

Commercial Banking, Collections and Bankruptcy

The newsletter of the Illinois State Bar Association's Section on Commercial Banking, Collections and Bankruptcy

Out With the Old and in With the New

BY JUDGE MICHAEL CHMIEL

As we approach the end of the fiscal year of the Illinois State Bar Association and the beginning of the next, fascinating is a review of what has transpired over this past period of time. Obviously, the world has evolved into a new order which better accounts for healthy habits to fend off the pandemic of 2020. More recently,

the world is working to address various social challenges as well. As we reconstitute ourselves, we are saying farewell to certain things and looking forward to others. Most notable may be the need to address things with eyes fully wide open, to get out of ruts and advance in positive ways. As we learned in law school, we need to think

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Staying Active, Healthy, and Productive at Home

BY MICHAEL B. HYMAN, E. KENNETH WRIGHT JR., & ERIN CLIFFORD

Most legal professionals have either been working from home or not working at all due to the COVID-19 pandemic. This is cause for anxiety and stress for us and anyone who lives with us. According to experts, embracing a healthy lifestyle maintains overall health. We offer a few suggestions to help you better manage working from home.

A Home Office

In uncertain times, structure is essential. Our minds do better with plans. Set a schedule for the entire workday and keep to it. A daily routine increases productivity, and in turn, creates healthier moods. Make sure to block time not just for the tasks that need attention, but also for stretch and snack breaks. Ask others living with you to

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things through, and not simply gravitate to routines. We need to add value.

As the practice of law evolves in the various communities of the state, the country, and beyond, litigants and their attorneys are well-advised to check, and check often, for new rules of operation. Just about every judicial circuit in the state of Illinois has fully resumed operations, albeit with a penchant for staggered calls and limits on the number of cases which can be called. In the 22nd judicial circuit, for example, folks might want to review the reconstitution plan or the standing orders of the various judges, which are all available through the virtual (online) office of the circuit. Much like that of the Supreme Court of Illinois, the circuit's online office is stacked with information and is open twenty-four/seven.

Staying Active, Healthy, and Productive at Home

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respect your boundaries when working. The more distractions and background noise, the less productive you become. If space is scarce, get noise cancelling headsets or headphones.

Create workspace, if possible, near a window or an area that offers good lighting. Looking outside will brighten your frame of mind; dark workspace may strain your eyes and make it difficult to focus. Be disciplined and follow the routine that works for you.

A recent *Forbes* magazine article recommends against multitasking. *Forbes* reported that studies found people who work on "one task at a time are calmer and more effective and productive." In addition, the article suggests pacing oneself, "Productivity isn't a marathon it's a sprint, and studies show that productivity is enhanced with balance. Plodding puts you at the finish line in time plus you can enjoy life on your way. Remember, the tortoise, not the hare, won the race."

Steps to Boost Wellness

Exercise provides the best defense against

In this last issue of our newsletter for 2019-2020 and/or first of 2020-2021, we welcome readers to two articles which will help folks further address the challenges of the day through good habits, an article which calls reform to avoid waste with regard to summonses for smaller cases, and an article which brings attention to certain challenges in the commercial arena. Thanks go to our authors who have been published other items earlier in 2020, and all of the authors who have contributed helpful insight throughout this past fiscal year. Best wishes for the new!

Questions or comments on any of this are welcome, along with other items for publication, through mjchmiel@22ndcircuit.illinoiscourts.gov. ■

coping with life's daily stressors. Being active distracts from daily worries while boosting feel-good endorphins. Experts recommend at least two-and-a-half hours of moderate exercise or seventy-five minutes of vigorous exercise each week. Can't go to a gym? That's not an excuse to stop working out. Make a point to keep up with a fitness routine at home. Workouts are available on YouTube or on exercise apps.

As long as you practice social distancing, enjoy the outdoors. Go for a walk, a run, a hike, or a bike ride. Spending time in nature provides much needed fresh air, sunshine, and a change of scenery.

What you eat makes a difference. Enjoy foods that support a healthy immune system like fruits, vegetables, nuts, and seeds. These foods also can provide fiber, protein, and healthy fats. Limit foods high in sodium, added sugar, and saturated fat. A healthy diet also includes two fish meals a week.

Consume alcohol in moderation. Alcohol is not a health food and encourages unhealthy food choices. The National Cancer

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Published at least four times per year. Annual subscription rates for ISBA members: \$30. To subscribe, visit www.isba.org or call 217-525-1760.

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Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

Institute recommends that men have no more than two drinks per day and women have no more than one drink per day. (A drink serving is 12 ounces of beer, five ounces of wine, or 1.5 ounces of liquor.)

Managing Stress

Mindfulness or the “science of chill” can effectively manage stress and anxiety. Meditating even a few minutes a day has a positive effect on emotional and physical health. Meditation puts you in the present moment, away from the latest news or stressing about the future. Any time you start to feel stressed or anxious, do breathing exercises to refresh your mind. For example, the 4-7-8 (inhale for 4 seconds, hold for 7 seconds, exhale for 8 seconds).

Dealing With Anxiety and Depression

Social isolation can lead to mental health problems. Over an extended period, social isolation has been known to cause negative thoughts, severe anxiety, and depression. Positive thinking can help mitigate these feelings.

While it may be tempting to think more about the things that you’ve given up, it’s healthier to think about the things that you’ve gained. For instance, maybe you’re spending quality time with your spouse, your children, or your pet. Or, you picked up that book you have been wanting to read for who knows how long.

Positive thinking takes effort, but that

effort can make a big difference to your well-being. Among the ways to generate positive thoughts are reading inspiring books, listening or watching uplifting podcasts, television programs, or movies, and downloading apps that encourage positive thinking such as Shine, Motivate, Headspace, Moodscope, and Moodpath.

Health Precautions

The safest place to avoid COVID-19 is at home. This means stocking up on groceries, medications, and other essentials to minimize trips to stores. It also means being wary of “high touch” surfaces. These include elevator buttons, door handles, credit card machines, and handrails. Use a tissue or your sleeve, and wash your hands as soon as possible. Of course, always wear a mask when in public places.

Experts say wearing gloves doesn’t do enough to avoid the spread of germs. Gloves come in contact with multiple objects that might contain the virus, and spread it elsewhere. Experts recommend frequent hand washing as the single most effective way of protecting yourself. Gloves should be used for specific tasks such as cleaning infected areas, disposing of waste, and pumping gas.

Physical Distancing, Not Social Distancing

You need to stay in touch and connected with your personal community. Call or FaceTime, Facebook, or Skype with people

you care about. If you’re part of a breakfast club or book group, continue it remotely. Hold a virtual party, a virtual dinner, or a virtual game night. And if you haven’t heard from someone, chances are they and you could benefit from your reaching out to them. These measures can reduce stress and anxiety associated with social isolation and blunt depressive thoughts.

Self-Care and Staying Connected

Take mental time outs. Call a friend, a family member, a colleague. Read a book or watch a good movie. Cook a meal. Play a game on-line or with friends. Limit listening to the news.

On average, you need seven to nine hours of quality sleep. This is crucial for maintaining the body’s immunity. A good night’s sleep stabilizes mood-regulating serotonin levels. Lack of good sleep inhibits brains from rebalancing.

Conclusion

These are uncertain and stressful times. But by staying active, healthy, and productive, they need not be so stressful. As it has been said, “If life was easy, where would all the adventure be?” ■

Michael B. Hyman is a member of the First District Appellate Court; E. Kenneth Wright, Jr. is the presiding judge of Cook County’s First Municipal District; and Erin Clifford is the Director of Marketing and Business Development at Clifford Law Offices.

Take Care of the Best Machine You Own!

BY ROBERT FIORETTI, NICKI PECORI FIORETTI, & MARY PETRUCHIUS

[Note: This article was in the works before COVID-19 entered our daily lives and now has taken on greater relevance.]

If you are a car owner like many of us, with every dashboard light that comes on or any rattle we hear, we have our car into the shop to address the issue, right? Oil change, done. New brake pads, no problem. Fuel level low, that one we can take care of ourselves and we do.

But what about YOU?

“Your body is the most incredible machine you will ever own. If you don’t take care of it, where will you live?” I’m paraphrasing, but that was a quote on the wall of a West Loop restaurant that my wife, Nicki, liked. And that quote stayed with me.

This introductory article will identify some of our realities and pose some questions to think about. Future articles will

endeavor to help ensure we are taking care of our most important machines on our professional and personal journeys in life.

As lawyers, we navigate issues with our clients every day. That impacts our own physical, mental and financial well-being every day. If you think about it, most people really don’t want to be with lawyers. Many come to lawyers by necessity. And let’s not underestimate the energy it takes to engage

a client, retain a client, and serve a client. When that energy is expended, what do we do to restore it?

The pressures on attorneys can be immense. Newer attorneys have the extra pressure of mountains of student loan debt. Recently admitted attorneys have the highest levels of anxiety, depression, and alcohol abuse. An attorney impaired is not only a danger to themselves, an impaired attorney is a risk to their clients, their communities and society at large.

In 2016, the Betty Ford Clinic conducted a study of 12,825 attorneys and learned the following:

- 20.6 percent of lawyers screened positive for hazardous, harmful, and potentially alcohol-dependent drinking.
- 28 percent of lawyers experience symptoms of depression.
- 19 percent of lawyers experience symptoms of anxiety.
- 23 percent exhibit symptoms of stress (from the 2016 Survey of Law Student Well-Being taken at 15 law schools).
- 43 percent reported binge drinking at least once in the prior two weeks.
- 14 percent reported using a prescription drug without a prescription in the prior 12 months.
- 17 percent screened positive for depression.
- 37 percent screened positive for mild to severe anxiety.

“The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys,” Patrick R. Krill, JD, LL.M., Ryan Johnson, MA, and Linda Albert, MSSW. (J Addict Med 2016;10: 46–52)

How do we reduce stress and anxiety in a constructive way? It takes courage to take care of oneself. As attorneys, we need to convey an image that we have everything under control. That means taking care of client matters, family matters, civic matters. Where is there time left to take care of oneself?

How are we aware of the dangers that can build up slowly and have compounding negative effects on our wellbeing? What do we do to keep in shape physically? What do we do make sure our body and mind have proper nutrition to function well? What do

we do to be mindful and have a clear head?

These are all important questions to regularly ask ourselves. Don't say you don't have time. You don't have time not to take stock.

To align with Mental Health Awareness Month, May 4-8, 2020 has been declared “Lawyer Well-Being Week.” The aim of Well-Being Week is to raise awareness and encourage action across the profession to improve well-being for attorneys and their support teams. For more information, go to <https://lawyerwellbeing.net/the-report/>.

We have agencies available through the ISBA to provide help for your personal wellness. Future articles will address eating right, exercise, and gratitude. If you have ideas for future topics to help us all be our best selves, we'd love to hear from you.

Resources for all of us:

Books

Jeena Cho and Karen Gifford, *The Anxious Lawyer: An 8-Week Guide to a Joyful and Satisfying Law Practice Through Mindfulness and Meditation*
Scott L. Rogers, *The Six-Minute Solution: A Mindfulness Primer for Lawyers*
Mark Williams and Danny Penman, *Mindfulness: An Eight-Week Plan for Finding Peace in a Frantic World*
Jon Kabat-Zinn, *Wherever You Go, There You Are*
Eckhart Tolle, *The Power of Now*

Websites:

www.theanxiouslawyer.com
www.mindful.org
www.umassmed.edu/cfm/
<https://illinoislap.org/mental-healthresources/mental-health-videos/>
<https://lawyerwellbeing.net/the-report/illinoislap.org>

Apps:

Stop, Breathe & Think Calm Headspace

Videos:

There are thousands of meditation videos on YouTube. ■

Bob Fioretti is a partner at Roth Fioretti, LLC where his practice concentrates on complex litigation and municipal law. He was elected to two terms on the Chicago City Council as served as alderman of one of the most diverse wards in the city, bringing economic development and creating over 8,000 jobs. Bob is a strong advocate of mental health resources for our communities.

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Mary Petrucci currently serves on Hon. James McCluskey's ISBA Special Committee on Health and Wellness, along with Bob Fioretti. Mary was the recipient of the Illinois Lawyers' Assistance Program's (LAP) 2019 Michael J. Howlett, Jr. Award, which honors individuals or law firms in recognition of their promotion of LAP within the Illinois legal community. In 2018, after 26 years practicing criminal defense, juvenile, and real estate law, Mary changed careers and is now the pro bono attorney program coordinator for Prairie State Legal Services' West Suburban office.

Save Judicial Resources: Eliminate Orders for Alias Summons

BY ROBERT G. MARKOFF & STEVEN A. MARKOFF

Judges contemplating how to resume their court calls should consider the following:

Cease granting orders permitting the issuance of alias summonses. Instead, set a specific time period for the plaintiff to obtain service. If service is not effectuated after one year, dismiss the case without prejudice.

Setting cases for status (even by email or Zoom hearing) when there is no service, is a major waste of judicial resources and the time of judges, court clerks and attorneys alike. It is a function of little value to anyone and does not aid in the administration of justice.

The legal authority for this suggestion is based upon our Code of Civil Procedure and Supreme Court Rules.

735 ILCS 5/2-201(a) governs forms of process and states "...the issuance of alias process...shall be according to rules."

Supreme Court Rule 103(a) governs an alias summons. It directs court clerks to issue an alias summons upon request of any party.

Nowhere in the Code or Rules is there a requirement for a court to grant permission to issue an alias summons. In fact, one could argue that local court rules requiring permission to issue an alias summons violate the Supreme Court Rule on point. Given the great backlog courts will face when reopening, this will help with initial case flow while ultimately allowing judges to keep their caseload numbers down.

Cook County's First Municipal District is one of the few courts in the state that does not require court permission to issue an alias summons. This has allowed their courts to focus on matters "at issue" or "in default." Periodic slaughter calls efficiently clean up the docket, specifically unserved cases and matters resolved without entry of a dismissal order.

Imagine the countless hours that could be saved if judges implement this proposal and eliminate unnecessary court appearances and orders. ■

Bank and Borrower Did Not Collude to Injure Another Lender

BY MICHAEL L. WEISSMAN

Under the Uniform Commercial Code (Section 9-332), a party is liable for colluding with another when there is evidence that the two parties acted pursuant to an agreement or otherwise in concert with each other and the purpose of the concerted action was illegal, fraudulent or otherwise wrongful toward the injured third party. This standard is based on Section 876 of the Restatement (Second) of Torts. Applied to *NearGear Capital, Inc. v. Bank of Springfield*, 2019 U.S. Dist. LEXIS 102381, 99 U.C.C. Rep. Serv. 2d 277 (Bankrtcy. E.D. Mo. June 19, 2019), the question was whether Bank of Springfield had colluded with its borrower, Gateway

Buick GMC, Inc. to injure Gateway's floor plan lender, NextGear Capital, Inc.

Gateway operated an automotive dealership in Hazelwood, Missouri selling new Buick and GMC vehicles. Between August 11, 2015, and January 12, 2016, it executed a series of promissory notes totaling \$13,625,000 with Bank of Springfield. The notes were secured by a blanket lien on all of Gateway's real and personal property.

Next Gear provided Gateway with floor plan financing pursuant to a demand note and a loan and security agreement dated October 27, 2014. Gateway granted NextGear a blanket lien on its personal

property thereby giving NextGear a senior lien position in Gatewas accounts receivable and any funds Gateway would receive from General Motors. Gateway received two types of payments from General Motors: vehicle rebates and holdbacks that were proceeds from vehicles floor-planned by NextGear, and dealer incentive payments.

With Gateway experiencing financial difficulties, the three parties executed a series of forbearance agreements. On October 1, 2015 NextGear agreed to subordinate its claim to payments Gateway had coming from General Motors, except for the sales proceeds arising from the vehicles NextGear had floor-

planned and for which it had not been paid. On May 27, 2016, the parties executed an amended forbearance agreement and on July 10, 2017 still another amended forbearance agreement. In the last of these agreements there was a provision prohibiting Gateway from any further borrowing from the bank.

Because NextGear found, as early as May, 2016, that Gateway was selling vehicles out of trust and not remitting the sales proceeds to NextGear, it had stationed risk managers at Gateway's premises to insure that the sales proceeds were delivered to NextGear. The bank was aware of this as well as Gateway's financial difficulties.

Gateway had bank accounts with several different banking institutions including Regions Bank. The NextGear loan documents obligated Gateway to deposit vehicle rebates and holdbacks from the sale of vehicles floor-planned by NextGear into the Regions account. NextGear was party to a tripartite control agreement giving it control over the Regions bank account.

Gateway directed General Motors to deposit rebate, holdback and incentive payments into Gateway's account at Bank of Springfield. Bank of Springfield knew the source of the deposits was General Motors. These deposits were a direct violation of the forbearance agreements, the floor plan financing agreements and the subordination agreements.

NextGear accused the bank of acting purposefully to induce Gateway to deposit monies Gateway received from General Motors to be deposited at the bank and applied to payments due the bank on its Gateway notes. These were monies that were supposed to be placed on deposit at Regions bank. Despite demands from NextGear, the bank refused to turn over the disputed funds.

The decision arose from a motion to dismiss the case filed by the bank. The bank claimed its conduct fell within the protection of Section 9-332 of the Uniform Commercial Code. The Court agreed.

Section 9-332 of the UCC states, "...a transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party". In the view of the

Court the decision hinged on whether the bank was acting in collusion with Gateway when it obtained the General Motors payments.

The Court said there was an insufficient allegation of collusion and ruled as follows: "... a junior secured party is under no obligation to identify and segregate cash proceeds for the benefit of the senior secured creditor... This is the case even if the junior secured creditor knew of the senior secured party's interest... The collusion standard in Article 9 does not impose a duty on a transferee of funds to identify and segregate the funds absent a contractual obligation to do so.... As long as BOS acts rightfully, it cannot be responsible for Gateway's potential wrongful actions".

For decision reaching the opposite conclusion on this issue of collusion, see *Banner Bank v. First Comm. Bank*, 854 F. Supp. 2d 846, (D. Mont. 2012). ■