specific showing of prejudice to the defendant?
9. Did the judge violate the double jeopardy rights of the defendant by allowing the case to proceed to trial after the indictment had been dismissed subsequent to the presentation of the government's case?
10. Did the trial judge err in not giving the defendant's instruction? Did he err in giving no accomplice instruction at all?

DISCUSSION OF QUESTIONS

1. Clearly there was, the suspicions generally, coupled with the signalling of the trained dog established probable cause. United States v. Chadwick, 433 U.S. 1, 97 S. Ct. 2476 (June 21, 1977).
2. The search of the car, even without probable cause, can be justified as an inventory search, as it was pursuant to established policy, it was for the protection of the owner's property while it was in police custody and was also for the protection of the police to combat later claims of lost or stolen goods. Moreover, inventory searches are not limited to situations in which the person is not available for purposes of requesting consent or situations in which the goods are discovered in plain view. Absent any showing of improper motives on the part of the officers, the inventory search is valid under both the 4th Amendment to the U.S. Constitution and Article I Section 6 of the Illinois Constitution. People v. Clark, 65 Ill. 2d 169, 357 N.E. 2d 798 (1976).
3. No, the locker was truly a piece of private property, there were no exigent circumstances present (explosives, no place to store the locker, etc.) to justify a warrantless search even though probable cause existed to believe there were drugs in the locker. United States v. Chadwick, *supra.*
4. Justice Blackman, dissenting in *Chadwick,* argues that the search of the locker could then be justified as part of the movable vehicle exception to the warrant requirement. Note, however, Justice Brennan's response in his concurrence:

> While the contents of the car could have been searched pursuant to the automobile exception, it is by no means clear that the contents of locked containers found inside a car are subject to search under this exception, any more than they would be if the police found them in any other place.

5. Again Justice Blackman in *Chadwick* argues that the search of the locker could be justified here as incident to arrest, under Chimel v. California, 395 U.S. 752, if the trunk was in the area under the defendant's immediate control. Such control would be present, according to Justice Blackman, if the locker was on the backseat. Justice Brennan disagreed here, too, finding that the locked locker was not such an item as would justify the *Chimel* exception.
6. No, this issue was resolved against the city in County of Champaign v. Anthony, 64 Ill. 2d 532, 356 N.E. 2d 561 (1976) where the Supreme Court held that such an obligation would impose an excessive burden on the right to bail, Section 9, Article I of the Illinois Constitution.
7. Yes, conflict of interest present. People v. Kester, 66 Ill. 2d 162, 361 N.E. 2d 569 (1977)
8. It was harmful and no specific showing of prejudice is required. *Kester.*
9. No double jeopardy right has been violated, even though the government's case had already been presented when the trial was dismissed. The Court in Lee v. United States, 432 U.S. 23, 97 S. Ct. 2141 (June 13, 1977) stressed the fact that the trial judge acted reasonably in not postponing the presentation of evidence as a result of the tardy motion.
10. The proper accomplice instruction is IPI No. 3.17 and the refusal of the defendant to accept *that* instruction indicates no error, particularly when the defendant's accomplice is subject to cross-examination and the jury is instructed generally as to the credibility of witnesses. People v. Parks, 65 Ill. 2d 132, 357 N.E. 2d 487 (1976).

Discussion Outline for Problem #2

Issue 1.

It should be noted here that the problem does not indicate whether the police arrested Dan and searched his apartment pursuant to an arrest or search warrant. There is no requirement that the police obtain an arrest warrant when they have probable cause to believe that a person has committed an offense. *U.S. v. Watson,* 423 U.S. 411 (1976). However even if the police have probable cause to search a residence the search will violate the fourth amendment unless it is made pursuant to a properly issued search warrant or an "exigent circumstance." *Chimel v. Calif.,* 395 U.S. 752 (1969). In this case the police have exceeded the scope of activities which might be deemed "search incident to arrest". Thus they must justify the search with some other exigent circumstance. The police might be able to show that obtaining a search warrant would have caused substantial delay in the investigation and that there was a need to act without any delay in order to protect the life and well being of the child. While this presents a

difficult theoretical question, it is unlikely that the court would refuse to find an exigent circumstance where in fact the prompt action of the police had resulted in the protection of human life rather than simply protecting other evidence.

Even if the police did not require a search warrant, they still required probable cause to make the search. As the search went beyond the person of the defendant in the area under his immediate control, the police will have to show that they had reasonable grounds to believe that the child (or other evidence of the crime) would have been in the areas they searched which belonged to the defendant. Here it should be noted that there would be no requirement that the police have probable cause for examining the common areas of the building as the defendant almost certainly has no reasonable expectation of privacy in those areas. As to the other areas, if there was reasonable basis for believing that Dan Defendant had taken the child, one could imply a basis for believing that the child (or some evidence of the child's whereabouts) would be in Dan's apartment or car. As the search itself produced nothing it would not be an issue but the question of probable cause for arrest remains the same.

In examining the issue of probable cause for arrest it should be noted that the statement of Judy Jones, the four year old neighbor, need not be subjected to the *Aguilar-Spinelli* test for reliability of informants' statements. Where an anonymous informant (or a named informant in the role of a "tipster") gives statements that are used to establish probable cause the prosecution will have to show *both*: (1) that the informant was known to be a credible source of information and (2) that the statement indicated that the informant received the information in a reliable way. However where the statements used to establish probable cause come from a *witness or victim* of a crime there is no need to establish a "track record" of previous information or further reliability. This is examined in our "Problem 4" (See, *People* v. *Martin,* 46 Ill. App. 3d 943 (1977). While the police have only the testimony of a four year old child, when combined with the absence of the other child and the need to act promptly it is most likely that the reviewing courts would uphold the arrest. (This certainly seems true after the actual identification of defendant by the neighbor.) The Illinois Supreme Court has held that probable cause may be based upon a variety of witness or accomplice statements (and hearsay information) so long as the totality of circumstances indicates probable cause to believe that the defendant committed a crime or that seizable items are in the area to be searched. See e.g., *People v. Clay,* 55 Ill. 2d 501 (1973); *People v. Saiken,* 49 Ill. 2d 504 (1971).

Note on the Child Identification

The "show up" identification of the defendant by the neighbor seems to be proper and it could be related in court. The defendant did not have a

right to counsel here as this was prior to indictment. *Kirby v. Illinois,* 406 U.S. 682 (1972). The test under due process is whether the procedure was "conductive to irreparable mistake." *Manson v. Braithwaite* (page 25 of the outline).

Issue 2.

When the defendant requests an attorney all questioning must stop until the attorney is present. However, the defendant was allowed to contact his attorney before any questioning commenced. In a case where the defendant had not requested an attorney but had sought to cut off questioning, the Supreme Court held that the defendant could be questioned at a later time upon receiving full *Miranda* warnings. See *Michigan v. Mosley,* 423 U.S. 96 (1975). In that case the Court held that the issue was whether the defendant's right to cut off questioning was "scrupulously honored" — whether the facts showed that the police had honored the policy of *Miranda* to insure that the defendant was not subjected to coercive interrogation.

In our example case, the problem is somewhat more difficult because the defendant initially asked for an attorney. The detective's statement came very soon after the time when the defendant invoked the right and he was not given the *Miranda* warning a second time until after the statement and his decision to talk. However, it may be that *Michigan v. Mosley* indicates that *Miranda* need not be mechanically applied and that *the test should be* one of whether the *Miranda* warnings were given and honored by the police in a way in which truly informs the defendant of his rights and seeks to limit the coercive effects of custody. Under such interpretation the statement of the defendant seems to comply with *Miranda.* The Illinois Supreme Court had upheld the "second questioning" practice in *People v. Morgan,* 67 Ill. 2d 1 (1977).

The United States Court of Appeals for the Ninth Circuit also upheld the use of a defendant's statement in similar circumstances in *United States v. Phaester,* 544 F. 2d 353 (9th Cir. 1976).

Issues 3, 4, 5:

It should be noted that issues 3, 4 and 5 all interrelate and together they raise the problem of whether the defendant's Sixth Amendment right to counsel was violated by the police statement and his later response concerning the location of the child. If there is a Sixth Amendment violation, then, at a minimum, his statements regarding the location of the child must be suppressed.

These three issues are all involved applications of *Massiah v. United States*, 377 U.S. 201 (1964) and *Brewer v. Williams* (see outline pages 7 & 8). In *Massiah* federal agents elicited information from a defendant after he had been indicted (and released on bail) outside of the presence of his retained counsel. The Court held that the use of such information constituted a violation of the Sixth Amendment. Because of the *Miranda* rule this separate basis for suppressing information has rarely been used (indeed citations to *Massiah* appear in only twenty-six Illinois Appellate and Supreme Court decisions). The case was given renewed importance last term with the decision in *Brewer*. The issues for discussion here are: (1) does the Massiah-Brewer rule apply prior to indictment, (2) what forms of "interrogation" are covered by the rule, (3) what is necessary to show a waiver of the right.

Issue 3.

This concerns the time at which the Massiah-Brewer rule comes into play. It had been previously thought that the *Massiah* rule applied only after defendant was indicted. However in *Brewer* the Supreme Court applied the rule where a defendant had been arraigned upon a charge specified in an arrest warrant. The opinion stressed that the formal adversary process had been "initiated" at this time. It now seems that we should focus on whether the process has so commenced — rather than the formal issuing of an indictment. Had the defendant been arraigned (or otherwise appeared before a judicial officer who was charged with assigning counsel) it would seem that the adversary process had started so as to invoke the Massiah-Brewer rule. However, in our example, the defendant has not been formally charged as "booking" constitutes only an administrative step in the process rather than the bringing of a charge. Thus, it might be found that the adversary process had not commenced in a way which makes the Massiah-Brewer rule applicable and that the entire issue should be decided on the basis of the *Miranda* issue. However (for purposes of continuing the discussion and examining the later issues) let us assume that *Massiah* is applicable because the defendant has been placed into the criminal justice process and because the police are aware that he has retained counsel. Indeed, the fact that the police were instructed not to talk to the defendant by his counsel may form an independent basis for finding the Massiah-Brewer rule applicable here.

Issue 4.

One might doubt whether this type of generalized statement by the police officer should constitute a violation of a rule concerning the improper gathering of information. The Supreme Court of the United States has held

that any actions of the government which are designed to elicit information from the defendant come under the *Massiah* rule. An examination of the Brewer facts (see pages 7 and 8 of the outline) discloses that this statement by the officer does constitute "interrogation."

Issue 5.

A few states (most notably New York — see *People v. Arthur*, 22 N.Y. 2d 325 (1968) and a few federal circuits (see *United States v. Thomas*, 474 F. 2d 110 (19th Cir. 1973) have held that any information which is received by questioning the defendant outside of the presence of his counsel is automatically to be suppressed — regardless of whether the defendant indicates a willingness to talk to the police. However most jurisdictions have held that a defendant may waive his sixth amendment right — including the *Massiah* prohibition of questioning. This is the position of the Illinois courts as well, see *People v. Sandoval*, 41 Ill. App. 3d 741 (4th D., 1976). In *Brewer* the Supreme Court indicated that a defendant might waive his rights under *Massiah* but the Court there very strictly applied the test for a "knowing and voluntary" waiver. As indicated in the outline at pages 7 and 8, the defendant in that case seemed more ready to talk to the police and gave no indication of a desire to invoke his rights following the police officer's general statement. However the Supreme Court (by a 5-4 vote) found that there could be no implied waiver in that case. Thus it would seem in our case there was no sufficient waiver of any Massiah-Brewer rights as the court appears to require an even more explicit waiver than is necessary for the normal *Miranda* situation. Here it might be noted that a panel of the Seventh Circuit followed the normal waiver rule in *U.S. v. Springer*, 460 F.2d 1344 (1972) over the dissent of then Judge Stevens — who provided the fifth vote in *Brewer*.

Issue 6.

The final issue concerns the "fruit of a poisonous tree." Here we should note that there might be problems for the defendant in establishing standing to challenge an illegal search of his neighbors apartment even though he had access to the apartment. However that issue is irrelevant to the problem at hand; here we are concerned with the exploitation of a fifth or sixth amendment violation. In this case the evidence must be suppressed unless the evidence would have been discovered regardless of the defendant's statement or unless the court finds that the use of the evidence does not constitute the exploitation of the original constitutional violation. In *Brewer*, the majority opinion refused to decide whether the child's body, or evidence regarding its location, had to be suppressed; indicating that the Court would look leniently upon a ruling that such testimony was not the

fruit of a *Massiah* violation. In our example there are some theoretical arguments for finding that the testimony concerning the location of the child would link the defendant to the child and constitute the fruit of the original fifth or sixth amendment violation. However the child's body would have been found in any event when the neighbors returned. It would seem very difficult to believe that any reasonable reviewing court would wish to exclude this evidence and thereby achieve the clearly unjust result of permanently acquitting the defendant when he would have been most assuredly convicted of kidnapping (or murder if the child died) had there been no violation of his fifth or sixth amendment rights.

PROBLEM NO. 4

On appeal the defendant has preserved every objection raised below. Will he prevail on appeal?

QUESTIONS TO CONSIDER

1. Was there probable cause to make the arrest?
2. Would the probable cause issue be easier for the state if it is shown that the male informant had previously given reliable information which led to a conviction?
3. Is the fact that the two witnesses were "citizen-informants" sufficient to establish probable cause?
4. Was the arrest lawful, did the police have to get an arrest warrant prior to entering the apartment? Would they if they stopped the defendant in the parking lot?
5. Would the answer to 4. change if the officer had been struck in the head by the butt of a gun rather than an unknown "blunt object"?
6. Was the seizure of the black jack lawful?
7. Would the answer to 6. change if the black jack was found in the kitchen? In the living room?
8. Is the defendant's objection to the insanity defense valid, should a separate instruction have been given as to the involuntary act defense? Are the two the same?
9. If the defendant is correct, did he waive his claim by failing to tender a correct instruction?
10. Can the defendant be convicted of both aggravated battery and obstructing a police officer?

DISCUSSION OF QUESTIONS

1. Would a reasonable person believe that defendant had committed the crime? Defense says no, only information is from unnamed source who may have been confused, and description is so general. State argues that description concrete enough, especially when everyone in agreement on the basic points.
2. State argues that such information shows that this man in fact reliable as evidenced by his earlier cooperation with the police. But, defense responds, if government tries to show this is "citizen informer", not mere paid informant, fact that he continuously cooperates with the police cuts against witness-informer rule.
3. Probably not, rule on citizen informants is not that their story is, per se, reliable, but rather that words of *identified* witness or victim of a crime can establish probable cause. Here witness not identified, but the corroboration of male informant's story by both the female informant and the officer enough to establish probable cause. People v. Martin, 46 Ill. App. 3d 943 (1977).
4. Arrest warrant not constitutionally mandated if arrest in public place. United States v. Watson, 423 U.S. 411 (1976). Is it required if arrest within private residence? Yes said the court in People v. Wolgemuth, 43 Ill. App. 3d 335 (3rd District 1976), unless exigent circumstances present; is crime of violence sufficient exigent circumstance? But see, People v. Johnson, 45 Ill. 2d 283.
5. Perhaps presence of the gun might establish exigent circumstances; i.e. absolutely necessary for police to get to defendant before he decides to shoot with gun rather than club with it. *Cf. Wolgemuth;* People v. Mitchell, 35 Ill. App. 3d 151, 341 N.E.2d 153 (1st District 1975) and cases cited therein.
6. Yes, under either of two theories: as incident to arrest (within reach of defendant at time of arrest) under Chimel v. California, 395 U.S. 752 (1969); as being in plain view under Coolidge v. New Hampshire, 403 U.S. 443 (1971).
7. Possibly, for then not incident to arrest (not within defendant's area of control) and not in plain view. If simply arrest being made, probably need warrant under these circumstances to conduct full search of residence including the kitchen. If found in the living room on way out the door, might be plain view if in fact in open view.
8. Objection is correct according to the court in People v. Grant, 360 N.E. 2d 809 (4th District 1977). Insanity defense consists of 3 elements: mental disease, lack of cognition, lack of volition, whereas automatism defense consists only of lack of volition element. But see dissenting opinion in *Grant.*

9. No, said the court in *Grant* as interests of justice require under Supreme Court Rule 451 (c).
10. No, both counts arose from single attack on police officer so that the conviction for the lesser offense of obstructing a police officer must be reversed. *Grant.*

Problem 5—Outline for Discussion

This problem may be discussed in somewhat less time than the earlier problems but it makes a number of specific points which should be noted for the judges.

Issue 1.

Officer Tribe would need probable cause to believe that Bill committed a crime in order to arrest him. He would need a reasonable belief that some type of criminal activity was in progress or recently ended in order to "stop" Bill under stop and frisk analysis. However in this case it seems that Officer Tribe neither arrested nor stopped Bill in a technical sense. Instead he only asked Bill if he would voluntarily come to the station house and he in no way deprived him of his freedom of action, temporarily or otherwise. Thus the fact that Bill travelled in the police car should be irrelevant and the case should be treated as if Bill received a request to come to the police station and did so on his own at some later time. In such a situation no "probable cause" or "reasonable belief" is necessary. (See generally *Oregon v. Mathison* — page 4 of the outline).

Issue 2.

In the last term the Supreme Court of the United States held that *Miranda* warnings were only required where the defendant was subjected to "custodial" interrogation in *Oregon v. Mathison,* 97 S.Ct. 711 (page 4 of the outline). Even though the questioning takes place in the station house if the defendant is not deprived of his freedom of action in a significant manner there is no "coercive" environment which requires warnings to insure the free exercise of the fifth and sixth amendment rights. Thus Officer Tribe did not have to warn Bill of his rights during their initial questioning.

Issue 3.

Absent the development of further facts (which are not in the hypothetical) the arrest seems clearly invalid. While there is no requirement that the police have an arrest warrant they must have probable cause to believe that an individual committed a specific offense in order to make a seizure of the person. Officer Tribe was acting in a most reasonable manner when he followed the instructions of his Captain who indicated that he had permissible ground upon which to arrest Bill. However the issue is whether the police officers acting in concert together had sufficient probable cause. *If Captain McNeil did not have probable cause to make his statement that an arrest was required then the arrest by Officer Tribe would be invalid* see, *Whiteley v. Warden* 401 U.S. 560 (1971). Whether McNeil had probable cause would depend on whether the anonymous tip meant the Aguillar-Spinelli tests for informant reliability. Under those tests the police would have to establish (1) that the informant was known to be reliable source and (2) that the informant got his information in a reliable manner. On the facts given, the police did not know that either branch of the test was satisfied when they acted — the tip would fail. Captain McNeil might show that he had other knowledge which justified a finding of probable cause. Unless he had within his knowledge clear facts showing that Bill Bumm burglarized the drugstore, or facts which corroborated a detailed tip, there would be no probable cause.

Issue 4.

If the arrest was invalid the statements would seem to be "the fruit of the poisonous tree." Had the defendant not been arrested he would not have been present in the cell to be confronted by his accomplice or to make a statement. However the police may show that this is not fruit of the illegal arrest if they could show that his statements were made voluntarily, with full knowledge of his rights and unconnected to the earlier illegality. If it appears that there was any purposeful exploitation of the illegal arrest the confession has to be suppressed *even if the Miranda warnings were properly given* and waived. Illinois had adopted a virtual *per se* rule which would have allowed confessions following an illegal arrest to be admissible whenever the defendant was properly given his *Miranda* warnings and voluntarily waived his rights thereunder. However the Supreme Court of the United States reversed the Illinois position in *Brown v. Illinois*, 422 U.S. 590 (1975).

Issue 5.

Issue 5 is only relevant if we find that the confession was not the fruit of the illegal arrest. Then we would be testing whether the statement violated the *Miranda* ruling. Here the defendant was given his Miranda warnings and indicated that he was willing to waive his rights and talk to the police. However there are two significant problems concerning the effectiveness of his waiver. First, at the time he signed the waiver form and agreed to talk he believed that he was being arrested for a crime he knew that he did not commit. Whether the mistatement of the charge precludes a good waiver depends on the facts of the individual case. Generally the police are not required to precisely inform the defendant of the nature and seriousness of the crime they are investigating — so long as they do not actively mislead the defendant as to the consequences of his waiver. (See generally *People v. Smith,* 108 Ill. App. 2d 172 (1969). However in this case a court might rule that the police officer's active misstatement totally mislead the defendant so that he could not intelligently assess whether he should waive his rights. In the police officer's favor, however, is the fact that he did inform the defendant of the precise nature of the charge before the defendant made the statement. Thus, at the time of the statement, the defendant was not mislead.

The second problem under *Miranda* is that we do not know how long of a break there was between when the defendant is given his warnings and when he saw his accomplice being brought into the station. If it is a very short time there is no further problem with the *Miranda* warnings. However if some significant amount of time has passed there would be a question as to whether the defendant should be given renewed warnings before he is "interrogated." The Illinois Supreme Court has held that once a defendant has voluntarily waived his rights no second warnings are required even when there is a break in the questioning. *People v. Hill,* 39 Ill. 2d 125 (1968). The Supreme Court of the United States has not spoken to this issue, but Illinois appears to be in a majority position here.

If the Court would feel that there is some problem with the *Miranda* warnings either as to the misleading of the defendant or the break between the waiver and the statement the problem of whether there was any "interrogation" becomes critical. The *Miranda* rules do not bar the use of a statement which is volunteered by defendant rather than being the product of official questioning. Thus one would have to ask whether the confrontation between Clyde and the defendant was to be considered interrogation. Most courts considering similar situations have held that the "purposeful" confrontation of a defendant with a witness, co-defendant or evidence which incriminates him, constitutes the interrogation of eliciting of information so as to be covered by *Miranda.* However these cases have focused on the purposeful nature of the police action and the fact that such confrontations are designed to elicit information in the same way as formal questioning.

Thus if it could be shown that the police were not bringing the accomplice into the squad room for the purpose of confrontation or interrogation this might be held to be a "volunteered" statement.

Issue 6.

The witness must be advised of his rights under Illinois Statute Ch 38 § 112-4(b). It is not at present clear whether a prosecutor is required by the Fifth Amendment to warn a defendant of any of his rights when he appears before the Grand Jury. This is not a custodial interrogation as we normally think of it. The Supreme Court has held that *Miranda* warnings need not be given in this case. In *United States v. Washington* (page 5 of the outline) the court found that there was no reason to suppress the statements before a Grand Jury when defendant was given a general warning of his fifth amendment rights and the fact that the statements might be used against him. However the Court did not consider the situation where a prosecutor brought one who was the focus of an investigation before the Grand Jury and totally failed to warn them of their rights. Because counsel is excluded from the Grand Jury (and because prosecutors are able to put a great deal of psychological pressure on a witness through questioning) it may come to pass that the Supreme Court will find some form of minimal generalized warning is required but as yet the court has not confronted this issue.

Topic IV—MOTION PRACTICE

A. Summary of Advance Reading Material

CONTENTS

C — Sec. 48 Motions
D — Discovery Motions
E — Motion in Limine
F — Venue Act
G — Notice of Motion

B. Summary of Discussions

Report of Professors H. Douglas Laycock and Michael J. Polelle

The Committee on Motion Practice presented a 52 page outline covering motions under sections 45, 48 and 57 of the Civil Practice Act, discovery motions, motions in limine, venue and forum non conveniens motions, and the notice of motion requirement, together with a one page checklist on each of these topics. Oral presentations were made to three seminars, covering sections 45, 48 and 57 in detail, and discovery motions briefly.

Numerous proposals for legislation were raised. No firm recommendations were made, but the limited discussion suggested study of the following possibilities:

1) Separate formal from substantive motions in section 45.

2) Eliminate either the motion for judgment on the pleadings or the motion to strike as substantially insufficient in law.

3) Adopt the last sentence of federal rule 12(b), with changes to conform to the names and section numbers of motions in Illinois.

4) Merge sections 48 and 57, keeping the best features of both.

5) Adopt federal rule 42(b), with a change to refer to the Illinois right of jury trial.

6) Require an answer before a motion for summary judgment.

7) Adopt federal rule 56(d).

8) Apply unified standards to motions for summary judgment and motions for directed verdict.

The following is intended to note the main points raised and to indicate the tone of the discussion. The statutes and rules referred to are set out in the appendix. Some of these points are discussed in more detail in the Committee's outline, available from the Administrative office.

There was widespread feeling that sections 45, 48 and 57 should be recodified to eliminate the confusion and overlapping. Section 45 mixes together motions both of substance and of form. Some of this may be unavoidable; the motion to strike as substantially insufficient in law is used for both substantive and formal purposes. But better drafting could greatly

reduce the risk of confusion. Better drafting could also more clearly distinguish striking the complaint from dismissing the action.

The motion for judgment on the pleadings serves no purpose not served by the motion to strike as substantially insufficient in law, and is often confused with the motion for summary judgment or erroneously given separate content in some other way. Only one dispositive pleading motion is necessary.

Despite *Janes v. First Federal Savings & Loan Association*, 57 Ill.2d 398 (1974), lawyers continue to confuse motions to strike with motions for summary judgment. Illinois should consider adopting the last sentence of federal rule 12(b) to make explicit one way for the trial judge to handle this problem. The reporters believe that trial judges have power to utilize that procedure whether or not it is codified.

Section 48 is substantially duplicative of sections 45 and 57, but the sentiment seemed to be that its good features should be kept in a recodified section 57. The power under section 48 to try potentially dispositive issues separately need not be limited to affirmative defenses or bench trial; Illinois should consider adopting federal rule 42(b).

Most judges indicated that they routinely granted leave to file late section 48 motions where no prejudice would result, raising the question whether the rule that they be filed within the time for pleading (§48 (1)) makes any sense. On the other hand, the rule that defendants may make a section 57 motion at any time (§57 (2)) may be too liberal; most judges seemed to think defendants should be required to answer before filing summary judgment motions.

Most of the judges were quite uncomfortable with the statement in *Fooden v. Board of Governors*, 48 Ill.2d 580, 587 (1971), that the *Pedrick* standard should be applied to motions for summary judgment. They thought this inconsistent with the rule that any issue of fact must be tried. The reporters thought *Fooden* gave content to the statutory provision that only "genuine" issues prevent summary judgment, and that it might be a good decision. The discussion certainly indicated that the question deserves study.

Questions were also raised about Illinois' decision not to adopt federal rule 56(d). Some judges agreed that the federal rule impinges on the right to jury trial; others thought that impossible if there were no issue of fact. One judge suggested that it is inconsistent to permit partial directed verdicts on individual issues, but not to permit partial summary judgment on individual issues. No one took issue with that comment; note the tension between it and the hostility to applying the *Pedrick* rule to motions for summary judgment.

Topic V—HOME RULE

A. Summary of Advance Reading Material

CONTENTS

B. Summary of Discussions

Report of Professors Vincent Vitullo and Richard A. Michael

The Committee on Home Rule in Illinois adopted a different approach for the presentation of this topic. Because of the newness of the topic many members of the judiciary expressed the need for an introduction to the entire area as distinguished from the more typical discussion of the current problems being encountered. For this reason the Committee elected to present two lecture-type presentations by the Professor-Reporters followed by a question and answer session rather than a seminar-type discussion. The newness of the area as well as the difficulty of the problems it is presenting is attested by the fact that over sixty judges subscribed for the presentation and over two thirds of those in attendance were presently sitting on reviewing courts.

Professor Vitullo first analyzed the Constitutional language employed in Article VII, Section 6. He stressed not only the literal meaning of the provisions and the issues raised thereby, but the light shed on the issues by the proceedings of the Constitutional Convention. Professor Michael discussed the case decisions to date on the key issues of what areas pertain to a home rule unit's "government and affairs", the revenue authority of home

rule units, and the method of resolution of conflicts between state statutes and home rule ordinances. During the discussion period Judges Karns and Linn used their experience as members of the Constitutional Convention to shed light on the motivation and intent of the draftsmen of the article.

The professor-reporters would like to thank the Chairman and Vice Chairman, Judges Karns and Linn, and the other members of the Committee, Judges Van Deusen, Stone and Swain, together with the Liaison Officer, Judge Jay J. Alloy, for their cooperation, courtesy and the many kindnesses they extended to the professor-reporters. The entire Committee would like to express their appreciation to all the judges in attendance for their kind attention and interesting comments. It is believed that the seminar was worthwhile and made a contribution to the understanding of this new and developing area of Illinois law by both the Committee and the judges in attendance.

Topic VI—CONTEMPT

A. Summary of Advance Reading Material

CONTENTS

B. Summary of Discussions

Hon. Richard Fitzgerald, Chairman
Hon. Nathan Cohen
Hon. John P. Shonkwiler
Hon. Earl Arkiss

Introduction

The Committee on Contempt concluded that the subject might best be presented by means of a dramatization, in a courtroom setting, of many of the situations that raise issues relative to the contempt power. Judge Arkiss drafted a script containing sixteen specific issues of contempt founded on actual case law. The script of the scenario, as enacted by Judges Shonkwiler and Arkiss, is included in the report which follows.

The innovative nature of the format provided a unique opportunity for the two hundred judges in attendance to observe the practical as well as theoretical elements of contempt situations. Judges Fitzgerald and Cohen joined the scenario team in discussing the specific issues raised in the presentation and fielding the numerous questions the program generated.

The Committee on Contempt from the outset stressed that the exercise of contempt powers should be undertaken with utmost reluctance. However, once the situation necessitates such action, the Committee sought to identify the trend in current case law toward expansive notice and due process procedural requirements in contempt proceedings.

SUMMARY OF ADVANCE READING MATERIAL

PART I

(Outline of types of contempt.)

DIRECT CONTEMPT

1. Definitions of Direct Contempt.
2. Examples
3. Responsibility of Judges.
4. Conduct and Responsibility of the Lawyers.
5. Conduct of Parties.
6. Conduct of Spectators and Others.
7. Continuing as Opposed to Separate Contempt Actions.
8. Right to Trial by Jury.
9. Summary Proceeding and Sanctions.
10. Referral of Contempt Matters to Another Judge.
11. Order.

INDIRECT CONTEMPT

1. Definition
2. Failure to Comply with Discovery Orders.
3. Failure to Obey Order of Payment.
4. Contempt by Recalcitrant Witnesses.
5. Right to Trial by Jury.

6. Constructive Contempt.
7. Contempt by Members of the Bar.
8. Injunctions
9. Petition for Rule to Show Cause, Notice, Hearing and the Order.
10. Sanctions.

PART II

(Supplement to Outline—Update of Case Law)

1. Current Cases.
2. Suggested Orders

PART III

(Appendix—Sample Orders)

STATEMENT ON PROCEDURES BY WHICH COURTS MAY ENFORCE SUPPORT ORDERS

Commentary by Hon. John Shonkwiler on the Enforcement of Orders.

1. Nature of the Proceeding
2. Court's Mandate
3. Petition
4. Notice
5. Hearing on the Rule
6. Right to Trial by Jury
7. Order
8. Sanctions
9. Appeal
10. Recalcitrant Witnesses
11. Failure to Obey Orders of Payment/Family Law Matters.

HISTORICAL EVOLUTION OF CONTEMPT

(Commentary by Hon. Nathan Cohen)

SCENARIO ON CONTEMPT ISSUES

1. Transcript of Scenario
2. Sixteen Issues Specifically Raised in Scenario — Points of Discussion With Reference to Case Law.

STATE OF ILLINOIS)
)
COUNTY OF EREHWYNA)

IN THE CIRCUIT COURT OF EREHWYNA—LAW DIVISION

IN RE MATTER)
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)
)
of EARL ARKISS) 77L 282
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)
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COMMENTATOR:

Rex Sanctimonious, a very prominent business man and lay leader in his church was arrested and subsequently indicated for an alleged deviate sexual assault. The complaining witness was a 19 year old woman employed in his factory. There was a prodigious amount of publicity in the mass media concerning the charge.

The case was assigned to the very able Judge John P. Shonkwiler. Counsel for the defendant, Earl Arkiss, is a veteran trial lawyer, flamboyant in style, with a marked proclivity for publicity and "concerned causes."

A week prior to the trial date, May 2, 1977, Judge Shonkwiler, sua sponte, issued the following order:

"It is ordered that neither the State's Attorney nor counsel for the defendant, make or issue any statement, written or oral, either at a public meeting or event, or for public reporting or dissemination in any fashion, regarding:

(1) The Judge

(2) Jury or jurors, prospective or selected

(3) The merits of the case

(4) The witnesses

(5) Or the rulings of the court.

This order shall remain in effect as long as this litigation is before this court."

Judge John P. Shonkwiler
April 25, 1977

COMMENTATOR:

A day after the court issued its order, Mr. Arkiss, in a press conference, stated:

"The order issued by Judge Shonkwiler is clearly in violation of the First Amendment's Freedom of Speech. No court in this country can circumscribe this inherent basic right. This order reflects a dictatorial mind in an anointed head."

At an agreed omnibus Pre-Trial Hearing in the Judge's Chambers, two days prior to trial, the following dialogue ensued:

COURT: Mr. Arkiss, you were aware of my order issued on April 25, 1977, weren't you.

ARKISS: The court's illegal order was served on me, your Honor.

COURT: It is reasonable to assume that you called the press conference and made the statement reported in the mass media.

ARKISS: Your Honor's presumption is well founded.

COURT: From your years of experience, I am sure you know you have an obligation under the law to obey every order until such time as that order may be reversed on appeal. This order was issued to safeguard the concept of a fair trial. This order may not be attacked collaterally in any contempt proceeding which may ensue. You are on notice.

ARKISS: With all due regard, the court is in error. There is no duty to obey an order which is clearly illegal. I intend to speak out whenever and wherever the rights of my client dictate or warrant. The ramifications of obeying illegal orders was the hallmark of the Nueremberg Trials.

COURT: Mr. Arkiss, you will have to bear the consequences of that statement and any other statement you might issue in the future. While we are at it, pursuant to the pleadings that were filed with reference to the State's discovery under Supreme Court Rule 413 (a), the State requested that the defendant submit to a reasonable medical inspection of his body. You have stated in your pleadings that you have directed your client not to submit on the grounds of the Fifth Amendment.

ARKISS: That's right — the State has no right to see alleged wounds that complaining witness claims she inflicted.

COURT: Do you still persist in your direction to your client?

ARKISS: I do.

COURT: You are hereby cited for contempt and fined $25.

ARKISS: With all due respect, this is one time that the court will not collect.

COMMENTATOR:

On the day of the trial, pursuant to previous notice, the case was scheduled to start at 09:30 a.m. Two events occurred which resulted in a confrontation between the court and counsel.

FIRST: A motor caravan of some several hundred people, seemingly in sympathy with the defendant, drove around the Court House at approximately 8:30 a.m. Part of the caravan then proceeded to occupy all the available seats in the courtroom. The balance lingered outside of the courtroom in the hall. There was some disturbance in the courtroom prior to the commencement of the trial. Mr. Arkiss, on the previous day, had made inquiry of the police department whether a traffic escort would be made available in order to preclude any traffic hazards for the caravan.

SECOND: Mr. Arkiss did not arrive in the courtroom until 10:30 a.m.

The following exchange took place in the Judge's chambers:

COURT: There are several things I have to discuss with you about this caravan that you organized —

ARKISS: (Interrupting) There was nothing illegal in the motor caravan.

COURT: Let's get the record straight about this ploy — that caravan and stacking the courtroom had but one purpose, to influence the jury panel.

ARKISS: Your honor is misconstruing the whole thing. All you have is a bunch of concerned people who are giving expression to their support to a great American.

COURT: Counsel, I have practiced law and have been a judge for a good many years, and this court doesn't appreciate the soft soap job.

ARKISS: Their actions are all governed by the First Amendment.

COURT: Counsel, lets not fly the constitution — you are not legally correct and you are ethically wrong in your conduct. In addition, you were told to be here at 9:30 a.m. weren't you?

ARKISS: May it please this court, lets be realistic, you and I both know that the jury is never assembled, and then sent upstairs until 10:30 a.m. So, what's the harm or rush?

COURT: Mr. Arkiss, it is the court's business to insure the presence of the jury. So, when I told you to be here at 9:30 a.m. — I meant 9:30 a.m.

ARKISS: Your Honor, you have either a conscious or unconscious prejudice against me.

COURT: It is because of your conduct.

ARKISS: It is not my conduct, I say respectfully. I am old enough ——.

COURT: You don't say it respectfully.

ARKISS: I am old enough and wise enough to have my opinion concerning the matter, and I do believe you have a pre-occupation with wanting to inconvenience and wanting to criticize me.

COURT: That is not true.

ARKISS: Your actions, may it please the court, speak louder than your words.

COURT: The only criticism I have around here is your deplorable conduct.

ARKISS: Cite me one incident of the deplorable conduct.

COURT: The parade and seat stacking, plus your statement to the press and your last comment here are glaring examples.

ARKISS: I move the court for a recess.

COURT: The motion is denied.

ARKISS: You are imposing upon the jury to get them up here so early.

COURT: You are cited for contempt.

COMMENTATOR:

The following episode took place during the course of the trial. Mr. Arkiss was cross-examining a police officer with regard to the identification

of photographs by two persons at the police station. After numerous objections by the State's Attorney were sustained, the following dialogue ensued:

COURT: Now Mr. Arkiss, there is case after case which holds that it is quite improper to have a detective testifying to someone else's identification. I think we had better go into chambers.

ARKISS: I don't want to go into chambers, Judge.

COURT: Let's go into chambers right now.

ARKISS: No, I am not going into chambers. This is a public trial, and I am going to have a public trial.

COURT: Bring the attorney in, Mr. Bailiff.

ARKISS: I will not go into chambers unless I am — are you going to do it by force? You will have to do it by force, sir. Make your arrest, I am not going to do it. I am not going to do it. I am not going into chambers, under no circumstances.

COURT: All right, the jury will go into the jury room right at this time.

COMMENTATOR:

The jury retired to the jury room after which the following proceedings were held in open court, outside the presence of the jury.

COURT: I told you to stop the line of cross-examination — yet you persist, not withstanding my direction to you.

ARKISS: I am not making reference to the actual identification with this witness. All I am trying to do is to examine certain procedures and activities of these witnesses at the police station. This is a valid and pertinent distinction.

COURT: I don't agree.

ARKISS: I have many cases to support my position. May I present to you case law for that point.

COURT: No, you may not.

ARKISS: Take the case of People vs. Townsend ____ ____ ____.

COURT: I don't want your case.

ARKISS: You wish to ignore that.

COURT: I wish to ignore that.

ARKISS: Have you read the case?

COURT: I forbid you to ask any questions along that line.

ARKISS: Have you read the case?

COURT: I have.

ARKISS: In spite of the case, you refuse - - -

COURT: Mr. Arkiss, I have given you an order. I don't want any more testimony from this officer along that line.

ARKISS: Your Honor, in the Federal Court, in the case of Dellinger, the court held that an attorney has a right to pursue his advocacy to the point of appearing obnoxious.

COURT: Let's call in the jury - - I have had enough.

COMMENTATOR:

In the course of the defendant's closing argument, the following event and confrontation took place:

Counsel removed his shoe and struck the table and then said:

ARKISS: At this point in my closing argument, I am going to deviate from my comments on the evidence that was adduced. I feel it is essential that we comment on the rulings of the court up to this point, to see what evidence was kept out.

COURT: The jury will please leave the courtroom and retire to the jury room.

COMMENTATOR:

The jury retires to the jury room, after which the following exchange took place.

COURT: Mr. Arkiss, you are aware of the fact that the court has made certain rulings in this case, and you are not taking up with the jury rulings that the court has made, which is none of their business. The instructions so state it, and I am warning you at this time, if you comment in respect to any rulings the court has made in this matter, which is not appropriate, you'll be found in contempt.

ARKISS: What is so inappropriate to comment on what took place in front of the jury. The court rulings will indicate a biasness in favor of the State.

COURT: That is enough — I'm calling the jury back and you will complete your closing argument without any further reference to my rulings.

COMMENTATOR:

After the trial in which the jury found the defendant guilty — the judge retired to the chambers after entering the requisite orders, including a sentencing date.

Mr. Arkiss, in the hallway outside the courtroom, made the following statement, which was overheard by Judge Shonkwiler's bailiff.

"Judge Skunkwater's actions, his rulings and his attitude indicate that he prejudged the case. There can be no question, but that we will have to appeal this gross miscarriage of justice."

The next day, the Judge called Mr. Arkiss into his chambers and the following conversation took place.

COURT: Mr. Arkiss, it is now my unpleasant duty to frankly inform you that this court holds you in contempt of court for your conduct during the trial.

ARKISS: It is not my duty to instruct this court how to conduct a fair trial. What you are really doing — is to punish me for a vigorous representation on behalf of my client.

COURT: I have, for two weeks, sat here and listened to you. Now you are going to listen to me. Stand right here Sir.

For two weeks I've seen you put on the worst display I've ever seen an attorney in my many years on the bench. You've quoted that you couldn't do it any other way. You know our court system is completely based upon reason. It doesn't mean that it's based upon trickery, it doesn't mean it's based upon planned confusion. Sometimes I wonder really what your motive is, if you're really interested in justice for your client, or if you have some ulterior motive, such as Earl Arkiss. As far as a lawyer is concerned, you're not. I want the entire community to hear this, that you are not the rule, you're the exception to the rule.

ARKISS: (Interrupting) Thank you.

COURT: I want them to understand your actions should not be their actions — this is not the way an officer of the court should conduct himself.

ARKISS: I would respond to you, Sir.

COURT: (Interrupting) You're not responding to me on anything.

ARKISS: Oh yes I will.

COURT: The sentence is as follows —

ARKISS: (Interrupting) My lawyers will respond to you.

COURT: The sentence of this court, is as follows:

Citation One: Violating the court's order of April 25, 1977 — 30 days.

Citation Two: There is due and owing the $25 fine the court imposed for refusal to comply with the discovery request.

Citation Three: For the motor caravan and courtroom stacking, 30 days.

Citation Four: For your late arrival on the date of the trial, 30 days.

Citation Five: Your refusal to accompany me to my chambers for an in camera hearing, 30 days.

Citation Six: Your persistence in continuing the cross examination of the witness after you were directed to stop — 30 days.

Citation Seven: For the obnoxious and repugnant shoe episode — 30 days.

Citation Eight: Your insistence in your closing argument to argue the court's rulings on objections after you were told to desist — 30 days.

Citation Nine: Your contumacious statement which was overheard by my bailiff wherein you mispronounced my name deliberately — 30 days.

ARKISS: Your Honor, it was merely a freudian slip.

COURT: It is further ordered that you are barred from practicing before the court for a period of one year.

ARKISS: That is no punishment, but a pleasure.

COURT: Mr. Bailiff, Remove this man!!

COMMENTATOR:

The following order was submitted by the State's Attorney and was duly signed by the court.

STATE OF ILLINOIS)
)
COUNTY OF EREHWYNA)

IN THE CIRCUIT COURT OF EREHWYNA

IN RE: MATTER OF EARL ARKISS)
) NO. 77 282
)

ORDER OF CONTEMPT

Now, in the name and by the authority of the People of the State of Illinois, the Respondent, Earl Arkiss being present in his own person, the matter against the Respondent of alleged direct contempt of this court is considered by the court, and thereupon the court finds as follows:

(1) That on May 9, 1977, in the Circuit Court of Erehwyna, in the case of the People v. Rex Sanctimonious, Case No. 77 2481, Deviate Sexual Assualt, came on to be heard in the regular course before the court.

(2) That during the course of said case, the Respondent, Earl Arkiss, appeared as counsel for the defendant, Rex Sanctimonious.

(3) That during the course of said case, Respondent pursued a studied and planned course of contemptuous conduct which had, as its purpose and design:

a — To impede and interrupt the proceedings;
b — To lessen the dignity of this court;
c — To embarrass and obstruct the court; all of which:
d — Brought the administration of law into disrespect and disregard.

All of the aforesaid conduct transpired while this court was in open session.

(4) A copy of the transcript of proceedings is attached hereto, incorporated herein and made part of this order.

THE COURT FURTHER FINDS that Respondent is now and here present in Open Court and is by reason of said contempt, guilty of direct contempt of this court in Open Court.

IT IS THEREFORE ORDERED, considered and adjudged, that Earl Arkiss, because of said contempt as aforesaid, be and is hereby:

(A) Fined $25;

(B) Incarcerated for eight (8) months; in the County Jail; and

(C) Precluded from practice before this court for a period of One Year, from the date hereof.

JOHN F. SHONKWILER, JUDGE

Dated:

PART II

Scenario Points for Discussion

1. Will a prior restraint on the attorney's First Amendment rights sustain a contempt citation?

   Craig v. Harney, 331 U.S. 367, 373

   Chase v. Robson, 435 F 2d 1059, 1061

   In Re Oliver, 452 F 2d 111, 114

2. Will a contempt citation be sustained where the defendant, upon the advice of counsel, invoked the Fifth Amendment in a discovery proceeding?

   Maness v. Meyers, 419 U.S. 449, 464

   Hanley v. McHugh Construction, 419 F. 2d 955

   People Ex Rel Kunce v. Hogan, 37 App 3rd 673

3. Does non-verbal conduct come within the ambit of direct criminal contempt?

   People v. Gholson, 412 Ill 294

   People v. Roberts, 42 Ill App 3d 608

4. Is the unexplained attorney absence subject to a citation? If so, what kind?

   People v. Pincham, 38 Ill App 3d 1043

   Geraty v. Carbona Products, 16 Ill App 3rd 702

5. Does an in-camera proceeding violate the mandate of a public trial?

   People v. Oliver, 25 Ill App 3d 66

   In Re Oliver, 333 U.S. 257, 267

   Gaines v. Washington, 277 U.S. 81, 85

6. When does proper zeal of advocacy terminate and contumacy begin?

   In Re Little, 404 U.S. 553, 555

   People V. Roberts, 42 Ill App 3d 604

7. Was the statement by Attorney Arkiss outside the courtroom, immediately after the trial, in a constituent part of the court, and subject to a citation?

   People v. Javaras, 51 Ill 2d 296

   People v. Pomeroy, 405 Ill 175

8. Should the court have cited Attorney Arkiss during the course of the trial?

   Mayberry v. Pennsylvania, 400 U.S. 455, 463

   Sacher v. U.S., 343 U.S. 1, 10

9. Where court fails to rule summarily on each direct contempt, what procedure is to be employed?
   Mayberry v. Pennsylvania, 400 U.S. 455
   Kunce v. Hogan, 37 Ill App 3d 673
10. Was it necessary to refer the entire proceeding to another judge?
   People v. Barnett, 35 Ill App 3rd 939
   People v. Almanza, 25 Ill App 3d 860
11. Was the court's proceeding a valid one?
   No — Committee's commentary
12. Factors in making the punishment fit the crime.
   (Concurrent vs. Consecutive)
   In Re Van Meter, 413 F 2d 536
13. What constitutes a good order?
   People v. Tomashevsky, 48 Ill 2d 559
   People Ex Rel Woodward, 25 Ill 3d 66
14. The Appellate Court's criteria in review of contempt orders.
   People v. White, 48 Ill 2d 559, 564
   People v. Jashunsky, 51 Ill 2d 220
15. Where is the line to be drawn between offenses to court's sensibilities and the obstruction of justice?
   In Re Little, 404 U.S. 553
   People v. Miller, 51 Ill 2nd 76, 79
16. The past, the present and a peek into the future of the contempt proceeding.
   Committee's Commentary.

REPORT

OF THE

1977 REGIONAL SEMINARS

OF THE

ILLINOIS JUDICIAL CONFERENCE

REGIONAL SEMINARS

During 1977, the Subcommittee on Judicial Education, consisting of Hon. Mel R. Jiganti, chairman, Hon. Harry G. Comerford, Hon. Richard Mills, Hon. Harry D. Strouse, Jr., and Hon. George W. Unverzagt, sponsored seven regional seminars. The dates, topics and faculty for these seminars were as follows:

January 20-22, 1977, at the Clock Tower Inn, Rockford, with 58 judges in attendance:

Civil Procedure

Thursday, January 20, 1977

10:00 - 12:00 Noon Introductory Session
Underlying Concepts
Common Law Pleading
Forms of Action
Law and Equity

1:30 - 3:00 P.M. Individual Preparation Session
Study and review of materials to be covered at afternoon and evening sessions

3:00 - 5:00 P.M. Seminar Session — Competency of Court's Jurisdiction

7:00 - 9:00 P.M. Seminar Session — Competency of Court's Jurisdiction (concluded)
Venue — Generally
Change of Venue
Forum non-Conveniens in Illinois

Friday, January 21, 1977

9:30 - 12:00 Noon Seminar Session — Pleadings — General Introduction
Stating a Cause of Action

1:30 - 3:00 P.M. Individual Preparation Session
Study of materials to be covered at afternoon and evening sessions

3:00 - 5:00 P.M. Seminar Session — Pleadings
Stating a Cause of Action
Concept of Duty

7:00 - 9:00 P.M. Seminar Session — Parties and Joinders
Joinders
Effect of Misjoinder
Indispensable Parties
Third Party Practice

Saturday, January 22, 1977

9:30 - 11:30 A.M. Seminar Session — Parties and Joinders
Class Actions
Intervention

The faculty for this seminar consisted of Hon. Charles E. Jones, Professor Jonathan M. Landers and Professor Richard A. Michael.

February 24-26, 1977, at the Holiday Inn, Collinsville, with 55 judges in attendance:

Civil Procedure

Thursday, February 24, 1977

10:00 - 12:00 Noon Introductory Session
Underlying Concepts
Historical Perspective
Common Law Pleading
Forms of Action
Current Procedural Issues

1:30 - 3:00 P.M. Individual Preparation Session
Study and review of materials to be covered at afternoon and evening sessions

3:00 - 5:00 P.M. Seminar Session — Competency of Court's Jurisdiction

6:30 - 8:30 P.M. Seminar Session — Competency of Court's Jurisdiction (concluded)
Venue (generally)
Change of Venue
Forum Non-Conveniens

Friday, February 25, 1977

9:30 - 12:00 Noon Seminar Session — Pleadings
General Introduction
Statutory Requirements
Stating a Cause of Action

1:30 - 3:00 P.M. Individual Preparation Session
Study of materials to be covered at afternoon and evening sessions

3:00 - 5:00 P.M. Seminar Session — Pleadings
Stating a Cause of Action
Concepts of Duty and Foreseeability in Pleadings

6:30 - 8:30 P.M. Seminar Session — Parties and Joinders
Joinders
Indispensable Parties
Third Party Practice

Saturday, February 26, 1977

9:30 - 11:30 A.M. Seminar Session — Parties and Joinder
Class Actions
Intervention

The faculty for this seminar consisted of Hon. Charles E. Jones, Professor Jonathan M. Landers and Professor Richard A. Michael.

March 10-12, 1977, at the Holiday Inn, Collinsville, with 37 judges in attendance:

Civil Remedies

Thursday, March 10, 1977

10:00 - 12:00 Noon Introductory Session
Historical and Philosophical Background on Tort Remedies
Emerging Causes of Action

1:30 - 3:00 P.M. Individual Preparation Session
Study and review of materials for afternoon and evening sessions

3:00 - 5:00 P.M. Seminar Session
Classic Negligence Action — Duty, Foreseeability and Causation

6:30 - 8:30 P.M. Discussion Session — Break into three groups for detailed discussion of day's presentations

Friday, March 11, 1977

9:30 - 12:00 Noon Seminar Session
Strict Liability

1:30 - 3:00 P.M. Individual Preparation Session

3:00 - 5:00 P.M. Seminar Session
Third Party Actions
Indemnity
Contribution
Loan Agreements

6:30 - 8:30 P.M. Discussion Session — Three groups — detailed discussion of day's presentations

Saturday, March 12, 1977

9:30 - 11:00 A.M. Seminar Session
Damages

11:00 - 12:00 Noon Discussion Session — Questions, Comments and Suggestions from Attendants.

The faculty for this seminar consisted of Hon. Allen Hartman, Professor Nina S. Appel and Professor Donald H. J. Hermann.

April 21-23, 1977, at the Clock Tower Inn, Rockford, with 65 judges in attendance:

Criminal Law

Thursday, April 21, 1977

10:00 - 12:00 Noon Seminar Session I
Motions
Rulings and Objections
The Trial Record

1:30 - 3:00 P.M. Individual Preparation Session
Study and review of materials for afternoon and evening sessions

3:00 - 5:00 P.M. Seminar Session II
Hostile Witnesses
Impeachment
Turncoat Witness
Joint Representation

6:30 - 8:30 P.M. Seminar Session III
Opinion/Expert Testimony
Examination and Cross-Examination of Experts

Friday, April 22, 1977

9:30 - 11:30 A.M. Seminar Session IV
Real and Demonstrative Evidence
Scientific Evidence
Indentification

1:00 - 3:00 P.M. Seminar Session V
Hearsay and its Exceptions in Criminal Trials

3:30 - 5:30 P.M. Seminar Session VI
Burden of Proof
Presumptions
Privilege

Saturday, April 23, 1977

9:30 - 11:30 A.M. Seminar Session VII
New Decisions
Trends in Criminal Law and Procedure
Problems Raised by Attendants

The faculty for this seminar consisted of Hon. Louis B. Garippo, Professor Robert E. Burns and Professor James B. Haddad.

October 20-22, 1977, at the Holiday Inn East, Springfield, with 53 judges in attendance:

Juvenile Law

Thursday, October 20, 1977

10:00 - 12:00 Noon Introductory Session
The Juvenile Problems Committee
Overview of Seminar Content
Juvenile v. Criminal Jurisdiction — the Waiver Hearing

1:30 - 3:00 P.M. Individual Preparation Session
Study and review of materials to be covered at afternoon and evening sessions

3:00 - 5:00 P.M. Seminar Session II
Delinquency

6:30 - 8:30 P.M. Seminar Session III
Delinquency

Friday, October 21, 1977

9:00 - 12:00 Noon Seminar Session IV
Dependency and Neglect

1:30 - 3:00 P.M. Individual Preparation Session
Study of materials to be covered at afternoon and evening sessions

3:00 - 5:00 P.M. Seminar Session V
MINS
Interstate Compact on Juveniles

6:30 - 8:30 P.M. Seminar Session VI
Practical Considerations in Marshalling Optimal Dispositional Resources

Saturday, October 22, 1977

9:30 - 11:30 A.M. Seminar Session VII
General Discussion of Problems in Juvenile Proceedings
Open Forum for Attendants' Questions

The faculty for this seminar consisted of Hon. William S. White, Hon. Peter F. Costa, Hon. Arthur N. Hamilton, Hon. Thomas E. Hornsby, Hon. John P. McGury, Hon. John D. Zwanzig, Prof. Jill K. McNulty and Prof. Patrick D. McArany.

November 10-12, 1977, at the Holiday Inn, Collinsville, with 30 judges in attendance:

Civil Remedies

Thursday, November 10, 1977

10:00 - 12:00 Noon Seminar Session I
Judicial Discretion

1:30 - 3:00 P.M. Individual Preparation Session
Study and review of materials to be covered at afternoon session.

3:00 - 5:00 P.M. Seminar Session II
Privacy
Creditors
Publication of Names and Pictures
Advertising

6:30 - 8:30 P.M. Group Discussion Session
Attendants will be divided into small groups and discuss in informal seminar style the materials covered earlier in the day.

Friday, November 11, 1977

9:00 - 12:00 Noon Seminar Session III
Professional Malpractice
Attorneys
Accountants
Doctors
Engineers

1:30 - 3:00 P.M. Individual Preparation Session
Study of materials to be covered at afternoon session

3:00 - 5:00 P.M. Seminar Session IV
Business Torts
Interference with Employment
False Advertising

6:30 - 8:30 P.M. Group Discussion Session

Saturday, November 12, 1977

9:00 - 11:30 A.M. Seminar Session V
Premises Liability
Trespassers
Licensees
Invitees
Public Officers
Questions from Seminar Attendants

The faculty for this seminar consisted of Hon. Allen Hartman, Professor Nina S. Appel and Professor Donald H. J. Hermann.

December 8-10, 1977, at the Clock Tower Inn, Rockford, with 55 judges in attendance:

Criminal Law

Thursday, December 8, 1977

10:00 - 12:00 Noon Seminar Session I
First Appearance
Bail
Charging
Preliminary Hearing

1:30 - 3:00 P.M. Individual Preparation Session
Study and review of materials to be covered at afternoon and evening sessions

3:00 - 5:00 P.M. Seminar Session II
Opening and Closing Statements
Order of Proof
Instructions

6:30 - 8:30 P.M. Seminar Session III
Evidence of Other Crimes
Impeachment

Friday, December 9, 1977

9:30 - 12:00 Noon Seminar Session IV
Effective Representation
Role of Judge
Pro Se Defendants

1:00 - 2:00 P.M. Individual Preparation Session
Review of materials to be covered at afternoon session

2:00 - 5:00 P.M. Seminar Session V
Sentencing
Recent Legislative Action
Death Penalty

Saturday, December 10, 1977

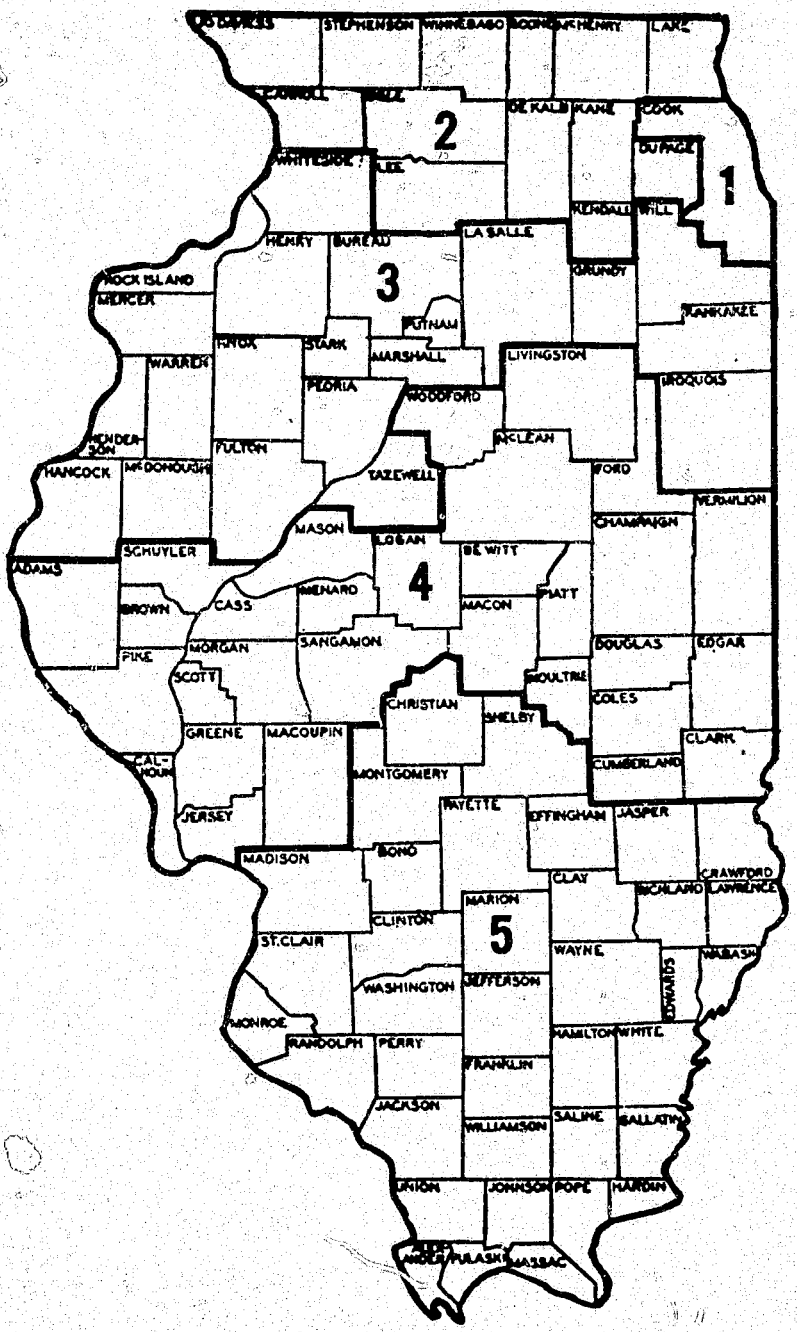
9:30 - 11:30 A.M. Seminar Session VI
Recent Developments in Criminal Law
Questions from Seminar Attendants

The faculty for this seminar consisted of Hon. Louis B. Garippo, Prof Robert E. Burns and Prof. James B. Haddad.

CONTINUED

2 OF 3

ILLINOIS JUDICIAL DISTRICTS



SUPREME AND APPELLATE COURTS

[A6448]

SUPREME COURT OF ILLINOIS
(May 1, 1977)

FIRST DISTRICT

Daniel P. Ward*
Westchester, Illinois

William G. Clark
Chicago, Illinois

James A. Dooley
Chicago, Illinois

SECOND DISTRICT

Thomas J. Moran
Waukegan, Illinois

THIRD DISTRICT

Howard C. Ryan
Tonica, Illinois

FOURTH DISTRICT

Robert C. Underwood
Bloomington, Illinois

FIFTH DISTRICT

Joseph H. Goldenhersh
East St. Louis, Illinois

*Chief Justice

APPELLATE COURT OF ILLINOIS
May 1, 1977

FIRST DISTRICT

First Division

Mayer Goldberg, Presiding Justice
John M. O'Connor, Jr.
Thomas A. McGloon
Nicholas J. Bua

Second Division

Robert J. Downing, Presiding Justice
John J. Stamos
Maurice Perlin

Third Division

Seymour F. Simon, Presiding Justice
Daniel J. McNamara
Mel R. Jiganti
Helen F. McGillicuddy

Fourth Division

Henry W. Dieringer, Presiding Justice
Glenn T. Johnson
David Linn
Philip Romiti

Fifth Division

John J. Sullivan, Presiding Justice
Francis S. Lorenz
James J. Mejda
Kenneth E. Wilson

SECOND DISTRICT

L. L. Rechenmacher, Presiding Justice
Glenn K. Seidenfeld
William L. Guild
James E. Boyle
Alfred E. Woodward
William R. Nash

THIRD DISTRICT

Richard Stengel, Presiding Justice
Jay J. Alloy
Allan L. Stouder
Tobias Barry
Albert Scott

FOURTH DISTRICT

James C. Craven, Presiding Justice
Harold F. Trapp
Frederick S. Green
Richard Mills
John T. Reardon

FIFTH DISTRICT

Richard T. Carter, Presiding Justice
John M. Karns
Charles E. Jones
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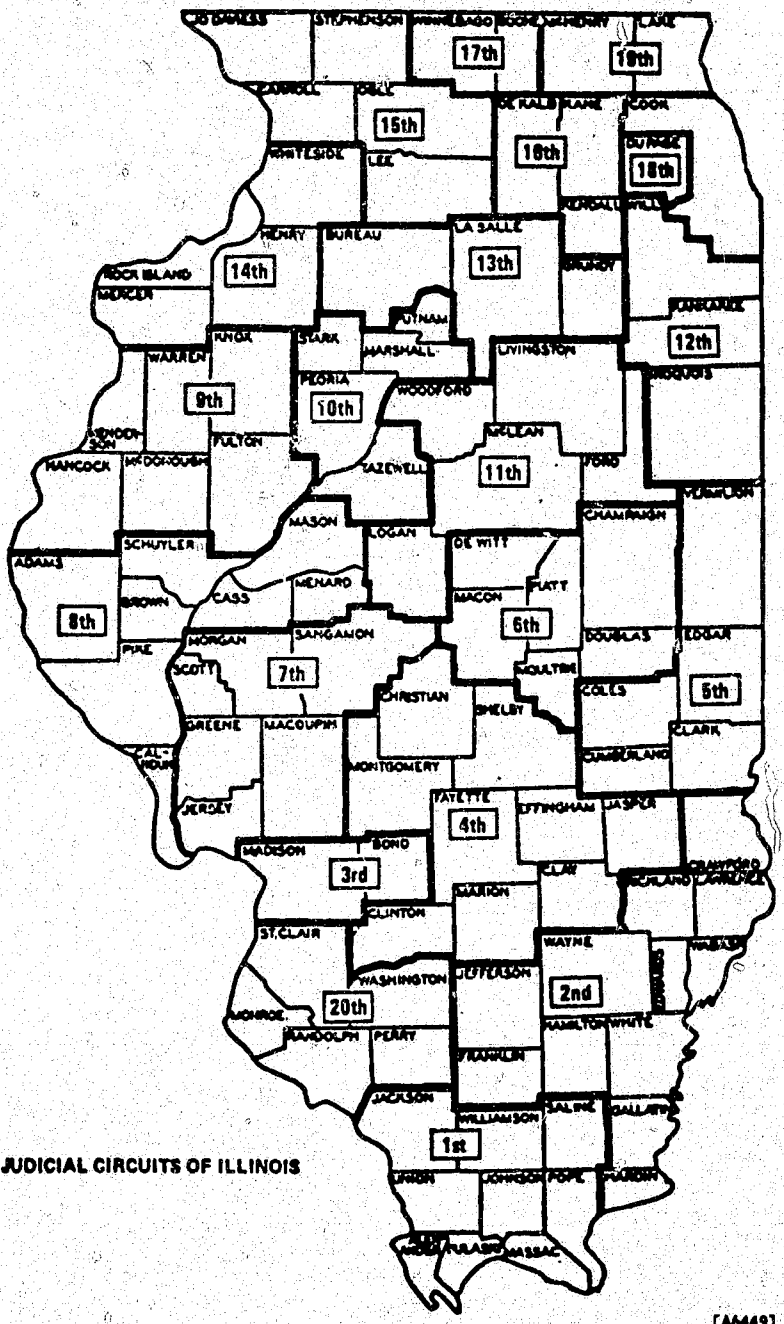

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[A6449]

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(May 1, 1977)

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