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SURVEY OF ILLINOIS LAW— CIVIL PROCEDURE

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I. INTRODUCTION

This year's survey of Illinois civil procedure focuses on the work of both the state and federal courts and the General Assembly. One of the most important developments in state civil procedure law during the last year was the legislative revision of Illinois' long-arm statute. The courts addressed a wide range of topics, most notably in the areas of jurisdiction, pleading, discovery, sanctions, and judgments. This survey article discusses the most significant among these developments.

Section II looks at recent developments in jurisdiction, such as the revision of Illinois' long-arm statute, personal jurisdiction, subject matter jurisdiction and notice. Section III discusses recent decisions relating to pleadings, particularly those involving questions of statute of limitations and standing. Sections IV and V look at recent case law regarding discovery and imposition of sanctions. Section VI concludes this article with a discussion of judgments, specifically issues involving voluntary dismissals, collateral estoppel, vacation of judgments and comity.

II. JURISDICTION

A. Revised Long-Arm Statute

The most important legislative development in the area of civil procedure during 1989 was the substantial reworking of the Illinois long-arm statute. Since *International Shoe v. Washington*[1] introduced

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1. 326 U.S. 310 (1945).

the modern framework for testing the constitutional limits of personal jurisdiction,[2] states have varied in their statutory responses to the potential expansion of jurisdictional power. A few states, most notably California, adopted the simple statement that their courts are authorized to exercise jurisdiction on any constitutional basis.[3] Most states, including Illinois, adopted long-arm statutes that set forth a list of specific acts which could subject a non-resident defendant to the personal jurisdiction of the forum.[4] A few states combined the two approaches.[5]

A comparison of the laundry-list style statutes with the due process statutes may suggest that legislative endorsement of the former approach was a conscious repudiation of the latter. However, in 1957, the Illinois Supreme Court stated in *Nelson v. Miller*,[6] that the statute was clearly intended to extend long-arm jurisdiction to the limits of due process. With that decision, the court began a generation of jurisdictional analysis which, while referring to the limiting language of the statute, interpreted it as if it were co-extensive with due process.[7]

In the 1981 case of *Green v. Advance Ross Electric Corp.*,[8] the Illinois Supreme Court rejected this construction as overbroad, holding that the statute "should have a fixed meaning without regard to changing concepts of due process . . . ." Consequently, some acts by non-residents could satisfy due process but not fall within the specific language of the statute, thus depriving Illinois courts of a basis for exercising jurisdiction.[9] This discrepancy became most ap-

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2. According to *International Shoe*, "due process requires only that in order to subject a defendant to a judgment *in personam* . . . he have certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316.

3. CAL. CIV. PRO. CODE § 410.10 (1973).

4. For a complete list of state long-arm statutes, see Beyler, *The Illinois Long Arm Statute: Background, Meaning, and Needed Repairs*, 12 S. ILL. U.L.J. 293, 296 n.2 (1988).

5. IOWA CODE ANN. § 617.3 (West Supp. 1990); NEB. REV. STAT. § 25-536 (1989); S.D. CODIFIED LAW ANN. § 15-7-2 (West Supp. 1990) & § 47-8-17 (1983).

6. 11 Ill. 2d 378, 389, 143 N.E.2d 673, 679 (1957). *See also* Beyler, *supra* note 4, at 307. However, in an article written after the original passage of the statute, Professor Cleary, the intellectual father of Illinois' long-arm statute, recognized that while the enactment did not extend to the limits of the due process clause, it did include all the jurisdictional bases considered to be consistent with *International Shoe*. Cleary & Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 NW. U.L. REV. 599 (1955).

7. *See* Beyler *supra* note 4, at 297-98.

8. 86 Ill. 2d 431, 436, 427 N.E.2d 1203, 1206 (1981).

9. For an example of such a factual situation, see Hellriegel v. Sears Roebuck & Co., 157 F. Supp. 718 (N.D. Ill. 1957).

parent in cases to enforce child support obligations,[10] which largely provided the political impetus for the 1989 legislative revisions of the long- arm statute.[11]

The revised statute is an almost exact formulation of a proposed long-arm statute set forth in the *Southern Illinois University Law Journal* in 1988 by Professor Keith Beyler.[12] The statute adopts the "hybrid" approach of first listing specific acts which will subject non-residents to jurisdiction, and then adding a general provision stating that, in addition, courts may exercise jurisdiction on any basis consistent with due process. Pertinent sections of the new statute read as follows, with the revised language italicized:

> § 2-209. Act submitting to jurisdiction—Process.
>
> (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:
>
> (1) The transaction of any business within this State;
>
> (2) The commission of a tortious act within this State;
>
> (3) The ownership, use, or possession of any real estate situated in this State;
>
> (4) Contracting to insure any person, property or risk located within this State at the time of contracting;
>
> (5) With respect to actions of dissolution of marriage, *declaration of invalidity of marriage* and legal separation, the maintenance in this State of a matrimonial domicile at the time this cause of action arose or the commission in this State of any act giving rise to the cause of action;
>
> (6) With respect to actions brought under the Illinois Parentage Act of 1984, as now or hereafter amended, the performance of an act of sexual intercourse within this State during the possible period of

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10. The Illinois Supreme Court extended the language of the statutory provision providing that a "tortious act" within Illinois would include the failure to pay child support obligations in *In re* Marriage of Highsmith, 111 Ill. 2d 69, 74, 488 N.E.2d 1000, 1003 (1986). In *Highsmith*, the custodial father sent his daughter to live with her grandparents in Illinois and then attempted to transfer custody to them. Even though the father's acts were deemed sufficient to satisfy due process requirements for Illinois long-arm jurisdiction, a failure to provide child support is not a tort in traditional terms. Professor Beyler maintained that the *Highsmith* court went beyond the intended meaning of the "tortious act" provision. Beyler, *supra* note 4, at 416. Despite *Highsmith*, the General Assembly apparently felt that Illinois courts might still lack constitutionally permissible jurisdiction in some child support cases.

11. P.A. 86-840, 1989 Ill. Laws 4629 (effective Sept. 7, 1989).

12. Beyler, *supra* note 4.

conception;
(7) *The making or performance of any contract or promise substantially connected with this State;*
(8) *The performance of sexual intercourse within this State which is claimed to have resulted in the conception of a child who resides in this State;*
(9) *The failure to support a child, spouse or former spouse who has continued to reside in this State since the person either formerly resided with them in this State or directed them to reside in this State;*
(10) *The acquisition of ownership, possession or control of any asset or thing of value present within this State when ownership, possession or control was acquired;*
(11) *The breach of any fiduciary duty within this State;*
(12) *The performance of duties as a director or officer of a corporation organized under the laws of this State or having its principal place of business within this State;*
(13) *The ownership of an interest in any trust administered within this State; or*
(14) *The exercise of powers granted under the authority of this State as a fiduciary.*
(b) *A court may exercise jurisdiction in any action arising within or without this State against any person who:*
(1) *Is a natural person present within this State when served:*
(2) *Is a natural person domiciled or resident within this State when the cause of action arose, the action was commenced, or process was served;*
(3) *Is a corporation organized under the laws of this State; or*
(4) *Is a natural person or corporation doing business within this State.*
(c) *A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.*[13]

The key part of the statute, indeed the only part which is actually necessary, is subsection (c), which returns Illinois courts to the pre-1981 practice of treating Illinois' long-arm statute as co-extensive with due process. This time, however, the "one-step" inquiry is authorized by statute rather than by judicial decree.

In light of subsection (c), the necessity of setting forth the specific acts of subsection (a) is unclear. Subsection (c), in conferring jurisdiction on all constitutionally permissible bases, clearly imports

13. ILL. REV. STAT. ch. 110, ¶ 2-209 (1989).

any and all of the specific acts of subsection (a) which meet due process requirements. On the other hand, the specific language of subsection (a) may not extend beyond the limitations of subsection (c) and authorize the exercise of jurisdiction in any manner that would offend the state or federal constitutions.[14] Hence, the main purpose of subsection (a) appears to be illustrative—to specify to attorneys the types of acts generally considered sufficient to satisfy due process, and to inform citizens of the types of acts the consequences of which they can expect to answer for in Illinois courts.[15]

While most of the specific bases for jurisdiction listed in section 2-209(a) seem clearly sufficient to satisfy due process, at least one category is highly suspect. Professor Beyler proposed, and the legislature adopted, subsection (a)(8), which purports to confer jurisdiction on the basis of "sexual intercourse within this State which is claimed to have resulted in the conception of a child." Although Illinois is not the first state to attempt to base jurisdiction on claims of conception occurring within its borders in cases involving parental duties,[16] it is quite likely that this act alone is too minimal to satisfy due process unless applied in the context of some other affiliating contacts with the state.

For example, in *Kulko v. Superior Court*,[17] the United States Supreme Court applied the *International Shoe* test in the context of a dispute involving child support. The Court held that California lacked sufficient minimum contacts to support jurisdiction where the father and mother, New York residents, had been married in California during a "three-day stopover" in that state prior to the father's

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14. Professor Beyler notes that some Supreme Court cases, including Kulko v. Superior Court, 436 U.S. 84 (1978), contain language stating that in the particular case the state involved had not "expressed its interest" in jurisdiction by enacting a specific provision applicable in that case. *Id.* at 98. This omission, he notes, suggests that by identifying its interest in asserting jurisdiction on the basis of a specific set of facts, a state might make it more likely that the extension of jurisdiction will be upheld. Beyler, *supra* note 4, at 418-19. Professor Beyler is correct in suggesting that such a conclusion is "misguided"; wishing, and even codifying, no matter how clearly, should not make it so, at least with respect to the scope of the due process clause.

15. Beyler, *supra* note 4, at 413-14.

16. *See e.g.*, KAN. STAT. ANN. § 60-308(b)(10) (1983); KY. REV. STAT. ANN. § 454.210(2)(a)(8) (Michie 1988); LA. REV. STAT. ANN. § 13.3201(7) (West Supp. 1990); ME. REV. STAT. ANN. tit. 14, § 704-A(2)(E) (1980); MD. CTS. & JUD. PROC. CODE ANN. § 6-103.2 (1989); N.D.R. CIV. P. 4(b)(I) (Supp. 1985); ORE. R. CIV. P. 4(K)(3) (1989); S.D. CODIFIED LAW ANN § 15-7-2(8) (1981); TEX. FAM. CODE ANN. § 11.051(1) (Vernon 1986); WASH. REV. CODE ANN. § 4.28.185(1)(e) (1988). *See also* Beyler, *supra* note 4, at 416.

17. 436 U.S. 84 (1978).

departure for military duty in Korea.[18] The mother returned to New York immediately, as did the father following his tour of duty, and in 1961 and 1962 their two children were born there. Ten years later the parties divorced, and the mother moved to California. The father consented to an agreement which allowed the children to spend part of the year with their mother in California and obligated him to make child support payments. The Court held that the three-day stopover in California, the marriage in California, the presence of the wife and children in California, and the father's consent to the custody agreement were insufficient contacts to render him subject to California's jurisdiction. The father's acts would not lead "a reasonable parent" to anticipate "the substantial financial burden and personal strain of litigating a child-support suit in a forum 3,000 miles away."[19]

Kulko, as well as numerous commercial cases, focused on whether the defendant engaged in such activities in relation to the forum as to render the state's exercise of jurisdiction over that defendant foreseeable.[20] Professor Beyler defends the "sexual intercourse" provision, even in the case of "a one-night stay in the state", on the grounds that the consequences are not more remote or unforeseeable than an auto accident resulting from "a one-night drive through the state."[21] This argument is not persuasive. The chance that a single act of intercourse will lead to conception, *and* that a child will be born, *and* that the relationship of the parents will be severed, *and* that the parent with custody will choose to live subsequently in the state of conception seem marginally, if at all, analogous to a car passing through a state.

Assume, for example, that the Kulkos consummated their marriage in California during their three-day stop-over. The conjugal acts of Mr. Kulko in California are indistinguishable from those claimed to be sufficient to satisfy due process in section 2-209(a)(8).

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18. *Id.* at 86.

19. *Id.* at 97.

20. The standard of jurisdictional foreseeability differs from the tort standard of foreseeability. Tort foreseeability looks to whether the consequences of the defendant's acts are probable or predictable. It assesses the predictability of probabilities to the reasonable person. Judicial foreseeability looks to whether the defendant purposefully directed his activities to the forum, thereby giving rise to the presumption that when there is intent and purposeful activity directed to the forum, the defendant can reasonably expect to be sued in the forum for the consequences of those acts. Kaplan, *Civil Procedure Lecture Series*, The John Marshall Law School. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

21. Beyler, *supra* note 4, at 416-17.

In terms of Mr. Kulko's "acceptance" of the possibility of jurisdiction, what difference does it make *where* conception took place?

Consider the following hypothetical: Two law students from New York attend a conference in Chicago, where they engage in sexual relations. They also have sexual relations upon their return to New York. Nine months later, a baby is born. The couple marries. Ten years later they divorce. The wife and child move to Chicago. Is there long-arm jurisdiction over the husband in Illinois? Yes, under section 2-209(a)(8). Does this long-arm jurisdiction assist Illinois courts in providing financial support to children residing within its borders? Yes. Is it constitutional? No. Why not? Because the act of conception is too fortuitous, isolated and singular to serve as a dispositive jurisdictional contact. What happens to the foreseeability analysis if one or both parties used birth control? If the man has a low sperm count? If there are multiple putative fathers? Assuming that a "claim" of conception[22] is too minimal a contact to satisfy due process, is Illinois' interest in the issue strong enough to bootstrap a weak case of minimum contacts with other affiliating circumstances as permitted by *Burger King v. Rudzewicz*?[23] We think not.[24]

The legislature would have been on firmer constitutional ground had it provided that the act of intercourse take place when one or both parties were residents of Illinois.[25] Several state courts have upheld long-arm jurisdiction based on claims of residence *and* con-

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22. *See infra* note 26 and accompanying text.

23. 471 U.S. 462 (1985). In "appropriate case[s]," the courts may evaluate "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 476-77. *See also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Calder v. Jones, 465 U.S. 783 (1984); McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

24. Surely it cannot be meant to imply that a mere "claim" that sexual intercourse in Illinois resulted in conception provides a basis for jurisdiction; the claim must at least be plausible. *See generally* Sherburne County Soc. Servs. v. Kennedy, 426 N.W.2d 866 (Minn. 1988) (no jurisdiction based on single act of intercourse in forum state where conception was the result of intercourse six months later in another state, regardless of the fact that the mother was at all times a resident of the forum state). Yet § 2-209(a)(8) seems to reject the requirement that the sexual intercourse within the forum actually have led to conception as found in statutes such as KY. REV. STAT. ANN. § 454.210 (8) (1988) and KAN. STAT. ANN. § 60-308(10) (1983).

25. *See* KAN. STAT. ANN. § 60-308(b) (1973); KY. REV. STAT. ANN. § 454.210(2)(a)(8) (1988); IOWA CODE ANN. § 252B.12 (1985).

ception within the forum state.[26] A Minnesota appellate court, for example, upheld jurisdiction over a non-resident who had a continuing relationship with a Minnesota resident even though the act of sexual intercourse leading to conception took place in Wisconsin, the defendant's home state.[27] The place of conception alone is not determinative; rather, the determinative factor is whether the defendant's conduct could have foreseeable legal consequences in Illinois.

B. Personal Jurisdiction

Under the due process analysis, a state may exercise jurisdiction over a non-resident defendant who has minimum contacts with the state.[28] Illinois' only contribution to the minimum contacts melee was *Lichon v. Asido Chemical Co.*,[29] in which the First District bypassed *World-Wide Volkswagen Corp. v. Woodson*[30] and *Asahi Metal Industry Co. v. Superior Court*[31] to adopt a theory of transient jurisdiction over toxic chemicals traveling en route through Illinois to another destination. In so doing, the court upheld the dismissal of a third-party complaint filed by an American distributor (Asido) against an English chemical manufacturer (Campbell), finding that although the minimum contacts test was satisfied, due process requirements were not.[32]

Lichon filed suit against Asido for personal injuries sustained when he came into contact with leaking drums of phorate technical, a highly toxic chemical used in the manufacture of insecticides.[33] Asido filed a third-party complaint for contribution against Campbell, phorate's manufacturer, alleging that Campbell's negligent containment and labeling of the phorate resulted in the leaking drums, proximately causing the plaintiff's injuries.[34] Campbell was served with summons in England, and based on *Asahi*, moved to dismiss for lack of personal jurisdiction.

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26. *See* Larsen v. Scholl, 296 N.W.2d 785 (Iowa 1980); Bouchard v. Klepacki, 357 A.2d 463 (N.H. 1976); County of Ventura v. Neice, 434 N.E.2d 907 (Ind. App. 1982) (although the statute did not limit its scope to cases in which one party was a resident, that was true in this case); Howells v. McKibben, 281 N.W.2d 154 (Minn. 1979).

27. Howells v. McKibben, 281 N.W.2d 154 (Minn. 1979); Brown County Family Serv. Center v. Kahorn, 427 N.W.2d 20 (Minn. App. 1988).

28. *See supra* note 2.

29. 182 Ill. App. 3d 672, 538 N.E.2d 613 (1st Dist. 1989).

30. 444 U.S. 286 (1980).

31. 107 S. Ct. 1026 (1987).

32. *Lichon*, 182 Ill. App. 3d at 685-86, 538 N.E.2d at 616.

33. *Id.* at 673, 538 N.E.2d at 614.

34. *Id.* at 673, 538 N.E.2d at 614-15.

The First District applied the traditional two-step approach to its jurisdictional analysis. First, the court considered whether Campbell's participation in the stream of commerce satisfied the minimum contacts test. Notwithstanding the fact that the case involved a third-party complaint for indemnification against a foreign manufacturer, the court rejected the precedential value of *Asahi* and relied instead on three federal district court cases dealing with the placement of hazardous or toxic products into the stream of commerce.[35] Under this line of cases, the more dangerous the product, the greater the foreseeability of injury occurring as the product travels to its final destination. Hence, minimum contacts can be satisfied upon a lesser showing of contact between the forum and the defendant than would be required for a non-dangerous product.[36]

Following Justice Brennan's opinion in *Asahi*, the *Lichon* court stated that "mere placement" of a dangerous instrumentality into the stream of commerce is a sufficient contact between the defendant and the forum to satisfy minimum contacts.[37] The effect of this theory, of course, is that in spite of *World-Wide Volkswagen's* admonition to the contrary,[38] jurisdiction travels with the inherently dangerous product. As applied to the instant case, the court found that Campbell's act of selling phorate technical to an American company, which created the possibility that the phorate might cause injury in any state in which it traveled, constituted sufficient minimum contacts with Illinois when coupled with the fact that the injury allegedly occurred there.[39]

How did the Third District justify its appointment of a chattel as the defendant's agent for service of process?[40] It limited *World-Wide Volkswagen's* restrictive treatment of dangerous instrumentalities to local merchants who serve a "self-circumscribed market" and "ordinarily [have] no control over where the buyer takes the product after it is sold."[41] Interstate distributors, on the other hand, "have an 'interest in reaching as broad a market as' possible, and place

35. O'Neil v. Picillo, 682 F. Supp. 706 (D.R.I. 1988); Allied Towing Corp. v. Great E. Petroleum Corp., 642 F. Supp. 1339 (E.D. Va. 1986); Violet v. Picillo, 613 F. Supp. 1563 (D.R.I. 1985).

36. *Lichon*, 182 Ill. App. 3d at 684-85, 538 N.E.2d at 622.

37. *Id.*

38. 444 U.S. 286, 295-97 (1980).

39. *Lichon*, 182 Ill. App. 3d at 684-85, 538 N.E.2d at 622.

40. *See World-Wide Volkswagen*, 444 U.S. at 295-97.

41. *Lichon*, 182 Ill. App. 3d at 682, 538 N.E.2d at 620 (citing Violet v. Picillo, 613 F. Supp. 1563, 1576 (D.R.I. 1985)).

their products into the stream of commerce with either the subjective intention, or objective reason to know, that their products will be sold 'to a nation-wide market . . . in any or all states.'"[42] Hence, the Third District concluded, *World-Wide Volkswagen* does not insulate Campbell, who knowingly sold its dangerous product to Asido, a nationwide distributor, from amenability to jurisdiction in any state along the stream of commerce where the product causes injury.[43]

Having determined that Campbell had sufficient minimum contacts with Illinois to allow Illinois to exercise personal jurisdiction over it, the court turned to the question of whether the exercise of jurisdiction over Campbell comported with traditional notions of fair play and substantial justice.[44] The court weighed the burden of requiring Campbell to litigate under a foreign judicial system against Illinois' interest in providing a forum for a non-citizen in order to protect its own citizens from hazardous products. The court concluded that, although Illinois' interests in this case were greater than California's interests in *Asahi*, the exercise of personal jurisdiction in Illinois would not comport with traditional notions of fair play and substantial justice.[45]

C. Subject Matter Jurisdiction

1. Jurisdiction Over Medical Peer Review Procedures

The case of *Knapp v. Palos Community Hospital*[46] raised the interesting issue of the scope of a circuit court's subject matter jurisdiction over medical peer review procedures. The resolution of this question gave rise to a doctrine of judicial deference to medical facility judgments closely analogous to the corporate business judgment rule.

The *Knapp* litigation arose from the termination of several physicians' staff privileges by Palos Community Hospital pursuant to adverse peer review evaluations.[47] The action consisted of three consolidated appeals each raising questions related to the subject

42. *Id.* at 681-82, 538 N.E.2d at 620 (citing *Violet*, 613 F. Supp at 1576).
43. *Id.*
44. *Id.* at 684-85, 538 N.E.2d at 622.
45. *Id.* at 686, 538 N.E.2d at 622-23.
46. 176 Ill. App. 3d 1012, 531 N.E.2d 989 (1st Dist. 1988).
47. *Id.* at 1015, 531 N.E.2d at 990-91.

matter jurisdiction of the circuit court in light of the peer review privilege and the doctrine of judicial non-interference with hospital medical staffing decisions.[48] The Third District found that "the overwhelming weight of authority" recognized the power, authority and unique expertise of medical facilities to render staffing decisions that were final and not subject to judicial review. The only exception to this authority exists in instances of noncompliance with institutional medical requirements, in which case judicial review is limited to compelling compliance with the prescribed procedure.[49] The court cited "sound reasons" for its refusal to substitute its opinion for that of hospital authorities: the ignorance of the judiciary compared to the expertise of hospital authorities; the presumed good faith of hospital authorities in securing the best qualified staff; and matters of collegiality which can be evaluated only by colleagues.[50]

The court also cited the Medical Studies Act, now codified as sections 8-2101 to 8-2105 of the Code of Civil Procedure,[51] as support for its limited review doctrine. Sections 8-2101 and 8-2102 delineate the parameters of the terminated physician's due process entitlements. Section 8-2101 requires that the data collected by the peer review board be kept strictly confidential and used only for the peer review process itself or for judicial review limited in scope to a determination of compliance with internal procedures.[52] Section 8-2102 bars the use of any such peer review data as evidence in *any* action of *any* kind in *any* court.[53] So defined, these two sections virtually create an absolute peer review privilege for the medical facility and members of its peer review board.

The court then evaluated sections 8-2101 and 8-2102 in light of section 2b of the Medical Procedure Act.[54] Section 2b provides immunity for civil liability for peer review participants where these acts do not amount to wilful and wanton misconduct.[55] Finding section 2b to be in direct conflict with sections 8-2101 and 8-2102, and to be less specific than the latter provisions, the court refused to carve out a wilful and wanton exception to the absolute peer

48. *Id.* at 1019, 531 N.E.2d at 992-93.
49. *Id.* at 1018-19, 531 N.E.2d at 993.
50. *Id.* at 1020-21, 531 N.E.2d at 994-95.
51. ILL. REV. STAT. ch. 110, ¶¶ 8-2101—8-2105 (1989).
52. *Id.* ¶ 8-2101.
53. *Id.* ¶ 8-2102.
54. Act of June 30, 1923, ILL. REV. STAT. ch. 111, ¶ 4402 (1981), *repealed by* Medical Practice Act of 1987, ILL. REV. STAT. ch. 111, ¶¶ 4400-1—4400-63 (1989).
55. *Id.*

review privilege.[56] Accordingly, the court held that, taken in concert, sections 8-2101 and 8-2102 render peer review data privileged, confidential, undiscoverable, and inadmissible except (1) in the peer review process itself, (2) in any legal action related thereto unless limited to a determination of compliance with institutional procedures, or (3) upon request of the subject physician.[57]

2. *Public Education Labor Disputes*

In another case dealing with subject matter jurisdiction, the Illinois Supreme Court held that the Illinois Educational Labor Relations Act[58] prohibits the circuit courts from enjoining arbitration proceedings in the context of public education labor disputes. In *Board of Education v. Warren Township High School Federation of Teachers, Local 504*,[59] the school district sought and received declaratory and injunctive relief against Local 504 and the Illinois Educational Labor Relations Board to prevent them from arbitrating the grievance of a non-tenured teacher.[60] Local 504 and the labor relations board appealed the grant of the preliminary injunction to the appellate court, and then to the Illinois Supreme Court.[61]

The supreme court's analysis was based largely on *Board of Education v. Compton*,[62] a case decided while the *Warren* appeal was pending. *Compton* also involved the arbitrability of a grievance concerning a non-tenured teacher.[63] In that case, the Illinois Supreme Court held that the Act "vests *exclusive* primary jurisdiction over arbitration disputes with the Board",[64] and, thereby, "divests the circuit courts of jurisdiction to vacate or enforce arbitration awards in public education."[65] The *Compton* court offered three reasons to substantiate its holding: (1) the Act is a comprehensive statutory scheme creating rights and duties unknown at common law which vest jurisdiction over unfair labor practices in the labor relations board;[66] (2) the Act does not incorporate the enforcement mechanisms

56. 176 Ill. App. 3d at 1025, 531 N.E.2d at 997.
57. *Id.* at 1025-26, 531 N.E.2d at 997-98.
58. ILL. REV. STAT. ch. 48, ¶¶ 1701—1721 (1989).
59. 128 Ill. 2d 155, 538 N.E.2d 524 (1989).
60. *Id.* at 157-58, 538 N.E.2d at 525.
61. *Id.* at 158, 538 N.E.2d at 525.
62. 123 Ill. 2d 216, 526 N.E.2d 149 (1988).
63. *Id.* at 216, 526 N.E.2d at 150.
64. *Id.* at 222, 526 N.E.2d at 152.
65. *Id.* at 217, 526 N.E.2d at 150.
66. *Id.* at 221-22, 526 N.E.2d at 152.

of the Uniform Arbitration Act which funnels through circuit court proceedings to compel and stay arbitrations, and vacate arbitration awards;[67] and (3) dual jurisdiction over arbitration awards would invite "[c]onflicting judgments from forum shopping" which would "imperil the uniformity which the Act obviously seeks to achieve."[68]

Applying *Compton* to the instant case, the court found that the Act preempted not only the circuit court's power to enjoin arbitrations but also its power to determine the arbitrability of a dispute.[69] To avoid disruption of the statutory scheme, the court explained that the only matters over which the circuit court retained subject matter jurisdiction under the Act were: (1) enforcing labor relations board subpoenas;[70] (2) enjoining strikes by educational employees which pose a danger to public health or safety;[71] and (3) enforcing labor relations board orders during and after an unfair labor practice hearing.[72] Accordingly, the court found that the circuit court lacked the subject matter jurisdiction to impose the injunctions appealed from and ordered the vacation of the injunctions.[73]

D. Notice

In *In re Petition of Village of Kildeer to Annex Certain Property*,[74] the Illinois Supreme Court carved out a course-of-conduct-amounting-to-fraud exception to the notice requirement of the municipal annexation procedures of the Illinois Municipal Code.[75] In 1986, the Village of Kildeer attempted to annex three tracts of privately owned land by filing three separate petitions, each initiated by three separate municipal ordinances, before three separate circuit court judges.[76] Each judge was unaware of the petitions pending before the other two judges.[77] Kildeer published separate notices for each of the three hearings in the Chicago Sun-Times which, although a newspaper of general circulation, had limited circulation in that

67. *Id.*
68. *Id.*
69. Board of Education v. Warren High School Federation of Teachers, Local 504, 128 Ill. 2d 155, 164, 538 N.E.2d 524, 528 (1988).
70. *Id.* at 165, 538 N.E.2d at 528.
71. *Id.*
72. *Id.* at 166, 538 N.E.2d at 529.
73. *Id.* at 166-67, 538 N.E.2d at 529-30.
74. 124 Ill. 2d 533, 530 N.E.2d 491 (1988).
75. ILL. REV. STAT. ch. 24, ¶ 7-1-4 (1985).
76. *Kildeer*, 124 Ill. 2d at 536-38, 530 N.E.2d at 493-94.
77. *Id.* at 538, 530 N.E.2d at 493.

area.[78] As a result, potential objectors were uninformed of the annexations and failed to appear at the hearings.[79] Subsequently, each judge approved the ordinance pending before him.[80] Five months later, the property owners of each respective tract of land filed petitions to vacate each of the orders.[81] The property owners testified that they had not been notified and had not consented to the annexations. Each of the three petitions to vacate was granted.[82]

The Illinois Supreme Court upheld the vacation orders on two grounds. First, each ordinance had attempted to annex a tract of land the size of which violated the acreage limitation of section 7-1-2 of the Municipal Code.[83] Second, the court found that although in technical compliance with the statutory notice requirements of section 7-1-2, Kildeer had engaged in a course of conduct calculated to prevent objectors from discovering the legal notices, thus vitiating the effectiveness of the notice.[84]

In addition to the compliance procedures previously mentioned, the court noted the undisputed record evidence that (1) contrary to its practice of publishing notice in local papers, Kildeer had never previously published notices in the Chicago Sun-Times, the circulation of which in this particular area was only fifty-five copies per day;[85] (2) Kildeer failed to file plats of annexation in any of the courts in which it had filed petitions;[86] (3) officials of Kildeer had personal knowledge of the identity of at least one landowner but nevertheless failed to inform him of the annexation;[87] (4) an agent of Kildeer attended public meetings at which she learned that the affected property owners were unaware of the pending annexations but, pursuant to instructions, refrained from providing pertinent information to either the property owners or appropriate government officials;[88] and (5) objectors were compelled to resort to Freedom of Information Act requests because the Village of Kildeer refused to release relevant documentation upon request.[89] The court character-

78. *Id.* at 538, 548, 530 N.E.2d at 493, 498.
79. *Id.* at 538, 530 N.E.2d at 493.
80. *Id.*
81. *Id.* at 539, 530 N.E.2d at 494.
82. *Id.* at 537, 530 N.E.2d at 493.
83. *Id.* at 546, 530 N.E.2d at 497 (referring to ILL. REV. STAT. ch. 24, ¶ 7-1-2 (1985)).
84. *Kildeer*, 124 Ill. 2d at 550, 530 N.E.2d at 499.
85. *Id.* at 548, 530 N.E.2d at 498.
86. *Id.* at 549, 530 N.E.2d at 498.
87. *Id.*
88. *Id.*
89. *Id.* at 550-51, 530 N.E.2d at 499.

ized this conduct as "egregious"[90] and, although in technical compliance with the statute, "calculated to prevent objectors from discovering the legal notices."[91] Finding no abuse of the circuit court's discretion, the court affirmed the orders vacating the annexation petitions.[92]

III. PLEADINGS

A. Stating a Cause of Action for Psychiatric Malpractice: The Duty to Warn

The case of *Eckhardt v. Kirts*[93] raised the interesting issue of the scope of a psychiatrist's duty to warn a third party who is injured by an act of a patient undergoing psychiatric treatment. The complaint alleged that Joyce Eckhardt, a psychiatric patient of Dr. Kirts, shot and killed her husband while he was sleeping in his bedroom and that Kirts's failure to warn Mr. Eckhardt that he was one of his wife's three potential victims increased the likelihood of the homicide. The court framed the issue as the extent to which Dr. Kirts owed a duty to warn the potential victims of Mrs. Eckhardt's violent propensities.[94]

The plaintiff argued that Kirts owed a duty to the decedent because, although his specific homicide could not have been predicted, "he was a member of a readily identifiable group of three potential victims against whom Joyce Eckhardt would reasonably and foreseeably direct her violent acts."[95] Since this argument raised an issue of first impression for Illinois courts, the plaintiff relied heavily on the California case of *Tarasoff v. Regents of the University of California*,[96] which held a therapist liable for failing to warn a victim of threats on which his patient eventually acted.[97] *Tarasoff* created an exception to the general rule that no one owes a duty to control the conduct of another because, in that case, "the defendant

90. *Id.* at 549, 530 N.E.2d at 498.
91. *Id.* at 550, 530 N.E.2d at 499.
92. *Id.* at 551, 530 N.E.2d at 499.
93. 179 Ill. App. 3d 863, 534 N.E.2d 1339 (2d Dist. 1989).
94. *Id.* at 869, 534 N.E.2d at 1342. So framed, the issue and its resolution extended to all health care providers and hospitals, not only to physicians.
95. *Id.*
96. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).
97. *Eckhardt*, 179 Ill. App. 3d at 869, 534 N.E.2d at 1342.

was the known, specifically foreseeable and identifiable victim of the patient's threats."[98]

The *Eckhardt* court noted that in two recent decisions,[99] the Illinois Supreme Court refused to impose upon health care providers a duty to third parties who had neither a direct nor special relationship with the health care provider.[100] The court also noted that other jurisdictions have declined to extend the physician's duty to warn to the public at large or to an indeterminate class of potential plaintiffs.[101] Finally, the court recognized the strong public policy underlying the confidentiality of the patient-therapist relationship and the disruptive therapeutic consequences of routine disclosures.[102]

Against these concerns, the court considered the therapist's duty to warn when "a patient poses a serious danger of violence to the foreseeable victim."[103] Foreseeability, the court counseled, must not be based on predictions of mere possibilities, but rather, on "what the reasonably prudent person would have foreseen as *likely* to happen."[104]

Based on these considerations, the court found that a cause of action predicated upon a therapist's duty to warn must include the following three elements: First, the patient's threats of violence must be specific. Second, the threats must be directed at a specific and identified victim. Third, a direct or special relationship must exist between the patient and the health care provider.[105] The court concluded by observing that greater expansion of the duty to warn could impose limitless responsibility and an unacceptably severe burden on health care providers who render therapeutic assistance under circum-

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98. *Id.* at 872, 534 N.E.2d at 1344 (citing Thompson v. County of Alameda, 27 Cal. 3d 741, 751-52, 614 P.2d 728, 733, 167 Cal. Rptr. 70, 75 (1980)).

99. Estate of Johnson v. Condell Mem. Hosp., 119 Ill. 2d 496, 520 N.E.2d 37 (1988) (hospital was found to have no duty to unknown third parties who were the victims of a police chase of an escaped patient); Kirk v. Michael Reese Hosp. & Med. Center, 117 Ill. 2d 507, 513 N.E.2d 387 (1987) (psychiatrist was found to have no liability for injuries sustained by a passenger in a car driven by a patient who consumed alcohol which, in combination with medication prescribed by the psychiatrist, resulted in the patient's impaired driving ability).

100. *Eckhardt*, 179 Ill. App. 3d at 871, 534 N.E.2d at 1343 (citing *Kirk*, 117 Ill. 2d at 531, 513 N.E.2d at 398).

101. *Id.* at 871, 534 N.E.2d at 1343-44 (citing Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1967)).

102. *Id.* at 872, 534 N.E.2d at 1344 (citing Thompson v. County of Alameda, 27 Cal. 3d 741, 752, 614 P.2d 728, 734, 167 Cal. Rptr. 70, 76 (1980)).

103. *Id.* (citing *Thompson*, 27 Cal. 3d at 752, 614 P.2d at 734, 167 Cal. Rptr. at 76).

104. *Id.* at 870, 534 N.E.2d at 1343.

105. *Id.* at 872, 534 N.E.2d at 1344.

stances in which "[h]uman behavior is simply too unpredictable and the field of psychotherapy presently too inexact. . . ."[106]

B. Statute of Limitations

In *Johnson v. Johnson*,[107] the United States District Court for the Northern District of Illinois was called upon to resolve an issue of first impression under Illinois law: Whether psychological suppression, a form of forgetting, is the equivalent of lack of awareness for purposes of applying the delayed discovery doctrine.

The plaintiff alleged that although she was over 30 years old at the time the complaint was filed, she had until that time suppressed all memory of alleged sexual molestation by her father and corresponding psychological neglect by her mother until psychotherapeutic treatment enabled her "to begin to remember, perceive and understand the nature and scope of her injuries and their causal connection to Defendant's [sic] earlier acts."[108]

The defendants filed a motion to dismiss, which was subsequently treated as a motion for summary judgment, on the grounds that the complaint was time-barred.[109] In an *Erie*-style analysis, the court determined that Illinois would have applied its statute of limitations and discovery rule to this case.[110] The court looked to the rulings of other state courts and found that among the few courts that have resolved the specific issue, the holdings are in conflict.[111] The cases divide the suppression/statute of limitations issue into two categories: (1) cases in which the plaintiff knew of the sexual assault at or before majority but had not yet become aware of the consequences thereof; and (2) cases, such as this one, in which the plaintiff claims to have suppressed all knowledge and awareness of the assault until shortly before filing suit.[112]

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106. *Id.* at 874, 534 N.E.2d at 1345.
107. 701 F. Supp. 1363 (N.D. Ill. 1989).
108. *Id.* at 1364.
109. *Id.* at 1370.
110. *Id.*
111. *Id.* at 1367.
112. *Id.* Wisconsin has applied the discovery rule to both categories of cases. Hammer v. Hammer, 142 Wis. 2d 257, 418 N.E.2d 23, 25 (1987), *review denied*, 144 Wis. 2d 953, 428 N.E.2d 552 (1988). California and Montana have applied the discovery rule to the second category of cases but have declined to apply it to the first category. DeRose v. Carswell, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368 (1987); E.W. & D.W. v. D.C.H., 754 P.2d 817 (Mont. 1988). Several Washington cases had declined to apply the discovery rule to either category. Tyson v. Tyson, 107 Wash. 2d 72, 727 P.2d 226 (1986); Raymond v. Ingram, 47 Wash. App.

To determine Illinois' approach, the court looked to the analysis in *Rozny v. Marnul*,[113] which balanced the problems of stale proof against prejudice to the plaintiff. That court stated that the balance should be "founded on reason and common sense" and "developed to further justice."[114] According to *Rozny,* Illinois courts have applied the discovery rule in numerous contexts, using a case-by-case approach which places a higher value on equitable considerations than on proof problems.[115] Thus, the *Johnson* court concluded that in cases of adult incest survivors who allegedly have no conscious memory of sexual abuse, Illinois would toll the statute of limitations until the victim knew or should have known that injury was caused by the wrongful acts of another.[116] That point in time, the court concluded, was to be determined on a case-by-case basis.[117] Finding a factual dispute as to when the plaintiff first knew or should have known of the injury, the court denied the defendants' motion for summary judgment.[118]

The somewhat peculiar case of *McIntyre v. Christ Hospital*,[119] raised the seminal question of when, for statute of limitations purposes, a man reasonably should know that he does not, did not, and will not have descended testicles due to the alleged wrongful acts of another. The plaintiff contended that he never knew nor had reason to suspect that he did not have testicles until, at the age of 20, a surgeon informed him that he had, but should not have had, undescended testicles. The plaintiff alleged that the defendant, who had performed a hernia operation on the plaintiff when the latter was age 6, should have diagnosed and treated the undescended testicles problem at that time.

In his motion for summary judgment, the defendant hernia surgeon, who had last examined the plaintiff fourteen years earlier,

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781, 737 P.2d 314 (1987); Kaiser v. Milliman, 50 Wash. App. 235, 747 P.2d 1130 (1988). But the cases were subsequently superseded by statute. WASH. REV. CODE § 144 (1988). Despite the differences in outcome, each forum adopted the same analytical approach of weighing the risk of stale or fraudulent claims against the unfairness of barring meritorious claims. *Johnson*, 701 F. Supp. at 1367-68.

113. 43 Ill. 2d 54, 70, 250 N.E.2d 656, 664 (1969).

114. *Johnson,* 701 F. Supp at 1369 (quoting Fure v. Sherman Hosp., 64 Ill. App. 3d 259, 380 N.E.2d 1376 (2d Dist. 1978)).

115. *Id.*

116. *Id.* at 1369-70.

117. *Id.* at 1370.

118. *Id.*

119. 181 Ill. App. 3d 76, 536 N.E.2d 882 (1st Dist. 1989).

argued that the plaintiff's cause of action was time-barred.[120] The defendant cited the plaintiff's deposition testimony that his lack of complete genitalia was as noticeable as "having three fingers," causing him purposely to conceal himself in the high school locker room.[121] Hence, the defendant contended, through the use of reasonable diligence and inquiry, the plaintiff should have been aware of his condition long before he brought this action.[122] The circuit court granted summary judgment for the defendant and the plaintiff appealed.[123]

The appellate court found, given the nature of the injury claimed by the plaintiff, that it could not hold as a matter of law when the plaintiff knew or reasonably should have known that his condition was caused by the defendant's allegedly wrongful conduct.[124] For summary judgment purposes, whether the plaintiff knew or should have known of the injury and its cause were genuine issues of fact to be determined by the jury.[125] Characterizing the question as "close," the court held that the statute of limitations issue should be resolved by the jury.[126] In the final analysis, it is impossible to quarrel with the result reached by the appellate court. It may be appropriate, indeed, to hold malpractice plaintiffs to a higher standard than the physicians who attend them. The rule that emerges from this case may be stated simply: ignorance of the law is no excuse, but ignorance of medicine is excusable in all physicians and in some patients.

C. Standing: The Power of the Public Guardian

In *In re Estate of Burgeson*,[127] Patrick T. Murphy, the public guardian for Cook County, lost a skirmish to enlarge the power of his office but made significant inroads in the war against attorney misconduct. Murphy had attempted to challenge and vacate two orders entered during probate of the estate of Zella Burgeson, a former Guardian ward. One order closed the Burgeson Estate and included an award of fees to attorney Sheldon Kirschner who had

120. *Id.* at 80, 536 N.E.2d at 884.
121. *Id.* at 82, 536 N.E.2d at 886.
122. *Id.*
123. *Id.* at 80, 536 N.E.2d at 884-85.
124. *Id.* at 82, 536 N.E.2d at 886.
125. *Id.* at 81, 536 N.E.2d at 885.
126. *Id.* at 82, 536 N.E.2d at 886.
127. 125 Ill. 2d 477, 532 N.E.2d 825 (1988).

been charged with Burgeson's care during the two years prior to her death. The second order included a judicial finding that Kirschner committed no improprieties in his care of the deceased.[128]

In November 1982, Burgeson, an elderly woman, signed over a broad power of attorney to Kirschner after it became apparent that she no longer could care for herself.[129] Kirschner hired a "companion" to live with and care for Burgeson, but it later became apparent that Burgeson was not being well cared for. For example, by 1984, Kirschner had received several letters from Burgeson's neighbors reporting that,

> Burgeson was wandering in the lobby naked, had urinated in the lobby and that the odors emanating from her apartment were overwhelming . . . . [H]er . . . apartment . . . was in a shocking state of disarray—the sink, counter and tables were littered with dirty dishes, garbage containers overflowed, the bathtub was filled with standing dirty water and the toilet had not been cleaned in some time.[130]

Building residents also complained that Kirschner had neither responded to their letters nor taken corrective action to aid Burgeson. In July 1984, the companion was arrested for attempting to cash a check forged from Burgeson's account. Two months previously, the companion allegedly cashed $4,000 in unauthorized checks from the same account.[131] Subsequent investigation revealed that Burgeson was indeed kept in a neglected and virtually disabled state.[132]

Due to these circumstances, Burgeson became a temporary ward of the Office of the Public Guardian. Murphy and Kirschner both sought to be named as her plenary guardian. This dispute ended when Burgeson died, at which time her brother, John Hounson, was appointed executor and retained Kirschner as counsel for her estate. Undaunted, Murphy filed a petition for the appointment of a special administrator to investigate the allegations of Kirschner's misconduct and, additionally, initiated disciplinary proceedings against Kirschner with the Attorney Registration and Disciplinary Commission (ARDC). An administrator was appointed and a preliminary investigation instigated, but the investigation was discontinued when Hounson and

128. *Id.* at 479-80, 532 N.E.2d at 825.
129. *Id.* at 480, 532 N.E.2d at 826.
130. *Id.* at 481, 532 N.E.2d at 826.
131. *Id.*
132. *Id.*

other beneficiaries of the estate petitioned to remove the special administrator.[133]

Kirschner then filed a petition to close the estate and approve the final account. Murphy received no notice of the estate's closing even though he had requested it because Kirschner told the court that notice need not be given. Murphy discovered that the estate had been closed when the ARDC informed him, three months later, that his complaint against Kirschner had been dismissed. Murphy then filed a section 2-1401 motion to vacate the two orders.[134] The trial court denied the motion and the appellate court affirmed.[135]

On appeal, the state supreme court agreed that once discharged, a former guardian lacked "injury in fact to a legally recognized interest"[136] and, therefore, lacked standing to protest the pre-death treatment of the deceased. However, the court did find that as an officer of the court, Murphy had responsibly executed his duty to bring allegations of Kirschner's misconduct before the ARDC. The court expressed great concerns about these allegations and admonished the ARDC to thoroughly investigate the matter.[137]

IV. DISCOVERY

In *Willing v. St. Joseph Hospital*,[138] the First District further defined what is discoverable and what is not in the medical peer review process. The case involved a medical malpractice claim in which the plaintiff requested the following documents:

> 1. Any and all materials maintained on Dr. Kitt, including but not limited to his entire credentials file, applications for appointment to staff, applications for specific privileges, references, transcripts, reappraisals, evaluations, recommendations, initial privileges, restrictions to privileges, revocation of privileges, letters of resignation or withdrawal.
>
> 2. The written criteria or standards which must be satisfied for granting each category of privilege granted to Dr. Kitt.
>
> 3. Any and all written rules; regulations, policies or procedures for medical doctors on staff for the departments of surgery, plastic surgery and otolaryngology.[139]

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133. *Id.* at 482, 532 N.E.2d at 826-27.
134. *Id.* at 483-84, 532 N.E.2d at 827.
135. *Id.* at 484, 532 N.E.2d at 827.
136. *Id.* at 486, 532 N.E.2d at 827.
137. *Id.* at 488, 532 N.E.2d at 829.
138. 176 Ill. App. 3d 737, 531 N.E.2d 824 (1st Dist. 1988).
139. *Id.* at 739-40, 531 N.E.2d at 826.

The defendant health care providers refused to produce the documents, claiming they were privileged under sections 8-2101 and 8-2102 of the Medical Studies Act.[140] The court granted the plaintiff's motion for a rule to show cause and held the defendants' attorney in contempt.[141]

The court explained that the purpose of section 8-2101 is to protect the integrity of the peer review process by enabling health care professionals to engage in candid and critical evaluations of their peers without fear of reprisal.[142] As such, section 8-2101 materials are subject to several levels of protection. First, section 8-2101 renders confidential the content of peer review sessions and documents employed therein but not actions taken as a result of such sessions.[143] Consequently, changes in status and restrictions of privileges are discoverable because such information discloses the resolution but not the content of peer review sessions.[144] Second, to confirm that distinctions are properly made, a defendant physician or hospital may request that the court screen each document before its release.[145] Third, even if certain information is found to be discoverable, it must still overcome the obstacles posed by the rules of evidence before it is admissible at trial.[146]

Based on this analysis, the court found that the information requested by the plaintiffs either pertained to matters anteceding or preceding the peer review process and as such were discoverable. Accordingly, the court affirmed the district court's order to produce the requested documents.

V. SANCTIONS

Under Illinois law, sanctions are presently available under two sets of circumstances. First, sanctions are available under section 2-611 of the Code of Civil Procedure (now Supreme Court Rule 137) if a party or its counsel makes an untrue statement in a pleading or motion.[147] Second, sanctions are available under Supreme Court Rule 219(c) if a party or counsel violates discovery rules.[148]

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140. ILL. REV. STAT. ch. 110, ¶¶ 8-2101, 8-2102 (1989).
141. *Willing*, 176 Ill. App. 3d at 740, 531 N.E.2d at 826.
142. *Id.* at 741, 531 N.E.2d at 827.
143. *Id.* at 742, 531 N.E.2d at 827.
144. *Id.* at 744, 531 N.E.2d at 829.
145. *Id.*
146. *Id.*
147. ILL. REV. STAT. ch. 110, ¶ 2-611.1 (1989). The statute provides in pertinent part:

A. Sanctions Under Section 2-611 and Illinois Supreme Court Rule 137

Section 2-611 has been in effect since 1986 and represents a substantial reworking of its predecessor, which applied only to pleadings and parties (not their attorneys) upon a showing of bad faith and limited available sanctions to actual expenses and attorneys fees.[149] Since the new section 2-611 substantially altered prior law, a number of cases have held that it could not be applied retroactively to actions filed before its effective date.[150] Thus, appellate courts rarely were called upon to apply the new statute in its first years of existence.

In *Beno v. McNew*,[151] decided during the past survey year, the Second District provided a fine, single-paragraph summary of section 2-611:

> Section 2-611 of the Code requires that an attorney sign pleadings and other papers filed with the court as a certification that the attorney has read the document, made a reasonable inquiry into its basis, and believes that it is well grounded in fact and law. (Citation omitted). Pleadings and other papers filed in violation of section 2-611 shall subject the party, the party's attorney, or both to an

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> [A]llegations and denials, made without reasonable cause and found to be untrue, shall subject the party pleading them . . . to the payment of reasonable expenses, actually incurred by the other party . . . together with a reasonable attorneys' fees, to be summarily taxed by the court upon motion made within 30 days of the judgment or dismissal.

Id.

148. *Id.* ch. 110A, ¶ 219(c). This rule provides, in pertinent part:

> If a party, or any person at the instance of or in collusion with a party, unreasonably refuses to comply with any provision of [the discovery rules of this court] or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:
>
> (i) that further proceedings be stayed until the order or rule is complied with;
>
> (ii) that the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;
>
> (iii) that he be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;
>
> (iv) that a witness be barred from testifying concerning that issue;
>
> (v) that, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that his action be dismissed with or without prejudice; or
>
> (vi) that any portion of his pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue.

149. *Id.* ch. 110, ¶ 2-611.

150. Safeway Ins. Co. v. Graham, 188 Ill. App. 3d 608, 613, 544 N.E.2d 1117, 1120 (1st Dist. 1989).

151. 186 Ill. App. 3d 359, 542 N.E.2d 533 (2d Dist. 1989).

> appropriate sanction which may include an order to pay the other party the amount of reasonable expenses incurred because of the filing of the pleading, including reasonable attorneys fees. (Citations omitted). The purpose of section 2-611 is to prevent a litigant from abusing the judicial process by penalizing the party who brings a vexatious or harassing action without legal foundation or an action that is based on false statements. (Citations omitted). The party seeking relief has the burden of proof and must establish both that the challenged allegations were untrue and that they were made without reasonable cause . . . .[152]

In *Washington v. Allstate Insurance Co.*,[153] the First District considered an award of $27,182.00 in attorney's fees and costs to the defendant under section 2-611 after the circuit court granted a directed verdict for the defendant.[154] The plaintiffs had sued for breach of contract following the defendant's refusal to pay an insurance claim on an automobile, but failed to establish that they actually owned or had an insurable interest in the car.[155]

In upholding the order, the court stressed that sanctions against the parties rather than their attorney were appropriate because the unreasonable allegations were of fact rather than law. The court found that this was a case "in which an attorney must rely almost exclusively on his client for the facts" and that the attorney's reliance on his client's statement was not clearly unreasonable.[156] This circumstance was contrasted to situations in which "a motion was unsupported by existing law rather than the facts," in which case it would be clear that the attorney, not the client, should bear the burden of the sanctions.[157]

In *In re Caruso*,[158] another panel of the First District upheld sanctions against an attorney for failing to conduct reasonable investigations into allegations made about a child's putative father. In a child custody fight, the mother alleged that the petitioner father was not the child's real father.[159] This allegation was refuted by several facts: the petitioner and respondent had lived together at the time of the child's conception; petitioner was present at the child's

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152. *Id.* at 364-65, 542 N.E.2d at 536.
153. 175 Ill. App. 3d 574, 529 N.E.2d 1086 (1st Dist. 1988).
154. *Id.* at 576, 574 N.E.2d at 1087.
155. *Id.* at 577, 574 N.E.2d at 1087.
156. *Id.* at 581, 574 N.E.2d at 1090.
157. *Id.* at 580, 574 N.E.2d at 1090.
158. 185 Ill. App. 3d 739, 542 N.E.2d 375 (1st Dist. 1989).
159. *Id.* at 741, 542 N.E.2d at 376.

delivery with respondent's consent; petitioner was named as the father on the child's birth certificate which was certified by respondent as true; and blood tests showed petitioner to be the father with ninety-nine percent probability.[160]

The appellate court held that the circuit court was within its discretion in finding that the attorney had not made a reasonable inquiry into the facts. The court asserted that the attorney's professional obligation of loyalty to the client did not override his "professional duty to promptly dismiss a baseless lawsuit, even over the objection of the client, when the attorney learns that the client has no case."[161] Thus, in such cases, sanctions against both attorney and client are appropriate.

Taken together, *Washington* and *Caruso* illustrate the types of difficult questions posed by section 2-611. For example, how does one distinguish between a weak factual case and a baseless one? How much skepticism of a client is required and how will this attitude affect the attorney/client relationship? Illinois courts have yet to provide a specific test of what a reasonable inquiry is, and perhaps nothing more than a set of general guidelines is possible.

Interestingly, both *Washington* and *Caruso* relied on federal precedent under Federal Rule of Civil Procedure 11, which served as the model for the drafters of section 2-611.[162] On August 1, 1989, section 2-611 was replaced by Supreme Court Rule 137 which essentially adopts the gist of Federal Rule 11 and requires that the person signing court documents, whether attorney or *pro se* applicant, certify that "he has read the pleading, motion, or other paper; and, that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose . . . ."[163]

Rule 137 preempts all matters sought to be covered under the previous section 2-611.[164] Rule 137, however, differs from section 2-

160. *Id.* at 741, 542 N.E.2d at 377.

161. *Id.* at 744, 542 N.E.2d at 379.

162. ILL. ANN. STAT. ch. 110, ¶ 2-611 Historical and Practice Notes (Smith-Hurd 1987). In a recent development, the United States Supreme Court held that lawyers who file frivolous actions may still be subject to Rule 11 sanctions even after the actions have been voluntarily dismissed. Cooter & Gell v. Hartmarx, 110 S. Ct. 2447 (1990).

163. ILL. REV. STAT. ch. 110A, ¶ 137 (1989).

164. *Id. See* ILL. ANN. STAT. ch. 110A, ¶ 137 Committee Comments (Smith-Hurd 1989).

611 in two respects. First, Rule 137 allows for, but does not require, the imposition of sanctions.[165] Second, where an imposition of sanctions is found to be appropriate, Rule 137 requires the trial judge to "set forth with specificity the reasons and basis of any sanction in a separate written order."[166] As Supreme Court Rule 137 is new, no case law has yet to interpret it. However, since it is patterned after Federal Rule 11, one would suspect that the federal decisions construing Rule 11 would provide adequate guidance.

B. Sanctions Under Rule 219(c)

Illinois Supreme Court Rule 219(c) provides that a circuit court may issue a wide range of sanctions, including dismissal, for an unreasonable failure to comply with a discovery order.[167] Several recent appellate cases illustrate the range of Rule 219(c) sanctions in contradistinction to the significantly different approaches imposed under section 2-611.

In *Mueller v. Insurance Benefit Administrators, Inc.*,[168] a lawsuit marked by a series of "affronts and vendettas" by the attorneys toward each other, the defendant obtained a court order scheduling the plaintiff's deposition for October 15, 1985. The plaintiff, who previously had failed to appear at two scheduled depositions, appeared on October 15 but his attorney did not. The plaintiff's attorney previously had called defense counsel to request a postponement, but defense counsel refused, referring to the court order and stating that everyone would wait until the plaintiff's attorney arrived. The plaintiff's attorney responded that defense counsel could "wait until the cows come home."[169]

The defendant sought sanctions under Rule 219(c), and was awarded fees and costs of $625.00 to be paid by the plaintiff himself.[170] When the plaintiff did not pay, claiming that he could not afford to, his complaint was dismissed. The plaintiff appealed the dismissal.

The First District noted that the purpose of Rule 219(c) sanctions is to "accomplish discovery rather than inflict punishment"[171] and

165. ILL. REV. STAT. ch. 110A, ¶ 137 (1989).
166. *Id.*
167. *Id.* ¶ 219(c).
168. 175 Ill. App. 3d 587, 529 N.E.2d 1126 (1st Dist. 1988).
169. *Id.* at 594, 529 N.E.2d at 1129.
170. *Id.* at 598, 529 N.E.2d at 1132.
171. *Id.* at 598, 529 N.E.2d at 1133.

are appropriate only where "the offending party's conduct is characterized by a deliberate and pronounced disregard for the discovery rules and for the court."[172] Although the court described the conduct of the plaintiff's attorney on October 15 as "unprofessional," and stated that it "condemned" his telephone "diatribe," it reversed the circuit court's order,[173] stating that it was unreasonable for defense counsel to continue the day-long vigil after the telephone conversation. The court also stressed that, despite his unprofessional behavior, plaintiff's attorney had a "good faith opinion" that the plaintiff's deposition should not be taken until a pending motion to dismiss had been ruled on.[174]

In *Kubian v. Labinsky*,[175] the circuit court dismissed a malpractice action after repeated failures by the plaintiff's counsel to identify expert witnesses and to respond to interrogatories. Although the First District stated that an imposition of sanctions would be disturbed only if found to be an abuse of discretion, and that it sympathized "with the very able trial judge, whose fair and patient attempts to compel discovery were repeatedly frustrated by unexplained noncompliance with his orders," it nonetheless reversed.[176]

The court explained that although "sanctions were clearly necessary and proper," the circuit court should have invoked "progressively harsher sanctions" short of dismissal, using dismissal only as a last resort.[177] The court suggested that it might not have objected to a less harsh sanction, but that "the sanction of dismissal with prejudice was too severe for an initial sanction in this case."[178]

The lessons of *Mueller* and *Kubian* clearly illustrate the differences between sanctions imposed under section 2-611 (now Rule 137) and Rule 219(c). The purpose of section 2-611 sanctions is to punish and deter wrongful conduct by attorneys and parties. The purpose of Rule 219(c) sanctions is to move cases through discovery to trial. A dismissal order, by definition, precludes a trial, and although it may help clear a court's docket, it does not further the true purpose of the rule. Thus, dismissal orders are to be used only as a last resort; they are not to be used in every case of unprofessional attorney conduct.

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172. *Id.*
173. *Id.* at 598-99, 529 N.E.2d at 1129.
174. *Id.* at 598-99, 529 N.E.2d at 1130.
175. 178 Ill. App. 3d 191, 533 N.E.2d 22 (1st Dist. 1988).
176. *Id.* at 201, 533 N.E.2d at 28.
177. *Id.* at 202, 533 N.E.2d at 28.
178. *Id.*

VI. JUDGMENTS

A. Voluntary Dismissals

During the survey period, the Illinois Supreme Court handed down two significant decisions based on its previous ruling in *O'Connell v. St. Francis Hospital*.[179] *Martinez v. Erickson*,[180] held that *O'Connell* was to be given retroactive application. *Gibellina v. Handley*[181] held that it was not. Here's how this Push-Me-Pull-You duo came to be:

In *O'Connell*, the supreme court examined the interrelationship among the diligence requirement of Rule 103(b),[182] the voluntary dismissal provision of section 2-1009 of the Illinois Code of Civil Procedure,[183] and the one-year time expansion accorded section 2-1009 dismissals pursuant to section 13-217 of the Code.[184] The *O'Con-*

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179. 112 Ill. 2d 273, 492 N.E.2d 1322 (1986).

180. 127 Ill. 2d 112, 535 N.E.2d 853 (1989).

181. 127 Ill. 2d 122, 535 N.E.2d 858 (1989).

182. ILL. REV. STAT. ch. 110A, ¶ 103(b) (1989) provides:

> (b) Dismissal for Lack of Diligence. If the plaintiff fails to exercise reasonable diligence to obtain service prior to the expiration of the applicable statute of limitations, the action as a whole or as to any unserved defendant may be dismissed without prejudice. If the failure to exercise reasonable diligence to obtain service occurs after the expiration of the applicable statute of limitations, the dismissal shall be with prejudice. In either case the dismissal may be made on the application of any defendant or on the court's own motion.

183. *Id.* ch. 110, ¶ 2-1009(a). This paragraph provides:

> The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause. Thereafter the plaintiff may dismiss, only on terms fixed by the court (1) upon filing a stipulation to that effect signed by the defendant, or (2) on motion specifying the ground for dismissal, which shall be supported by affidavit on other proof. After a counterclaim has been pleaded by a defendant no dismissal may be had as to the defendant except by the defendant's consent.

For a good overview of voluntary dismissals in Illinois, see Johnston & Johnston, *Voluntary Dismissals in Illinois*, 9 N. ILL. U.L.R. 515 (1989).

184. *Id.* ch 110, ¶ 13-217 provides:

> Reversal or dismissal. In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if judgment is entered for the plaintiff but reversed on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction, then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or entered against the plaintiff, or after the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction.

nell plaintiff filed suit on the last day of the statute of limitations and then failed to effect service on the defendants for nine months. The defendants moved for dismissal pursuant to Rule 103(b), and in response, the plaintiff voluntarily dismissed his action pursuant to section 2-1009. The trial judge allowed the plaintiff's voluntary dismissal without taking any action on the defendants' Rule 103(b) motion. The plaintiff then refiled his action in accordance with section 13-217 and served the defendants within ten days. The defendants again moved for dismissal under Rule 103(b). The trial judge denied the motion but certified the question. On appeal, the defendants argued that the reasonable diligence requirement of Rule 103(b) applied to both the original and the refiled complaints.

The supreme court found a conflict between its Rule 103(b) and Code sections 2-1009 and 13-217 in that the legislative enactments were unduly infringing upon the judiciary's authority to "discharge its duty fairly and expeditiously."[185] Finding that Rule 103(b) prevailed over the legislative enactments, the court held that a Rule 103(b) motion, if filed first, must be heard on its merits prior to a motion for voluntary dismissal under section 2- 1009.[186] As applied to the instant case, the court held that a plaintiff's right to voluntarily dismiss and refile a complaint is subject to the reasonable diligence requirement of Rule 103(b) and, thus, the circuit court may consider the efforts, or lack thereof, of the plaintiff to serve both the original and the refiled complaints.[187]

Martinez v. Erickson[188] raised the issue of whether *O'Connell* should be given retrospective or prospective application. In *Martinez*, the plaintiff had filed and subsequently dismissed several medical malpractice suits without attempting service of process. Pursuant to section 13-217, the plaintiff then refiled a single action joining all of the defendants from the previously dismissed actions. All defendants were served within three weeks, and all defendants moved to dismiss pursuant to Illinois Supreme Court Rule 103(b) based on the plaintiff's lack of service in the original suits.

On appeal, the supreme court held that a determination of the plaintiff's diligence in serving both the original and the refiled complaints may be made retroactively.[189] Based on this analysis, the

185. *O'Connell*, 112 Ill. 2d at 282, 492 N.E.2d at 1327.
186. *Id.* at 283, 492 N.E.2d at 1327.
187. *Id.*
188. 127 Ill. 2d 112, 535 N.E.2d 853 (1989).
189. *Id.* at 117-18, 535 N.E.2d at 857.

court remanded the case to the circuit court to determine the extent to which the plaintiff had complied with the Rule 103(b) requirements upon refiling.[190]

Gibellina v. Handley,[191] was the first in a long line of cases successfully to extend *O'Connell's* holdings to other dispositive motions.[192] The ruling in *Gibellina*, however, was given prospective application only.

Gibellina was the consolidation of two medical malpractice cases and one products liability case. In each case, the plaintiffs failed to disclose their expert witnesses, who were eventually barred from testifying at trial.[193] In each case, the defendants moved for summary judgment on the grounds that the plaintiffs would be unable to prove their case without the aid of expert testimony. Subsequently, each plaintiff filed a section 2-1009 motion for voluntary dismissal. The motions were denied in favor of the defendants' motions for summary judgment. The appellate court reversed on the ground that the circuit court did not have the discretion to rule on the summary judgments in advance of the motions for voluntary dismissal.

On appeal to the Illinois Supreme Court, the issue was whether a potentially dispositive motion could be heard prior to a motion for voluntary dismissal. The defendants argued that the court should restrict the scope of section 2-1009 to that of Federal Rule of Civil Procedure 41(a), which permits a plaintiff to take a voluntary dismissal as of right only in advance of the filing of an answer or responsive motion by the defendant.[194] The plaintiffs argued that

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190. *Id.* at 122, 535 N.E.2d at 858. *But see* Johnston & Johnston, *supra* note 183; Johnston & Johnston, *The Vagueness of Illinois Supreme Court Rule 103(b)* (1989) (unpublished manuscript available from the authors at the John Marshall Law School).

191. 127 Ill. 2d 122, 137, 535 N.E.2d 858 (1989).

192. *See* Mancuso v. Alda Blanche Beach, 149 Ill. App. 3d 188, 500 N.E.2d 589 (1st Dist. 1986) (attempted to extend the rule to motions to dismiss for failure to state a cause of action); Jacobsen v. Ragsdale, 160 Ill. App. 3d 656, 513 N.E.2d 1112 (5th Dist. 1987); Goldberg v. Swedish Covenant Hosp., 160 Ill. App. 3d 857, 513 N.E.2d 919 (1st Dist. 1987); Metcalfe v. St. Elizabeth's Hosp., 160 Ill. App. 3d 47, 513 N.E.2d 12 (5th Dist. 1987) (attempted to extend the rule to motions to dismiss based on an affirmative defense); Rohr v. Knaus, 153 Ill. App. 3d 1013, 506 N.E.2d 634 (5th Dist. 1987) (attempted to extend rule to motions for summary judgment).

193. 127 Ill. 2d at 126, 535 N.E.2d at 860.

194. *Id.* at 132, 535 N.E.2d at 863. Federal Rule 41(a) provides in pertinent part:

> [A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

FED. R. CIV. P. 41(a).

section 2-1009 gave them an absolute right to dismiss their action at any time prior to trial.

The supreme court, while refusing to adopt the philosophy of Rule 41(a), concluded that the plaintiff's right to voluntarily dismiss was not absolute and held that the circuit court may hear a potentially dispositive motion prior to its consideration of a plaintiff's section 2-1009 motion for voluntary dismissal.[195] The court noted that as currently applied, section 2-1009 allowed plaintiffs to dismiss a deteriorating case or interpose needless delay to avoid an adverse ruling, both of which increase docket congestion and interfere with the ability of the court to discharge its duties.[196] The court further held that its ruling was to have prospective application only. The court noted that *Gibellina*, unlike *Martinez*, did effect a "clear departure from prior precedent" by carving out an exception to section 2-1009.[197]

Contrary to the direction of the *O'Connell*, *Martinez*, and *Gibellina* trilogy, in *Kilpatrick v. First Church of the Nazarene*,[198] the Fourth District refused to extend *O'Connell* beyond its facts and held that an absolute right to voluntary dismissal existed following a mistrial despite the fact that the mistrial was necessitated by the misconduct of the plaintiff's counsel. In *Kilpatrick*, a first trial was commenced in 1986 with the selection of four jurors. This trial was continued until 1987,[199] when a second trial began and proceeded into the evidentiary stage. Due to repeated misconduct of the plaintiff's counsel, the second trial resulted in a mistrial. Following an unsuccessful attempt to change judges, the plaintiff voluntarily dismissed her action under section 2-1009.

On appeal, the defendants argued first that the proceedings in 1986 constituted the "commencement" of trial as the parties had begun jury selection and had selected four jurors. The defendant

195. *Gibellina*, 127 Ill. 2d at 137-38, 535 N.E.2d at 866.

196. The court stated that it was "apparent that an ever increasing number of plaintiffs are using a section 2-1009 motion to avoid a potential decision on the 'merits' or to avoid an adverse ruling as opposed to using it to correct a procedural or technical defect." *Id.* at 137, 535 N.E.2d at 865. The court also observed that "the allowance of an unrestricted right to dismiss and refile an action in the face of a potentially dispositive motion is not only increasing the burden on the already crowded dockets of our courts, but is also infringing on the authority of the judiciary to discharge its duties fairly and expeditiously." *Id.* at 137, 535 N.E.2d at 866.

197. *Id.* at 138, 535 N.E.2d at 866.

198. 177 Ill. App. 3d 83, 531 N.E.2d 1135 (4th Dist. 1988).

199. The trial was continued as a dispute arose during the defendant's voir dire regarding the presence of an issue of comparative fault. *Id.* at 84, 531 N.E.2d at 1136.

relied on *Cummings v. Simmons*,[200] where the court held that once jury selection had commenced, a trial had begun for the purposes of section 2-1009. The *Kilpatrick* court, however, rejected the defendants' argument and noted that unlike *Cummings*, the voluntary dismissal had occurred more than one year after the selection of the jurors and after a continuance of the trial date. The court stated that "if a trial is set and commenced but, for some reason is canceled, the right to absolute dismissal is still available."[201]

The defendants also argued that the plaintiff's absolute right to dismiss should be curtailed because the plaintiff's counsel deliberately caused the mistrial. The defendant's noted that it was inequitable to allow the plaintiffs to "manipulate and abuse" the system. The court, while acknowledging that there was some merit to the defendants' argument, disagreed and stated that "the voluntary dismissal statute grants plaintiffs the absolute privilege to dismiss regardless of the circumstances or motive."[202]

Interestingly, the court based its interpretation of *O'Connell's* limitations on *Rohr v. Knaus*[203] which stated that, "any further restriction of the privilege of voluntary dismissal should be addressed to the general assembly or to the supreme court should it extend the holding of *O'Connell*."[204] In light of *Gibellina* and *Martinez*, it appears as if the supreme court has spoken and that the *Kilpatrick* defendants should consider further appeal. The defendants' second argument in *Kilpatrick* is highly consistent with the underpinnings of the *O'Connell* trilogy. The defendants argued that a voluntary dismissal allowed the plaintiffs to avoid the policy of section 2-1009 "by intentionally creating a mistrial and moving for a dismissal after the mistrial was ordered."[205] Although a mistrial vitiates all proceedings up to that time, the defendants argued that an exception should be made where counsel's deliberate conduct caused the mistrial.[206]

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200. 167 Ill. App. 3d 544, 521 N.E.2d 634 (4th Dist. 1988). In *Cummings*, the plaintiff moved for a voluntary dismissal after four jurors were sworn. The circuit court granted the plaintiff's motion, which was reversed on appeal. The court noted that "[t]o allow plaintiff to dismiss her cause of action after *voir dire* has begun and before all 12 jurors are sworn in can result in abuse analogous to that designed to be corrected by section 2-1009." *Id.* at 548, 521 N.E.2d at 637.

201. 177 Ill. App. 3d at 87, 531 N.E.2d at 1137.

202. *Id.* at 88, 531 N.E.2d at 1138-39.

203. 153 Ill. App. 3d 1013, 1015, 506 N.E.2d 634, 636 (5th Dist. 1987).

204. *Id.* at 1017, 506 N.E.2d at 637.

205. *Kilpatrick*, 177 Ill. App. 3d at 88-89, 531 N.E.2d at 1138.

206. *Id.* at 88, 531 N.E.2d at 1138-39.

Under the *Kilpatrick* court's broad reading of section 2-1009, plaintiffs could orchestrate a mistrial at *any time* and still obtain the benefits of a voluntary dismissal, leaving defendants in a revolving door of filed and dismissed actions.

B. Collateral Estoppel

1. Defensive Use

In *Simcox v. Simcox,*[207] a case of first impression, the Illinois Supreme Court held that children are not privies of their parents in dissolution proceedings and thus are not collaterally estopped from relitigating the issue of paternity in a subsequent proceeding. Linsey Simcox, through her mother, filed a paternity action[208] in the circuit court of Cook County. Linsey's parents, Deborah and Christopher, divorced in 1984 when Linsey was a year old. In 1986, Deborah married Jeffrey Dear and subsequently brought the paternity action on Linsey's behalf seeking to establish Dear as Linsey's real father. The issue before the circuit court was whether the action was barred by the doctrine of collateral estoppel because Linsey's paternity previously had been determined in the judgment of dissolution. The circuit court granted the defendant's motion to dismiss with prejudice because the uncontested judgment of dissolution included a judicial finding that Christopher Simcox was Linsey's father.[209]

The issue framed by the Illinois Supreme Court was whether Linsey was a party or in privity with the parties to the dissolution of marriage judgment and, therefore, collaterally estopped from bringing the paternity action.[210] Under the doctrine of collateral estoppel, "an issue which has been addressed by a court of competent jurisdiction cannot be relitigated in a later action between the same parties or their privies in the same or a different cause of action."[211] The court held that Linsey had not been a party to the dissolution proceeding despite the fact that the paternity issue was addressed in those proceedings.[212] The court then looked to whether Linsey was in privity with either of her parents in the dissolution proceeding.

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207. 131 Ill. 2d 491, 546 N.E.2d 609 (1989).
208. Such actions are permitted under ILL. REV. STAT. ch. 40, ¶¶ 2501—2507 (1989).
209. *Simcox*, 131 Ill. 2d at 494, 546 N.E.2d at 610.
210. *Id.*
211. *Id.* at 496, 546 N.E.2d at 611.
212. *Id.* at 497, 546 N.E.2d at 611.

Relying exclusively on rulings from other states which have held that children are not privies of their parents in dissolution proceedings because their interests are not properly represented in such proceedings, the court held that the plaintiff was not collaterally estopped from bringing the instant paternity action because she previously had not been in privity with the parties to the dissolution action.[213]

A concurring opinion filed by Justice Ryan made the significant point that section 506 of the Illinois Marriage and Dissolution of Marriage Act[214] permits the court to appoint a *guardian ad litem* to represent the interests of minor children. No such appointment had been made on Linsey's behalf in the dissolution action. Had such an appointment been made, the instant case would have presented a different question and possibly a very different result.

2. *Offensive Use*

In *In re Owens*,[215] the Illinois Supreme Court considered whether collateral estoppel should be used offensively as readily as it is used defensively. The collateral estoppel issue arose from an action filed by Burt and John Beatty against Carroll and Gerald Owens, alleging that the Owens brothers fraudulently breached a partnership agreement and corresponding fiduciary duties owed to the Beattys. The circuit court found for plaintiffs as to both allegations.[216]

Because the Owens brothers were also attorneys, they faced disciplinary proceedings before the Attorney Registration and Disciplinary Commission (ARDC) at the termination of the civil action. The ARDC administrator filed a motion for summary determination of major issues based on the factual findings of the previous civil case.[217] The motion emphasized that the burden of proof in a civil fraud action, clear and convincing evidence, is the same as that used in a disciplinary action.[218] The motion was granted and respondents were precluded from presenting evidence except in extenuation and mitigation.[219]

The question before the supreme court was whether the ARDC could offensively collaterally estop the respondents from relitigating

213. *Id.* at 496, 546 N.E.2d at 611.
214. ILL. REV. STAT. ch. 40, ¶ 506 (1989).
215. 125 Ill. 2d 390, 532 N.E.2d 248 (1989).
216. *Id.* at 394, 532 N.E.2d at 249.
217. *Id.* at 395, 532 N.E.2d at 249.
218. *Id.* at 395, 532 N.E.2d at 250.
219. *Id.*

facts resolved adversely to them in the prior civil proceeding because the factual findings in both proceedings were based on a clear and convincing standard of proof.[220] The court's analysis focused on concerns of judicial efficiency and fairness to the defendant.

As a preliminary matter, the court stated that collateral estoppel may be used offensively when a plaintiff forecloses a defendant from relitigating an issue which had been litigated and found against the defendant in a prior action to which the current plaintiff was not a party.[221] The court explained that although offensive collateral estoppel was formerly treated in the same manner as defensive collateral estoppel,[222] the elimination of the mutuality requirement[223] broadened the use of collateral estoppel considerably, and thus brought into question the wisdom of allowing collateral estoppel to be used offensively as freely as it is used defensively.[224] Specifically, the court stressed that offensive collateral estoppel does not always foster judicial economy and fairness to the defendant. The court noted that while defensive collateral estoppel provides an incentive for the plaintiff to join all defendants in one action, offensive collateral estoppel can have the opposite effect. Because offensive collateral estoppel allows a plaintiff to rely on a previous judgment against a defendant without being bound by that judgment if the defendant prevails, the plaintiff has no reason not to adopt a "wait and see" attitude in hope that the first action by another plaintiff will result in a favorable judgment. Consequently, the court warned, the liberal use of offensive collateral estoppel will increase rather than decrease the total amount of litigation since potential plaintiffs risk nothing by not intervening in the first action.[225]

As to the fairness issue, the court was concerned that the offensive use of collateral estoppel imposed on the defendant the dilemma of needlessly but aggressively litigating an insignificant case to preclude the adverse use of findings in a subsequent, though unforeseeable, suit.[226] The court observed that this dilemma would

220. *Id.* at 397, 532 N.E.2d at 250-51.

221. *Id.*

222. *Id.* at 397, 532 N.E.2d at 251.

223. *Id.* at 398, 532 N.E.2d at 251. Under the mutuality doctrine, neither party could assert a prior factual finding to estop the others unless both parties were bound by the judgment. *In re Hutul*, 54 Ill. 2d 209, 296 N.E.2d 332 (1973). The mutuality requirement was abandoned in Illinois State Chamber of Commerce v. Pollution Control Bd., 78 Ill. 2d 1, 398 N.E.2d 9 (1979).

224. *Owens*, 125 Ill. 2d at 398, 532 N.E.2d at 251.

225. *Id.* at 399, 532 N.E.2d at 251.

226. *Id.*

not arise in the instance of a criminal conviction involving moral turpitude since presumably, a defendant would make "every reasonable effort to cast doubt on his guilt" in such an action.[227] The instant action, however, was civil rather than criminal in nature.

Applying these concerns to the case at hand, the court held that the use of offensive collateral estoppel is not appropriate in disciplinary proceedings based on civil litigation because the risk of prejudice to the defendant in being denied a hearing on the fundamental facts of a disciplinary complaint outweighed whatever judicial economy was gained from estopping the relitigation of those facts.[228]

The court further stated that, although it was compelled to rely on the ARDC Hearing and Review Boards to enforce the disciplinary code, the ultimate responsibility of determining what conduct is subject to discipline and the severity of the discipline in a particular case is a nondelegable function of the judiciary even if the fact-finding function sometimes must be relegated to proceedings outside of formal disciplinary proceedings. Such substitute proceedings, however, must rise to the same level of litigation-worthiness as the charge of the ARDC to ensure that the relevant issues have been fully and fairly litigated.[229]

C. Vacation of Judgments

In *DiNardo v. Lamela*,[230] the Second District vacated a default judgment in favor of a *pro se* defendant, upholding the appealability of motions to quash for lack of jurisdiction. State Farm Automobile Insurance Company, as subrogee of Christopher DiNardo, filed a personal injury complaint against the defendant, Lamela. The plaintiff's first attempt to serve Lamela failed, allegedly because she had moved out of the state.[231] The plaintiff then served an alias summons on the Secretary of State in accordance with section 10-301 of the Illinois Vehicle Code,[232] which provides for substitute service of process in cases where claims arise from the use of a motor vehicle within Illinois and the defendant is a non-resident or subsequently becomes a non-resident.[233] The defendant failed to appear and a default judgment was entered against her for $2,823.75.

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227. *Id.* at 401, 532 N.E.2d at 252.
228. *Id.*
229. *Id.* at 400, 532 N.E.2d at 252.
230. 183 Ill. App. 3d 1098, 539 N.E.2d 1306 (2d Dist. 1989).
231. *Id.* at 1100, 539 N.E.2d at 1307.
232. ILL. REV. STAT. ch. 95 1/2, ¶ 10-301(b) (1989).
233. *DiNardo*, 183 Ill. App. 3d at 1100, 539 N.E.2d at 1307.

Less than two years later, the defendant filed two *pro se* motions entitled "Notice to Vacate" and "Reinstate."[234] The "Reinstate" motion stated: "I moved to default defendant $2823.75."[235] The court *sua sponte* treated this motion as a section 2-1401 motion to vacate.[236] The defendant testified that she received no notice of prior proceedings and did not become aware of the default judgment until she learned that her driver's license had been suspended. Based upon this testimony, the court vacated the default judgment. The plaintiff subsequently appealed.[237]

The appellate court treated the defendant's motion as a motion to quash service of process. Analysis of applicable case law revealed a split in authority as to the appealability of an order quashing service.[238] The court found in favor of the line of cases supporting appealability based on the Illinois Supreme Court case of *Brauer Machine & Supply Co. v. Parkhill Truck Co.*,[239] which stated:

> It is true, the order, in form, was only an order quashing the service of the summons. It was not an order dismissing the suit, nor was it in the form of a final judgment on the merits. Regardless of its form, however, it was a complete and final disposition of the case, based upon the conclusion the court had reached that appellee was not amenable to the service of process in the manner in which the summons was served. On that issue it was not only as effectual and conclusive but it was as final as any decision upon the merits. The result was the same.
>
> If it should be held that an order of this character is not appealable, then there would be no method by which a plaintiff could obtain a review of an order of the trial court quashing the service of process.[240]

An examination of the record disclosed ample support for defendant's assertion that she had not been served and that the plaintiff had failed to comply with the substitute service provisions of paragraph 10-301.[241] Finding that the plaintiff had failed to serve the defendant properly,

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234. *Id.*

235. *Id.*

236. *Id.* at 1100, 539 N.E.2d 1307-08. Section 2-1401 provides, in pertinent part: "(a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section." ILL. REV. STAT. ch. 110, ¶ 2-1401 (1989).

237. *DiNardo*, 183 Ill. App. 3d at 1101, 539 N.E.2d at 1308.

238. *Id.* at 1101-02, 539 N.E.2d at 1308.

239. 383 Ill. 569, 50 N.E.2d 836 (1943).

240. *Id.* at 577-78, 50 N.E.2d at 840.

241. *DiNardo*, 183 Ill. App. 3d at 1103, 539 N.E.2d at 1310.

the appellate court affirmed the circuit court's order vacating the default judgment.[242]

D. Comity

In *Schoeberlein v. Purdue University*,[243] the Illinois Supreme Court had to decide as a matter of first impression if it should recognize Indiana's sovereign immunity statute, which attempts to immunize Indiana from suit outside of its own courts. The products liability complaint alleged that Indiana, through Purdue University, sold a defective product to a company in Illinois and that the product injured an Illinois resident.[244]

As a threshold matter, the court recognized that, absent comity, Indiana's sovereign immunity statute would have no force and effect beyond Indiana and that Illinois was under no compulsion to recognize such law if doing so contravened Illinois' own public policy.[245] The only such policy which the court could identify was article 1, section 12 of the Illinois Constitution,[246] which provides that "[e]very person shall find a certain remedy . . . for all injuries and wrongs . . . ."[247] The court construed this language as aspirational rather than mandatory and found that Indiana's sovereign immunity statute, which restricts suits against Indiana to Indiana courts but does not bar them outright, did not contravene section 12.[248] The court also found great similarity between Indiana's sovereign immunity statute and the Illinois Court of Claims Act,[249] which places restrictions on both choice of forum and recoverable amount in actions brought against the state or any instrumentality thereof.[250] The court concluded that recognizing Indiana's sovereign immunity statute would not contravene any relevant Illinois public policy.[251]

The court's analysis and holding are unconvincing for many reasons. First, the only similarity between the Illinois Court of Claims Act and Indiana's sovereign immunity statute are that both acts relate to the manner in which the sovereign can be sued. Structurally and

242. *Id.* at 1104, 539 N.E.2d at 1310.
243. 129 Ill. 2d 372, 544 N.E.2d 283 (1989).
244. *Id.* at 375, 544 N.E.2d at 284.
245. *Id.* at 377, 544 N.E.2d at 285.
246. ILL. CONST. art I., § 12.
247. *Schoeberlein*, 129 Ill. 2d at 379, 544 N.E.2d at 286.
248. *Id.*
249. ILL. REV. STAT. ch. 37, ¶ 439.8 (1989).
250. *Schoeberlein*, 129 Ill. 2d at 380, 544 N.E.2d at 286.
251. *Id.*

philosophically, the acts are otherwise very different. The Illinois' Court of Claims Act conditions and limits the plaintiff's forum and recoverable amount in actions brought against the sovereign. Indiana's statute bars such suits altogether unless they are brought in Indiana. It is one thing to condition, it is quite another to bar all foreign actions by divesting all other states and tribunals of jurisdiction over the State of Indiana. That enlargement of sovereign autonomy should offend every other state's judicial integrity. What would happen, for example, if the State of Illinois wanted to sue the State of Indiana, or, if Illinois wanted to counterclaim in a suit brought by Indiana?

A second problem with the court's analysis is that Indiana's sovereign immunity law does, in fact, contravene Illinois' aspirational policy of providing a remedy for every cognizable wrong. An Illinois citizen was injured in Illinois by a product sold to an Illinois company. Notwithstanding the court's advice to the plaintiff to sue in the Indiana courts, in fact he cannot. Indiana requires a plaintiff to provide notice of injury to the state within 180 days of injury. That period had long since lapsed by the time the court rendered its opinion. In the contexts of products liability, long-arm jurisdiction, and environmental law, Illinois has expressed a strong state interest in providing redress for its citizens in Illinois courts. What's the difference here?

Third, Indiana was not acting in a sovereign capacity when it sold the product. This transaction did not implicate either its regulatory function, service function, or protective function. Rather, as the dissent aptly stated:

> Indiana, through Purdue, voluntarily sold an allegedly defective product to a company in Illinois and the product injured an Illinois resident. Indiana conducted itself in Illinois as if it were any other non-resident business. Indiana chose to sell its product outside its boundaries, thereby taking the risk that the product would injure someone outside its borders. The California court in *Hall v. University of Nevada* stated:
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> "We have concluded that sister states who engage in activities within California are subject to our laws with respect to those activities and are subject to suit in California courts with respect to those activities. When the sister state enters into activities in this state, it is not exercising sovereign power over the citizens of this state and is not entitled to the benefits of the sovereign immunity doctrine as to those activities unless this state has conferred immunity by law or as a matter of comity."[252]

252. *Id.* at 385-86, 544 N.E.2d at 288-89 (quoting *Hall*, 8 Cal. 3d 522, 524, 503 P.2d 1363, 1364, 105 Cal. Rptr. 355, 356 (1972), *aff'd*, 440 U.S. 410 (1979)).

A final problem with *Schoeberlein* is the underlying premise of the court's opinion that if it recognizes the sovereign immunity of other states, such states will reciprocally recognize the sovereign immunity of Illinois. This approach puts Illinois' appreciation of comity on the same level as the golden rule. The unpleasant reality, however, is that after the United States Supreme Court's affirmation of *Nevada v. Hall*, other states are not obligated to recognize sister states' sovereign immunity, and many, in fact, have not.[253]

253. *Id.* at 384, 544 N.E.2d at 288.