

JENNER & BLOCK

Practice Series

Illinois Civil Practice Guide

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I. CITING ILLINOIS CASES IN ILLINOIS COURT PLEADINGS

In 2011, the Illinois Supreme Court changed the way case law is to be cited in pleadings filed in and decisions authored by Illinois courts. The change was implemented to facilitate a move away from printed case reporters to an electronic public domain citation system. Formerly, the proper way to cite an Illinois decision was to cite to the Illinois Official Reporter. For example, *People v. Doe*, 123 Ill. App. 3d 456 (2009).

Illinois court decisions after July 1, 2011 and going forward, will not be published in printed Illinois reporters and only will be published online. Ill. S. Ct. R. 6. The proper citation should include the case name, year, court, docket number, and a pinpoint cite to internally numbered paragraphs. *Id.* A parallel citation to the North Eastern Reporter may be included but is not required. *Id.* Examples of public domain citations are as follows:

Supreme Court: *People v. Doe*, 2011 Ill 12345, ¶ 15

Appellate Courts: *People v. Doe*, 2011 Ill App (1st) 12345, ¶ 15

Subsequent opinion
under same docket number: *People v. Doe*, 2011 Ill App (1st) 12345-B, ¶15

Rule 23 opinions: *People v. Doe*, 2011 Ill App (1st) 12345-U, ¶ 15

II. JURY DEMAND

Section 2-1105 of the Code of Civil Procedure mandates that a plaintiff must file a jury demand with the clerk at the time the action is commenced. 735 ILCS § 5/2-1105. A defendant must file a demand no later than the filing of an answer. *Id.* Failure to file on time results in waiver. *Id.*

In actions seeking equitable relief, the parties cannot request a jury trial unless the court enters an order finding that one or more of the parties is entitled to a jury trial. *Id.* The plaintiff has three days from the entry of this order and the defendant has six days from the entry of this order to file a jury demand with the clerk of the court. *Id.*

If a plaintiff initially files a jury demand and later waives it, and the defendant desires a trial by jury, the defendant should make a prompt jury demand upon learning that the plaintiff has waived. *Id.* Similarly, in cases involving multiple defendants, if the defendant that filed the jury demand later waives it, any other defendant who desires a trial by jury should make a prompt jury demand *Id.*

All cases in which the demand for damages is less than \$50,000 will receive a six member jury, unless any party demands twelve jurors. *Id.*

III. PLEADINGS

A. FORM OF PLEADINGS

Pleadings must be legible and include a title with the court, the cause, and the parties. Ill. S. Ct. R. 131(a)-(b). In cases with multiple parties, it is sufficient to list the first-named plaintiff and the first-named defendant. Ill. S. Ct. R. 131(c). A filing must include the name, address, and telephone number of the responsible attorney(s) and law firm. Ill. S. Ct. R. 131(d).

All pleadings must contain a plain and concise statement of the pleader's cause of action, counterclaim, defense, or reply. 735 ILCS § 5/2-603. Each separate cause of action should be stated as a separate count or counterclaim, and each count, counterclaim, defense, or reply must be separately pleaded, designated, and numbered. *Id.* Pleadings should be divided into paragraphs with each paragraph containing a separate allegation. *Id.* If facts are adequately stated in one part of the pleading, or in any one pleading, they may be incorporated by reference elsewhere or in other pleadings. Ill. S. Ct. R. 134.

Pursuant to Section 2-612(b) of the Code of Civil Procedure, pleadings are sufficient in substance if they contain information that reasonably informs the opposing party of the nature of the claim or defense. *Id.*; 735 ILCS § 5/2-612(b). Defects in form or substance are waived if no objection is raised in the trial court. 735 ILCS § 5/2-612(c). If a pleading is insufficient in form or substance, the court may order more complete or particular statement or require a party to prepare other pleadings. *Id.* § 5/2-612(a).

Parties may plead as many causes of action, counterclaims, defenses, and matters in reply as they want, and each must be separately designated and numbered. *Id.* § 5/2-613(a). Parties may plead in the alternative, regardless of consistency. *Id.* § 5/2-613(b).

New Illinois Supreme Court Rule 138 prohibits the inclusion of social security numbers in pleadings. If disclosure is required, only the last four digits shall be used, and the filing must be accompanied by a Notice of Confidential Information Within Court Filing, which identifies the full social security number and shall remain confidential except to the parties as the court directs. Ill. S. Ct. R. 138. The Notice of Confidential Information Within Court Filing may be found in the appendix to Rule 138. *Id.*

B. THE COMPLAINT

A complaint must contain "substantial allegations of fact" to state a cause of action. 735 ILCS § 5/2-601. Similarly, all pleadings must contain a "plain and concise statement of the pleader's cause of action, counterclaim, defense, or reply." *Id.* § 5/2-603. The Illinois Supreme Court has held that "[a] complaint is deficient if it fails to allege the facts necessary for recovery." *Chandler v. Ill. Cent. R.R. Co.*, 207 Ill. 2d 331, 348 (2003). The complaint must set forth the ultimate facts needed to prove the claim, but not the evidentiary facts which tend to prove the ultimate facts. *Id.* Separate factual allegations should be arranged in separate and consecutively numbered paragraphs. *Id.* § 5/2-603(b). A complaint which does not put the defendant on notice of the facts necessary for the plaintiff to recover fails to state a cause of action. *Gonzalez v. Thorek Hosp. & Med. Ctr.*, 143 Ill. 2d 28, 36 (1991).

Each count of the complaint must state a specific prayer for relief. 735 ILCS § 5/2-604. Relief may be pleaded in the alternative. *Id.* Except in cases of default, the prayer for relief does not limit the relief the court may grant, but the court must protect adverse parties against unfair surprise when granting relief that is not requested in the pleadings. *Id.*

Punitive damages should not be pleaded in the complaint. *Id.* § 5/2-604.1. Instead, the party seeking punitive should file a pretrial motion and request a hearing on punitive damages. *Id.* The court should allow the party to amend the complaint to plead punitive damages if the party establishes “a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages.” *Id.* A plaintiff must file a motion to amend the complaint to include a prayer for relief seeking punitive damages no later than 30 days before discovery closes. *Id.*

C. VERIFIED PLEADINGS

Any pleading may be verified by oath of the party filing it or any other person having knowledge of the facts pleaded. 735 ILCS § 5/2-605(a). Any officer or agent having knowledge of the facts may verify pleadings on behalf of a corporation. *Id.*

If any pleading is verified, every subsequent pleading also must be verified, unless the court excuses verification. *Id.* Allegations contained in verified pleadings are deemed to be admissions of fact. *Winnetka Bank v. Mandas*, 202 Ill. App. 3d 373, 397 (1st Dist. 1990). Once a pleading has been verified, facts contained within it are judicial admissions that remain part of the record and are admissible against the pleading party, even if the pleading is subsequently amended. *Id.*

Specifically, the allegation of the execution or assignment of any written instrument is admitted unless denied in a verified pleading. 735 ILCS § 5/2-605(b). This rule does not apply if the court excuses verification of the pleadings. *Id.* If the party denying the execution or assignment of the instrument is not the party alleged to have executed or assigned the instrument, the party may deny on information and belief. *Id.*

D. AFFIDAVIT REGARDING DAMAGES SOUGHT

Illinois Supreme Court Rule 222(b) states: “[a]ny civil action seeking money damages shall have attached to the initial pleading the party’s affidavit that the total of money damages sought does or does not exceed \$50,000.” The Rule further provides: “[a]ny judgment on such claim which exceeds \$50,000 shall be reduced post-trial to an amount not in excess of \$50,000.” Ill. S. Ct. R. 222(b). If the damages sought do not exceed \$50,000, then Rule 222’s limited and simplified discovery procedures apply. (*See* Section IV. D. below.) The purpose of the Rule’s requirement for an affidavit to be filed only in cases seeking less than \$50,000 damages is so that the proper court division and scope of discovery can be determined at the outset of the litigation. However, at least one court has applied Rule 222(b) broadly to require plaintiffs in all civil cases to file a Rule 222(b) affidavit with the complaint or risk having the defendant successfully move to reduce damages for any damages that a jury awards above \$50,000. *Grady v. Marchini*, 375 Ill. App. 3d 174, 178-79 (4th Dist. 2007).

E. EXHIBITS

If a claim or defense is based on a written instrument, such as a contract or a will, a copy of the instrument must be attached as an exhibit or recited within the pleading. 735 ILCS § 5/2-606. If the instrument is not accessible to the pleader, the pleader must attach an affidavit to the pleading to that effect. *Id.*

Key Distinction From Federal Practice:

Federal Rule of Civil Procedure 10(c) permits, but does not require, the incorporation of written instruments by attachment to pleadings. If an exhibit is attached to a pleading or motion, Federal Rule 10(c) makes that exhibit part of the pleading or motion for all purposes.

F. ANSWERING THE COMPLAINT

i. Time to Appear and Answer

Illinois Supreme Court Rule 181 governs appearances. Where the summons requires appearance within 30 days after service, the defendant has 30 days, excluding the date of service, within which to appear. Ill. S. Ct. R. 181(a). The defendant may make an appearance by filing an appearance, answering the complaint, or filing another appropriate motion within the 30-day period. *Id.*

If the defendant appears by filing a motion to dismiss, and the court denies that motion, the court then should direct the defendant to file an answer or another appropriate motion within a certain amount of time in its order denying the defendant's motion. *Id.* If the defendant appears in any other way, the defendant must file an answer or another appropriate motion on or before the last day on which the defendant is required to appear. *Id.*

If, instead, the summons requires the defendant to appear on a specific day, the defendant must appear in person or by attorney at the time and place specified in the summons, or the defendant can file a written appearance, answer, or motion in person or through an attorney before the time specified for appearance. Ill. S. Ct. R. 181(b)(1). A written appearance must state the address where service may be made. *Id.* If the defendant appears in court, the court should require the defendant to enter a written appearance. *Id.* If the defendant files a written appearance other than an answer or motion, the defendant will have 10 days after the day of its appearance within which to file an answer or motion, unless the court directs otherwise. *Id.*

ii. Waiver of Service

If the defendant waives service, Section 2-213 of the Code of Civil Procedure provides the defendant 60 days from the date on which the request for waiver was sent, or 90 days from that date if the defendant resides outside the United States, to appear or serve an answer to the complaint. 735 ILCS § 5/2-213(c).

iii. Denials

Every allegation of a complaint must be specifically admitted or denied. 735 ILCS § 5/2-610(a). Denials “must not be evasive, but must fairly answer the substance of the allegation denied.” *Id.* § 5/2-610(c).

Generally, if an allegation is not explicitly denied, it is deemed admitted. *Id.* § 5/2-610(b). This rule does not apply to allegations of damages. *Id.* The defendant may, in good faith, deny all allegations in a paragraph of the opposing party’s pleading, or all the allegations that are not specifically admitted. Ill. S. Ct. R. 136.

If the defendant lacks knowledge sufficient to form a belief to admit or deny an allegation, the defendant must state this in its answer and file an accompanying affidavit swearing to its lack of knowledge. 735 ILCS § 5/2-610(b).

If only damages are contested, the defendant should state in its answer that it plans to contest only the issue of damages. *Id.* § 5/2-610(d).

Key Distinction From Federal Practice:

In Illinois courts and in federal courts, a party may state that it lacks knowledge or information sufficient to form a belief about the truth of an allegation in its answer, and the statement will have the effect of a denial. 735 ILCS § 5/2-610; Fed. R. Civ. P. 8(b). The Illinois Code of Civil Procedure, however, also requires the party to also file an affidavit swearing to its lack of knowledge, while Federal Rule of Civil Procedure 8(b) does not require an affidavit.

iv. Affirmative Defenses

Section 2-613(d) of the Code of Civil Procedure outlines certain affirmative defenses that a party must raise in its answer to the complaint or reply to a counterclaim. 735 ILCS § 5/2-613(d). The facts supporting the affirmative defense must be set forth in the answer, if they are not expressly stated in the complaint. *Id.*

These defenses include:

- payment;
- release;
- satisfaction;
- discharge;
- license;
- fraud;
- duress;
- estoppel;
- laches;
- statute of frauds;
- illegality;

- that the negligence of a complaining party contributed in whole or in part to the injury of which he complains;
- that an instrument or transaction is either void or voidable in point of law, or cannot be recovered upon by reason of any statute or by reason of nondelivery;
- want or failure of consideration in whole or in part;
- any other defense which by affirmative matter seeks to avoid the legal effect of or defeat a cause of action in whole or in part; and
- any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise.

Id.

Section 2-619 of the Code of Civil Procedure also provides guidance as to affirmative defenses. 735 ILCS § 5/2-619. (*See* Section IV.H. below for further discussion.)

Key Distinction From Federal Practice:

Fact-pleading of affirmative defenses is required in Illinois state courts, pursuant to 735 ILCS § 5/2-613. In contrast, federal law allows for notice-pleading of affirmative defenses pursuant to Fed. R. Civ. P. 8.

G. REPLIES TO ANSWERS AND AFFIRMATIVE DEFENSES

A plaintiff may file a reply to defendant’s answer within 21 days after the last day allowed for the answer to be filed. Ill. S. Ct. R. 182(a). However, if the answer contains affirmative defenses, the plaintiff must file a reply or the affirmative defenses are deemed admitted. 735 ILCS § 5/2-602.

Key Distinction From Federal Practice:

In Illinois courts, a plaintiff must reply to affirmative defenses or they will be deemed admitted. In federal courts, a reply to affirmative defenses is not required and an affirmative defense to which no reply is filed is deemed denied.

H. COUNTERCLAIMS AND CROSS-CLAIMS

Section 2-608 of the Code of Civil Procedure states that a counterclaim includes any claim by one or more defendant against one or more plaintiff and any claim by one or more defendant against one or more co-defendant. 735 ILCS § 5/2-608(a). Both counterclaims and cross-claims in Illinois are referred to as counterclaims.

A counterclaim must be pleaded as part of the answer and must be designated as a counterclaim. *Id.* § 5/2-608(b). Service is not required on parties already before the court. *Id.*

Counterclaims must be drafted in the same manner and with the same specificity as a complaint, but allegations set forth in other parts of the answer may be incorporated by specific reference. *Id.* § 5/2-608(c).

I. REPLIES TO COUNTERCLAIMS

The defendant to a counterclaim must answer the counterclaim consistent with the procedures for answering a complaint. 735 ILCS § 5/2-608(d). The answer to a counterclaim and any motions attacking a counterclaim must be filed within 21 days after the last day allowed for the filing of the counterclaim. Ill. S. Ct. R. 182.

J. THIRD PARTY COMPLAINTS

Third party proceedings are governed by Section 2-406 of the Code of Civil Procedure. 735 ILCS § 5/2-406. Within the time allowed for filing an answer, or with leave of court at any time, a defendant may bring a third-party complaint against a third party who is or may be liable to the defendant for all or part of the plaintiff's claim against it. *Id.* § 5/2-406(b). Responding to a third-party complaint follows the same procedure as responding to a complaint. *Id.* The third-party defendant may assert any defenses that it has to the third-party complaint or that the third-party plaintiff (the defendant) has to the plaintiff's claim and has the same right to file a counterclaim or third-party complaint. *Id.*

An action is commenced against the new party by filing the appropriate pleading against it, or the entry of an order naming the new party as a party. *Id.* § 5/2-406(c). Service of process for the new party has the same requirements as service upon a defendant at the origination of a lawsuit. *Id.*

K. INTERVENTION

Intervention is governed by Section 2-408 of the Code of Civil Procedure. Any party may intervene as of right when: (1) intervention is allowed by statute; (2) the intervening party has an interest in the litigation that is not adequately represented by existing parties and the intervening party will or may be bound by the order or judgment in the lawsuit; or (3) the intervening party is "so situated as to be adversely affected" by distribution or disposition of property at issue in the lawsuit. 735 ILCS § 5/2-408(a).

A party may intervene at the court's discretion if: (1) a statute confers a conditional right to intervene; or (2) an intervening party's claim or defense shares a common question of law or fact with the lawsuit. *Id.* § 5/2-408(b). In considering a party's application for intervention, the court should consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* § 5/2-408(e).

The State of Illinois may intervene in lawsuits challenging a constitutional provision, state statute, or state regulation if the court allows intervention. *Id.* § 5/2-408(c). Similarly, a municipality of governmental subdivision may intervene in lawsuits challenging the validity of an ordinance or regulation at the discretion of the court. *Id.* § 5/2-408(d).

A party seeking to intervene should file a petition with the court that establishes its grounds for intervening together with the initial pleading or motion which the party intends to file. *Id.* § 5/2-408(e).

L. SANCTIONS FOR IMPROPER PLEADINGS OR OTHER FILINGS

Pleadings must be signed by the attorney representing the party, or by the party itself if *pro se*. Ill. S. Ct. R. 137. The signature certifies that the attorney has read the pleading or motion and that the pleading or motion “to the best of his knowledge, information, and belief formed after a reasonable inquiry 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.” *Id.* If the pleading or motion is not signed, it should be stricken unless it is signed promptly after the omission is called to the attention of the party filing the pleading or motion. *Id.*

If the pleading or motion is signed in violation of Rule 137, the court upon motion or *sua sponte* may impose an appropriate sanction. *Id.* Motions for sanctions should be filed within 30 days of the entry of a final judgment, or within 30 days of the court’s ruling on a timely-filed post-judgment motion. *Id.* The sanction may include an order to pay the other party’s reasonable expenses incurred because of the filing of the pleading or motion, including reasonable attorneys’ fees. *Id.*

IV. MOTIONS

A. MOTION FOR SUBSTITUTION OF JUDGE

Section 5/2-1001 of the Code of Civil Procedure governs substitution of judges. Motions for substitution of a judge may be made for cause or as a matter of right. A party may move for substitution for cause at any time by filing a petition that asserts the specific allegations that justify substitution. 735 ILCS § 5/2-1001(a)(3).

i. As a Matter of Right

A motion for substitution as a matter of right is more commonly used than a motion for cause. Each party is entitled to one substitution of a judge without cause as a matter of right. *Id.* § 5/2-1001(a)(2)(i)-(ii); *see Aussikier v. City of Bloomington*, 355 Ill. App. 3d 498, 502 (4th Dist. 2005). Where there are multiple plaintiffs, each plaintiff may separately move for substitution as a matter of right. *Aussikier*, 355 Ill. App. 3d at 502. Similarly, each individual defendant in a multiple defendant action has an independent right to one substitution. *Behringer v. Hardee’s Food Sys., Inc.*, 282 Ill. App. 3d 600, 601 (5th Dist. 1996). Those rules apply even where the same counsel represents more than one plaintiff or defendant. *Id.*

The motion must be filed before the judge has ruled on any substantial issue in the case and will be heard by the judge who the party seeks to substitute. *Id.* § 5/2-1001(a)(2)(i)-(ii). A party who has not filed an appearance in a case and who has not been found in default may still obtain a substitution as a matter of right, even if its motion is filed after the judge has ruled on a substantial issue in the case. *Id.* § 5/2-1001(a)(2)(iii).

Illinois courts have differing opinions as to what constitutes a substantial ruling that precludes substitution. A substantial ruling is any decision that “directly relates to the merits of the case.” *Rodisch v. Commacho-Esparza*, 309 Ill. App. 3d 346, 350-51 (2d Dist. 1999). However, even if the judge has not ruled on any substantive issue, the court may prohibit

substitution once litigants have “tested the waters” because they had the opportunity to determine the judge’s position on the issues during pretrial proceedings. *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 246 (1st Dist. 2006); *In re Estate of Gay*, 353 Ill. App. 3d 341, 344 (3d Dist. 2004). Other courts reject this approach and more strictly follow the substantive ruling requirement of Section 2-1001. *Rodisch*, 309 Ill. App. 3d at 351; *Ill. Licensed Beverage Ass’n v. Advanta Leasing Servs.*, 333 Ill. App. 3d 927, 933 (4th Dist. 2002).

Thus, where a judge recommends a settlement agreement or rules on minor pretrial discovery issues, substitution as a matter of right will probably be allowed. *Rodisch*, 309 Ill. App. 3d at 351; *Becker v. R.E. Cooper Corp.*, 193 Ill. App. 3d 459, 463 (3d Dist. 1990). Nonetheless, substitution as a matter of right will probably be denied when the judge’s rulings involve interpretation of an Illinois Supreme Court rule or reveal the judge’s position on the admissibility of evidence. *In re Estate of Hoellen*, 367 Ill. App. 3d at 246.

ii. As a Matter of Cause

Each party is also entitled to move for substitution as a matter of cause. 735 ILCS § 5/2-1001(a)(3)(i). To move for substitution as a matter of cause, a party must file a petition setting forth the cause for substitution and praying for a substitution of judge. *Id.* § 5/2-1001(a)(3)(ii). The petition must be verified by the affidavit of the moving party. *Id.* § 5/2-1001(a)(3)(iii). The petition and accompanying affidavit should be presented, verified, and filed before any substantive ruling is made in the case. *Boatman v. A.P. Green Refractories Co.*, 223 Ill. App. 3d 121, 125 (5th Dist. 1991). A judge who is not named in the petition will conduct a hearing to determine whether cause for substitution exists. 735 ILCS § 5/1001(a)(3)(iii). A judge is presumed to be impartial, and the party moving for substitution carries a difficult burden to show actual prejudice caused by personal bias stemming from an extrajudicial source and prejudicial trial conduct. *In re Marriage of Petersen*, 319 Ill. App. 3d 325, 339 (1st Dist. 2001), *aff’d in part, rev’d in part*, 2011 Ill. 110984.

B. MOTION TO CHALLENGE PERSONAL JURISDICTION

To challenge personal jurisdiction, a party may file a motion to dismiss or a motion to quash service of process. 735 ILCS § 5/2-301. Prior to the filing of any pleading or motion other than a motion for an extension of time to answer or otherwise appear, a party may object to personal jurisdiction for insufficient service of process or on the ground that the party is not subject to the court’s jurisdiction. *Id.* These motions may be filed separately or as part of a combined motion pursuant to Section 2-619.1 of the Code of Civil Procedure. *Id.*; 735 ILCS § 5/2-619.1.

If the facts that support a motion to dismiss or to quash are not apparent from the face of the pleadings, the motion must be supported by an affidavit that sets forth the bases for the motion. *Id.* § 5/2-301. The affidavits must assert the personal knowledge of the affiant, and set forth the particular facts of the claim or defense. Ill. S. Ct. R. 191. Certified copies of any documents upon which the affiant relies should be attached to the affidavit. *Id.* The affidavit should contain facts admissible into evidence and should affirmatively show that the affiant, if sworn as a witness, can testify to them. *Id.*

A party waives any objection to personal jurisdiction if it files a responsive pleading or motion (other than a motion for extension of time to answer or otherwise plead) prior to filing a motion challenging personal jurisdiction. 735 ILCS § 5/2-301(a-5).

The court should rule on an objection to personal jurisdiction without deciding any issue of fact or considering the merits of the claim. *Id.* § 5/2-301(b). If the court denies the motion to dismiss or to quash service, the moving party may still raise any objection or defense which it might otherwise have made. *Id.*

A party waives its objection to personal jurisdiction by taking part in any further proceedings after the court rules against its objection. *Id.* § 5/2-301(c).

C. MOTION TO CHALLENGE VENUE

To challenge venue, a defendant must file a motion to transfer to a proper venue. 735 ILCS § 5/2-104(b). Section 2-101 of the Code of Civil Procedure provides the venue requirements:

every action must be commenced (1) in the county of residence of any defendant who is joined in good faith and with probable cause for the purpose of obtaining a judgment against him or her and not solely for the purpose of fixing venue in that county, or (2) in the county in which the transaction or some part thereof occurred out of which the cause of action arose.

Id. § 5/2-101. For venue purposes, a private corporation organized in Illinois or a foreign corporation authorized to transact business in Illinois is a resident of any county in which it has its registered office or other office or is doing business. *Id.* § 5/2-102(a). A partnership is a resident of any county in which any partner resides or in which the partnership has an office or is doing business. *Id.* § 5/2-102(b). A voluntary unincorporated association is a resident of any county in which the association has an office or, if on due inquiry no office can be found, in which any officer of the association resides. *Id.* § 5/2-102(c).

In considering a motion to transfer venue, the trial court must review the facts in the case and determine whether the venue statute is satisfied. *Corral v. Mervis Indus.*, 217 Ill. 2d 144, 154 (2005). The defendant bears the burden to prove that the plaintiff's venue selection was improper by setting forth specific facts that demonstrate a clear right to relief. *Id.* at 155.

The defendant waives its objection to venue unless it files a motion to transfer on or before the date on which the defendant is required to appear, or within any additional time that the court grants the defendant to answer the complaint. 735 ILCS § 5/2-104(b). But, if a defendant upon whose resident venue depends is dismissed upon motion of plaintiff, the remaining defendant may then move to transfer as though the dismissed defendant had not been a party. *Id.*

The plaintiff pays the costs for the transfer. *Id.* § 5/2-107. If the court finds that the plaintiff fixed the venue in bad faith and without probable cause, the court may order the plaintiff to pay reasonable expenses incurred by the defendant in moving to transfer, including a reasonable attorney's fee. *Id.*

D. MOTION TO DISMISS OR TRANSFER FOR *FORUM NON CONVENIENS*

A motion to dismiss or transfer an action on the grounds of *forum non conveniens* must be filed within 90 days after the last day allowed for the defendant to answer the complaint. Ill. S. Ct. R. 187(a). Hearings on these motions should be scheduled to allow the parties enough time to conduct discovery on issues of fact relevant to the convenience of the forum or the availability of an alternate forum. Ill. S. Ct. R. 187(b). Motions to dismiss or transfer for *forum non conveniens* should be supported and opposed with affidavits. *Id.*

Forum non conveniens is an equitable doctrine that calls for considerations of “fundamental fairness” and “effective judicial administration.” *Certain Underwriters at Lloyd’s London, v. Ill. Cent. R.R. Co.*, 329 Ill. App. 3d 189, 195 (2d Dist. 2002). A trial court may decline jurisdiction and instead direct that the matter proceed in a different forum if litigating the case in that forum “would better serve the ends of justice.” *Id.* When ruling on a *forum non conveniens* motion, the trial court must consider the totality of circumstances to determine whether the defendant has proved that the private and public interest factors weigh in favor of transfer of forum. *Id.* at 196. The private interest factors are: “(1) the convenience of the parties; (2) the relative ease of access to sources of testimonial, documentary, and real evidence; and (3) all other practical problems that may make the trial of a case easy, expeditious, and inexpensive” *Id.* The public interest factors are: “(1) the interest in deciding localized controversies locally; (2) the unfairness of imposing the expense of a trial and the burden of jury duty on residents of a county with little connection to the litigation; and (3) the administrative difficulties presented by adding further litigation to court dockets in the already congested fora.” *Id.* A final consideration is the forum in which the plaintiff filed the complaint, a factor which is given less deference if neither the plaintiff’s resident nor the location of the accident of injury is in the chosen forum. *Id.*

Rule 187(c)(1) provides that costs attending a transfer, together with the filing fee in the transferee court, shall be paid by the party or parties who applied for the transfers

E. MOTION FOR BILL OF PARTICULARS

Within the time a party is required to respond to a pleading, the party may file a motion requesting a bill of particulars. 735 ILCS § 5/2-607(a). A bill of particulars may be requested when a pleading lacks detail to which the responding party is entitled. *Id.* The motion should point to specific defects in the pleading and identify the information the responding party is seeking. *Id.*

For example, in *Hemingway v. Skinner Engineering Co.*, 117 Ill. App. 2d 452, 460-61 (2d Dist. 1969), the defendant moved for and the plaintiff filed a bill of particulars to supplement the bare allegations of the complaint for breach of contract. The bill of particulars included specific allegations regarding the services that the plaintiff rendered, the dates and hours when the plaintiff worked and when the plaintiff furnished the materials for the work, and numerous written memoranda exchanged between the plaintiff and the defendant regarding the terms of their agreement. *Id.*

If the pleading party does not believe the requesting party is entitled to the information, the pleading party may move the court to strike or modify the request for a bill of particulars. *Id.* § 5/2-607(d). Otherwise the pleading party will have 28 days to file a bill of particulars, and the responding party will have 28 days after receiving the bill of particulars to respond. *Id.* § 5/2-607(a). If the pleading party does not file and serve a bill of particulars within 28 days or if the bill of particulars is insufficient, the responding party may move to strike the pleading. *Id.* § 5/2-607(b). If the court does not strike the pleading, it may allow more time to respond or require a more particular pleading to be filed and served. *Id.*

If the bill of particulars in an action based on a contract contains the statement of items of indebtedness and is verified by oath, the items of the bill are admitted except to the extent the opposing party files an affidavit specifically denying them and facts to support the denial. *Id.* § 5/2-607(c).

F. MOTION TO CONSOLIDATE OR SEVER CLAIMS

Consolidation or severance of cases may be allowed “whenever it can be done without prejudice to a substantial right.” 735 ILCS § 5/2-1006.

The trial court has discretion to sever the issues where the substantial rights of litigants may be prejudiced during the course of the trial. *Mount v. Dusing*, 414 Ill. 361, 367 (1953). Or, the trial court may sever issues for purposes of administrative convenience. *Id.*

Consolidation serves “to expedite the resolution of lawsuits, conserve the court's time, avoid duplicating efforts, and save unnecessary expenses.” *J.S.A. v. M.H.*, 384 Ill. App. 3d 998, 1004-1005 (3d Dist. 2008) (citing *Peck v. Peck*, 16 Ill. 2d 268, 276 (1959)). Consolidation may be proper where cases are the same in nature, arise from the same acts, involve the same issues, and depend on the same evidence. *Id.* (citing *La Salle Nat'l Bank v. Helry Corp.*, 136 Ill. App. 3d 897, 905 (1st Dist. 1985)).

G. MOTION FOR VOLUNTARY DISMISSAL

At any time before trial or hearing begins, the plaintiff may move to voluntarily dismiss the action without prejudice. 735 ILCS § 5/2-1009(a). The plaintiff must provide the defendant with reimbursement of costs before the matter may be dismissed pursuant to Section 5/2-1009. *Id.* If an action is voluntarily dismissed without prejudice under Section 2-1009, the plaintiff may refile the case within one year. *Id.* § 5/13-217. A voluntary dismissal does not dismiss any pending counterclaims or third party complaints. *Id.* § 5/2-1009(d).

If another motion has been filed before the plaintiff moves to voluntarily dismiss, and a favorable ruling on the motion would dispose of the case, the court may adjudicate the earlier motion first. *Id.* § 5/2-1009(b).

After the trial or hearing begins, the plaintiff may move to voluntarily dismiss only if (1) the parties stipulate to dismissal, or (2) the plaintiff files a motion, supported by affidavit, that specifies the grounds for dismissal. *Id.* § 5/2-1009(c).

Note that Code of Civil Procedure Section 5/13-217 bars a plaintiff from twice voluntarily dismissing a complaint and re-filing a similar complaint under the “single re-filing” rule. *See Flesner v. Youngs Dev. Co.*, 145 Ill.2d 252 (1991).

H. PRE-ANSWER MOTION TO DISMISS

Motions to dismiss are governed by three provisions of the Code of Civil Procedure: 735 ILCS §§ 5/2-615, 2-619, and 2-619.1. A motion to dismiss under Section 2-615 may be based on defects within the pleading itself, while a motion to dismiss under Section 2-619 allows the defendant to go beyond the plaintiff’s allegations and present other affirmative defenses pursuant to nine grounds provided by the statute that may defeat the plaintiff’s claims. (*See* Section III.H.iii. below for specific grounds for 2-619 motion to dismiss.) Or, a combined motion may argue for the dismissal of plaintiff’s claims pursuant to Section 2-615, Section 2-619, and Section 1005 (summary judgment), together in one single motion. *Id.* § 5/2-619.1.

i. Time for Filing and Proof of Service

A defendant may make his, her or its appearance by filing a motion within the 30-day period within which the defendant is required to appear. Ill. S. Ct. R. 181(a). The 30-day period is computed from, but not including, the day the summons is left with the defendant or its authorized agent, and not the day the summons is mailed. *Id.* If the summons requires the defendant to appear on a certain date, the defendant may file a motion on or before the specified time for appearance. *Id.*

ii. 2-615 Motion to Dismiss

A Section 2-615 motion argues that plaintiff cannot prove any set of facts, under any circumstances, that would entitle him or her to relief. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). In ruling on a Section 2-615 motion, the court will accept as true all well-pled allegations, liberally construe those allegations, and draw all reasonable inferences in the plaintiff’s favor. *Marshall*, 222 Ill. 2d at 429. Often, the court will allow for amendment of the pleadings to correct the defect. 735 ILCS § 5/2-616.

In addition, the court may only consider the allegations in the complaint, admissions in the record, and any matters of which the court may take judicial notice. *Mt. Zion State Bank & Trust v. Consol. Commc’n, Inc.*, 169 Ill. 2d 110, 115 (1995). Illinois requires fact pleading, and therefore, the complaint must allege facts sufficient to state a claim for the cause(s) of action being asserted to survive a Section 2-615 motion to dismiss. *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 407 (1996).

Section 2-615 also allows other relief than dismissal, including that: (1) a pleading be stricken in whole or in part because it is substantially insufficient in law; (2) a pleading be made more definite and certain; (3) designated immaterial matter be stricken; (4) necessary parties be added; or (6) designated misjoined parties be dismissed. 735 ILCS § 5/2-615.

iii. 2-619 Motion for Involuntary Dismissal

A Section 2-619 motion asks the court to look outside the four corners of the complaint and consider defenses that completely defeat a cause of action. 735 ILCS § 5/2-619. A Section 2-619 motion “admits the legal sufficiency of the complaint but asserts affirmative matter to avoid or defeat the claim.” *Lamar Whiteco Outdoor Corp. v. City of W. Chi.*, 355 Ill. App. 3d 352, 359 (2d Dist. 2005). Section 2-619 motions must be filed before the last date set by the trial court for the filing of dispositive motions. Ill. S. Ct. R. 191.

Specifically, Section 2-619 provides nine grounds upon which a party may move to dismiss its opponent’s claims. 735 ILCS § 5/2-619. If grounds for dismissal are not apparent on the face of the complaint, the moving party must file an affidavit along with its 2-619 motion to demonstrate the basis or bases for dismissal. *Id.* The nine grounds for dismissal set forth in Section 2-619 are:

- the court lacks subject matter jurisdiction, and transfer of the case will not cure the defect;
- the plaintiff lacks legal capacity to sue, or the defendant lacks legal capacity to be sued;
- there is another action pending between the same parties for the same cause;
- the cause of action is barred by a prior judgment;
- the action was not commenced within the time limited by the law;
- the claim set forth in plaintiff’s pleading has been released, satisfied of record, or discharged in bankruptcy;
- the claim asserted is unenforceable under the Statute of Frauds;
- the claim asserted is unenforceable because of defendant’s minority or other disability; and
- the claim asserted is barred by other affirmative matter avoiding the legal effect of or defeating the claim.

Id. § 5/2-619(a).

Motions under Section 2-619(a) must be filed “within the time for pleading,” except that a motion based on lack of subject matter jurisdiction may be brought at any time. *Sheffler v. Commonwealth Edison Co.*, 399 Ill. App. 3d 51, 68 (1st Dist. 2010). Also, a Section 2-619 motion may be allowed after the answer is filed at the court’s discretion. *See Long v. Elborno*, 376 Ill. App. 3d 970, 976 (1st Dist. 2007). The court may deny leave to file a Section 2-619 motion if the responding party can show that the late filing has caused undue prejudice. *In re Marriage of Brownfield*, 283 Ill. App. 3d 728, 732 (4th Dist. 1996).

When a motion attacking a pleading under Section 2-619 is supported by an affidavit, the affidavit must assert the personal knowledge of the affiant and set forth the particular facts of the claim or defense. Ill. S. Ct. R. 191. Certified copies of any documents upon which the affiant relies should be attached to the affidavit. *Id.* The affidavit should contain facts admissible into evidence and should affirmatively show that the affiant, if sworn as a witness, can testify to those facts. *Id.*

iv. Combined 2-615/2-619 Motions

Section 2-619.1 allows a party to file a motion under any combination of Sections 2-615, 2-619, and 2-1005 (summary judgments) as a single motion. 735 ILCS § 5/619.1. However, a combined motion must be presented in parts, and each part must specify the section of the Code of Civil Procedure under which it is brought. *Id.* Motions that are not properly identified may be denied if the error prejudices the nonmovant. *Ill. Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484 (1994).

Key Distinction From Federal Practice:

Fed. R. Civ. P. 12(g) governs combining motions and defenses in federal court. If a party makes a motion under the Fed. R. Civ. P. 12 but omits an available objection or defense, the party may not later file a motion based on that objection or defense, except for the defenses set forth in Fed. R. Civ. P. 12(h)(2), including “failure to state a claim upon which relief can be granted, to join a person under Rule 19(h), or to state a legal defense to a claim,” or Fed. R. Civ. P. 12(h)(3), for lack of subject matter jurisdiction.

I. MOTION FOR CONTINUANCE

The court may grant continuances for good cause in its discretion for any action in litigation prior to judgment. 735 ILCS § 5/2-1007. The statute outlines certain sufficient bases for continuances, including: (1) a party or its attorney is a member of the General Assembly when in session; (2) a party’s attorney is a *bona fide* member of a religious faith that requires the person to refrain from normal business activity or to attend religious services for a religious holiday with which a court hearing conflicts; or (3) a party or its attorney is a delegate for the State Constitutional Convention when in session. *Id.*

J. MOTION FOR EXTENSION OF TIME

Illinois Supreme Court Rule 183 governs motions for extensions. The court may grant an extension for any deadline upon a showing of good cause. Ill. S. Ct. R. 183. The motion may be filed before or after the expiration of time. *Id.*

K. SUMMARY JUDGMENT MOTIONS

Section 2-1005 of the Code of Civil Procedure sets forth the time frame and procedure for moving for summary judgment. 735 ILCS § 5/2-1005. Local rules and standing orders also set forth time constraints and procedural requirements for summary judgment motions.

i. Timeframe for Moving for Summary Judgment

A plaintiff may move for summary judgment (1) after the defendant has appeared or (2) after the time allotted for the defendant to appear has expired. 735 ILCS § 5/2-1005(a). A defendant may at any time move for summary judgment. *Id.* § 5/2-1005(b). Summary judgment motions must be filed before the last date set by the trial court for filing dispositive motions. Ill. S. Ct. R. 191.

ii. Procedure for Moving for Summary Judgment

Either party may move for summary judgment with or without supporting affidavits. 735 ILCS § 5/2-1005(a)-(b). The party opposing the motion may file counter affidavits at any time prior to or at the time of the hearing on the motion. *Id.* § 5/2-1005(c). The affidavits must assert the personal knowledge of the affiant and set forth the particular facts of the claim or defense. Ill. S. Ct. R. 191. Certified copies of any documents upon which the affiant relies should be attached to the affidavit. *Id.* The affidavit should contain facts admissible into evidence and should affirmatively show that the affiant, if sworn as a witness, can testify to them. *Id.*

A motion for summary judgment seeks a judgment based on the pleadings, depositions, and admissions, together with the affidavits filed in support of or against summary judgment. 735 ILCS § 5/2-1005(c). Summary judgment should be granted “if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.” *Id.*

The court has discretion to enter partial summary judgment. Ill. S. Ct. R. 192. If summary judgment will not dispose of all issues in the matter, the court may (1) allow the motion and postpone judgment; (2) allow the motion and enter judgment; or (3) allow the motion, enter judgment, and stay enforcement pending the resolution of the remaining issues. *Id.*

L. MOTION FOR DEFAULT

A default judgment may be entered for failing to appear or for failing to plead. 735 ILCS § 5/2-1301(d). A motion to vacate default judgment must be filed within 30 days after the entry of the default. *Id.* § 5/2-1301(e).

In ruling on a motion to vacate a default judgment, courts consider whether substantial justice is being done, and whether, under the circumstances, it would be reasonable to compel the other party to proceed to a trial on the merits. *Bickel v. Subway of Chicagoland, Inc.*, 354 Ill. App. 3d 1090, 1097 (5th Dist. 2004). A court can consider the following factors when determining whether substantial justice is being done: whether the movant acted with due diligence; whether a meritorious defense exists; the severity of the penalty as a result of the default; and the hardship on the nonmovant to proceed to a trial on the merits. *Havana Nat’l Bank v. Satorius-Curry, Inc.*, 167 Ill. App. 3d 562, 565 (4th Dist. 1988). A trial court’s refusal to vacate a default judgment may be reversed because of a denial of substantial justice or for an abuse of discretion. *Rockford Hous. Auth. v. Donahue*, 337 Ill. App. 3d 571, 574 (2d Dist. 2003).

M. MOTION TO WITHDRAW

Illinois Supreme Court Rule 13(c) governs motions to withdraw. An attorney must give notice to all parties of record and obtain leave of court to withdraw his appearance for a party. Ill. S. Ct. R. 13(c). Unless another attorney is substituted, the attorney must give reasonable notice of the time and place where the motion will be heard to the party the attorney seeks to withdraw from representing. *Id.* Pursuant to a recent amendment to Rule 13(c), notice of the motion to withdraw may be through personal service, certified mail, or third-party carrier, such as UPS or FedEx, to the party at its last known business or residence address. *Id.* The notice

should instruct the party to retain other counsel or within 21 days after entry of the order of withdrawal, to file a supplementary appearance providing an address for service. *Id.*

If the party does not appear when the motion to withdraw is granted, the withdrawing attorney must serve a copy of the order of withdrawal upon the party within 3 days of the entry of the order granting withdrawal. *Id.* Unless another attorney is substituted immediately, the party must file a supplementary appearance within 21 days of the withdrawal stating an address at which the party may be served. *Id.* If the party does not file a supplementary appearance, notice by mail or a third-party carrier must be sent to the party at the party's last known business or residence address. *Id.*

The court may deny a motion to withdraw if the granting of it would delay the trial of the case or would otherwise be inequitable. *Id.*

V. DISCOVERY

A. COMMENCING CASE MANAGEMENT AND DISCOVERY

Pursuant to Illinois Supreme Court Rule 201(d), no discovery procedure shall be noticed or otherwise initiated without leave of court. A party may obtain leave of court upon a showing of good cause to initiate. Ill. S. Ct. R. 201(d).

Except as provided by local court rule, an initial case management conference must be held within 35 days after the parties are at issue and not later than 182 days after the filing of the complaint. Ill. S. Ct. R. 218(a). At that conference, the court will discuss the following with the parties' attorneys:

- the nature, issues, and complexity of the case;
- the simplification of the issues;
- amendments to the pleadings;
- the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- limitations on discovery, including: the number and duration of depositions; the subject matter and number of expert witnesses who may be called; and deadlines for disclosure of witnesses and the completion of written discovery and depositions;
- the possibility of settlement and scheduling a settlement conference;
- the advisability of alternative dispute resolution;
- the date on which the case will be ready for trial;
- the advisability of holding subsequent case management conferences; and
- any other matters which may aid in the disposition of the action.

Id. Also, at the conference, the court should issue an order that recites details any action taken by the court, any agreements reached by the parties, and outlining the remaining issues for trial. Ill. S. Ct. R. 218(c). That order controls the course of discovery. *Id.*

During the discovery conference, the court should set dates for disclosing witnesses and completing discovery to ensure that discovery will be completed within 60 days prior to trial, unless the parties agree otherwise. *Id.*

Key Distinction From Federal Practice:

Discovery in Illinois state court may begin automatically when all defendants have appeared or the time has passed for defendants to appear. In contrast, under Fed. R. Civ. P. 26, discovery in federal cases may not begin until after the parties meet and confer to discuss the nature and basis of their claims and defenses, the possibility for reaching a fair settlement, any issues around preserving discoverable information, and a discovery plan.

B. SCOPE OF DISCOVERY

i. Generally

Illinois Supreme Court Rule 201 sets forth general guidelines for discovery. Rule 201 provides for broad discovery of any matter relevant to the subject matter of the pending action, including all claims and defenses. Methods of discovery include: depositions upon oral examination or written questions; written interrogatories to parties; discovery of documents, objects, or tangible things; inspection of real estate; requests to admit; and physical and mental examination of people. Ill. S. Ct. R. 201(a). Attorneys should avoid duplication of discovery methods to obtain the same information. *Id.*

In response to discovery, full disclosure is required of all non-privileged materials and communications including “the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts.” Ill. S. Ct. R. 201(b). “Documents” under Rule 201 include but are not limited to “papers, photographs, films, recordings, memoranda, books, records, accounts, communications and all retrievable information in computer storage.” *Id.*

The court may enter protective orders on its own initiative or upon motion of the parties to limit the scope of discovery. Ill. S. Ct. R. 201(c).

ii. When a Motion Challenging Personal Jurisdiction is Pending

When a defendant files a motion pursuant to Section 2-301 of the Code of Civil Procedure to object to the court’s jurisdiction for insufficient process or service of process, a party may obtain discovery only on the issue of the court’s jurisdiction over the defendant unless the parties agree otherwise or the court orders discovery on issues other than personal jurisdiction for good cause. Ill. S. Ct. R. 201(l). The defendant may participate in a hearing regarding discovery or may conduct discovery pursuant to an agreement of the parties or court order without waiving its objection to the court’s jurisdiction. *Id.*

C. FILING DISCOVERY WITH THE COURT

Illinois Supreme Court Rule 201(m) establishes that discovery generally should not be filed with the clerk of the circuit court except where required by local court rules. One notable

exception is Cook County Circuit Court Local Rule 3.1 which requires answers to interrogatories to be filed with the Clerk of the Circuit Court of Cook County for cases pending in the Law Division. Also, Illinois Supreme Court Rule 201(o) requires that discovery requests to non-parties must be filed with the clerk of the circuit court in accordance with the procedure set forth in Illinois Supreme Court Rule 104(b).

D. MANDATORY DISCLOSURES IN CERTAIN TYPES OF CASES

Mandatory disclosures are required in: (1) cases subject to mandatory arbitration,¹ (2) civil actions seeking money damages less than \$50,000, and (3) cases for the collection of taxes not exceeding \$50,000. Ill. S. Ct. R. 222(a). Each party must make mandatory disclosures within 120 days after the filing of a responsive pleading. Ill. S. Ct. R. 222(c). That time period may be lengthened or shortened pursuant to local rule for the jurisdiction, agreement of the parties, or court order. *Id.* Each party must promptly disclose and supplement:

- the factual bases of the claims or defenses;
- the legal theory upon which each claim or defense is based, including citations to pertinent legal or case authorities;
- the names, addresses, and telephone numbers of any witnesses expected to be called at trial and the subject matter about which each witness might testify;
- the names, addresses, and telephone numbers of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the lawsuit and the nature of the knowledge or information that each person is expected to possess;
- the names, addresses, and telephone numbers of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian and the copies of those statements;
- the identity and address of each person expected to testify as an expert witness in addition to the expert disclosures required by Illinois Supreme Court Rule 213(f);
- a computation and the measure of damages alleged and the document or testimony on which such computation and measure are based, and the names, addresses, and telephone numbers of all damage witnesses;
- the existence, location, custodian, and general description of any tangible evidence or documents that the disclosing party plans to use at trial and relevant insurance agreements; and
- a list of the documents or, in the case of voluminous documentary information, a list of the categories of documents, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the

¹ Pursuant to 735 ILCS § 5/2-1001A, the Illinois Supreme Court may provide for mandatory arbitration for any case in which a claim is asserted for less than \$50,000 or where the court determines that no greater amount appears to be in controversy. Mandatory arbitration cannot apply to cases seeking other than money damages. Cook County Circuit Court Local Rule 18.3 requires that any civil case seeking money damages not in excess of \$30,000 proceed to mandatory arbitration.

discovery of admissible evidence, and the date(s) upon which those documents will be made, or have been made, available for inspection and copying.

Ill. S. Ct. R. 222(d). Also, each party is required to disclose a copy of each document that is relevant to the subject matter of the lawsuit, unless good cause is shown for not doing so. *Id.* If the document is not produced, the party must provide the name and address of the custodian of the document. *Id.* Documents are to be produced in the form in which they are kept in the normal course of business. *Id.*

Each mandatory disclosure must be accompanied by a written affidavit of an attorney or party which affirmatively states that the disclosure is complete and all reasonable attempts to comply with the Rule have been made. Ill. S. Ct. R. 222(e).

E. DOCUMENT REQUESTS

i. Serving Requests for Production

Any party may request “specific documents, objects, or tangible things, or to permit access to real estate” from any other party pursuant to Illinois Supreme Court Rule 214. The written requests must allow a reasonable time, not less than 28 days except by agreement or court order, and specify the manner of producing the documents and other materials that are requested. Ill. S. Ct. R. 214. Notice of the document requests must be sent to all parties of record. *Id.*

As discussed above, document requests are not necessary in cases subject to mandatory disclosures. Instead, each party is required to disclose any documents that may be relevant to the subject matter of the action or reasonably calculated to lead to the discovery of admissible evidence. Ill. S. Ct. R. 222. Parties also must disclose the dates upon which it will make the documents available for inspection or copying or furnish copies of the documents as part of its mandatory disclosures. *Id.*

ii. Responding or Objecting to Document Requests

A party served with document requests must either produce the requested documents or object to the request in writing on the ground that the request is improper in whole or in part. Ill. S. Ct. R. 214. Any part of the request which is not objected to must be complied with. *Id.* The responding party must produce the documents “as they are kept in the usual course of business” or must organize and label the documents produced in order to correspond with the categories in the request. *Id.*

When the responding party has completed production of the requested documents, it must provide an affidavit stating that production is complete in accordance with the document request. *Id.* A responding party has an ongoing duty to supplement any prior response to the extent that documents or other requested materials come into the party’s possession or control or become known to the party. *Id.*

If the responding party withholds documents or materials based on a claim of privilege, that party must disclose the nature of the documents or items that are being withheld and the exact privilege which is being claimed applies to each document or item. Ill. S. Ct. R. 201(n).

The requesting party may move the court to order disclosure over the responding party's objection, and to order the responding party to testify under oath that the requested documents are not within its possession and control or that it does not have information calculated to lead to the discovery of its whereabouts.

Aside from privilege and work product objections, other common objections to document requests include objections that the request:

- is irrelevant to subject matter of the pending action;
- is overly broad in that it is not limited to a reasonable period of time;
- is unduly burdensome;
- does not adequately specify the material sought; and
- seeks documents and materials that are not in the custody or control of the responding party.

Key Distinction From Federal Practice:

Parties to litigation in Illinois state court are not required to make the initial disclosures that parties to federal litigation are required to make under Federal Rule of Civil Procedure 26(a)(1). Also, the Federal Rules of Civil Procedure do not require the responding party to certify its completion of the document request or to testify before the court that responsive documents are not in its possession or control.

iii. Electronically Stored Documents

Illinois Supreme Court Rule 214 requires the party responding to document requests to produce all electronically stored information ("ESI") in printed form, and not in native form. Thus, a party requesting e-discovery may wish to request it in native format rather than on paper, or the parties may reach an agreement as to the method of disclosing e-discovery materials.

Key Distinction From Federal Practice:

Under the Federal Rules of Civil Procedure, parties must discuss and report to the court on issues concerning preservation and discovery of electronically stored documents at the Rule 26(f) conference. The federal district court is required to enter a scheduling order that addresses e-discovery procedures. Fed. R. Civ. P. 16(b). Parties must automatically disclose ESI they plan to use in support of their claims and defenses. Fed. R. Civ. P. 26(a)(1)(B). Under Illinois Supreme Court Rule 214, a party must only produce retrievable information in computer storage in printed form. The Federal Rules allow documents to be clawed back, recognizing that it is more difficult to review the large volume of electronically stored documents for privilege. Fed. R. Civ. P 26(b)(5).

F. INTERROGATORIES

i. Serving Interrogatories

Illinois Supreme Court Rule 213 governs written interrogatories in litigation pending in Illinois state court. Each party may serve up to 30 interrogatories, including sub-parts, on any other party, unless the parties agree to or the court allows additional interrogatories upon good cause shown. Ill. S. Ct. R. 213(c). A copy of the interrogatories must be served on all parties of record. Ill. S. Ct. R. 213(a). Illinois Supreme Court Rule 222 addresses interrogatories in cases with limited and simplified discovery, and is consistent with Rule 213's limit of interrogatories.

ii. Responding or Objecting to Interrogatories

A party has 28 days to respond to interrogatories unless the parties agree otherwise. Ill. S. Ct. R. 213(d). Responding parties are required to serve a sworn answer or objection to each interrogatory. *Id.* When interrogatories are served upon corporations, partnerships, or associations, an officer, partner, or agent of that entity shall answer the interrogatories based on information available to the party. *Id.* Answers should be verified pursuant to the language set forth in Section 1-109 of the Code of Civil Procedure:

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

735 ILCS § 5/1-109.

The answering party must either answer or object to each interrogatory and serve answers or objections upon the party propounding them, with proof of service on all other parties entitled to notice. Ill. S. Ct. R. 213(d). Upon motion by the requesting party, the court will hear any objection or refusal to answer an interrogatory. *Id.* If the information requested in an interrogatory can reasonably lead to the discovery of admissible evidence, the interrogatories are not objectionable on the grounds of relevance. Ill. S. Ct. R. 213(k) (this rule to be liberally construed "to do substantial justice between the parties.") Further, as in federal cases, contention interrogatories, which ask for the factual basis for the ultimate issue in a case, may be properly served after the parties have had an opportunity to conduct discovery, but interrogatories seeking an opponent's evidence that will be used to prove the ultimate issue are not proper. When the answer to an interrogatory may be found in documents that are in possession or control of the responding party, that party may produce documents in lieu of answering. Ill. S. Ct. R. 213(e).

Proper objections to interrogatories may include, without limitation, that the interrogatory:

- exceeds the 30 interrogatories permitted;
- is irrelevant to subject matter;
- tends to annoy, embarrass, or oppress;

- creates unnecessary burden or expense on the answering party;
- is not calculated to lead to the discovery of relevant information;
- seeks information equally available to both parties;
- seeks information protected from disclosure because it is privileged and/or work product;
and
- is vague, ambiguous and/or unintelligible.

The responding party has an ongoing duty to “seasonably” supplement or amend responses to interrogatories when new or additional information is brought to that party’s attention. Ill. S. Ct. R. 213(i). What “seasonably” means varies from case to case, but “in no event should . . . a party or an attorney . . . fail to comply with the spirit of this rule by either negligent or willful noncompliance.” Committee Comments, Ill. S. Ct. R. 213(i) (rev. June 1, 1995).

Answers to interrogatories may be used as evidence at trial to the same extent as discovery deposition testimony. Ill. S. Ct. R. 213(h). Thus, answers to interrogatories may be used as impeachment of a witness or as admissions of a party opponent. Further, answers to interrogatories can serve as the basis for a motion for summary judgment and are treated as an affidavit for the purpose of the motion. Finally, the court may consider answers to interrogatories in considering a motion to strike the plaintiff’s complaint. (*See* Section IV.G. below for more information on discovery depositions).

G. DEPOSITIONS

i. Evidence Depositions v. Discovery Depositions

Illinois distinguishes between two types of depositions: evidence depositions and discovery depositions. The type of deposition must be provided in the notice of deposition. Ill. S. Ct. R. 202, 206.

Evidence deposition testimony may be introduced at trial in lieu of live testimony where the deponent is unavailable because of death, illness, age, or incarceration. Ill. S. Ct. R. 212(b). Evidence deposition testimony also may be introduced at trial if the deponent resides out of the country or otherwise cannot be served with subpoena after reasonable efforts. *Id.* In contrast, discovery deposition testimony usually may not be introduced at trial except to be used for (1) impeachment, (2) an admission of a party opponent, (3) a hearsay exception, or (4) any purpose for which an affidavit may be used. Ill. S. Ct. R. 212(a).

The advantage to taking an evidence deposition over a discovery deposition is that testimony may be admitted as evidence at trial if the deponent is unavailable as stated above. The advantage to taking a discovery deposition is that more liberal questioning is permitted, as the deponent may be examined regarding any matter subject to discovery under the rules. Ill. S. Ct. R. 206(c)(1). Also, the deponent may be questioned by any party as if under cross-examination. *Id.* However, the duration of a discovery deposition is limited to three hours except by stipulation of all parties or court order upon a showing of good cause.

During an evidence deposition, the examination and cross-examination must be as the deponent is testifying at trial, and thus leading questions during direct are not permitted, and cross-examination is limited to the scope of direct. Ill. S. Ct. R. 206(c)(2). If an examination attorney steps outside of the rules during an evidence deposition, the defending attorney's only remedy is to object but the witness still must answer the question. A party may move to limit the scope and manner of a deposition if the examination is being conducted in bad faith or in a manner that annoys, embarrasses, or oppresses the deponent or party. Ill. S. Ct. R. 206(e).

Leading questions during the direct examination may be allowed if the witness is hostile or adverse to the deposing party. Rule 238(b) provides that “[i]f the court determines that a witness is hostile or unwilling, the witness may be examined by the party calling the witness as if under cross examination.” A witness's testimony may be unfavorable and still not qualify as adverse or hostile under Rule 238. *Zajac v. St. Mary of Nazareth Hosp.*, 212 Ill. App. 3d 779, 791 (1st Dist. 1991).

The court may not allow the discovery deposition of a party or a controlled expert witness to be admitted at trial, but the court may admit the discovery deposition testimony of a deponent whose evidence deposition was not taken and who cannot testify at trial because of death or infirmity if the court, in its sound discretion, finds that introducing the evidence at trial will do substantial justice between or among the parties. Ill. S. Ct. R. 212(a)(5); *see also Berry v. Am. Standard, Inc.*, 382 Ill. App. 3d 895, 900 (5th Dist. 2008). In addition, the evidence deposition of a physician or surgeon may be introduced at trial regardless of the deponent's availability and without prejudicing the right of either party to subpoena the physician or surgeon to take the stand at trial. Ill. S. Ct. R. 212(b). Note that evidence depositions may not be taken without leave of court in cases subject to mandatory arbitration or where the money damages sought are less than \$50,000. Ill. S. Ct. R. 222(f)(3).

ii. Method of Taking Depositions

Illinois Supreme Court Rule 206(h) allows a party to take a deposition by telephone, videoconference, or other remote electronic means by stating in the notice the specific electronic means to be used for the deposition. Prior to a recent 2011 Amendment, the Rule required stipulation of the parties or a court order for a party to take a deposition by one of those methods.

If a party intends to audio and/or video record a deposition, the party's notice of deposition must advise all parties of the deposition and the party's intent to record the testimony. Ill. S. Ct. R. 206(a)(2). Any party can record the deposition with an audio visual recording device, as long as the party has provided notice of that intent to all other parties. *Id.* Rule 206(g) provides specific procedures to be followed by the operator recording the deposition to ensure for the recording's validity, security, and authenticity. Parties receiving the notice of recording and object may seek a protective order under Illinois Supreme Court Rule 201. *Id.* If the court does not hold a hearing prior to the deposition, the recording shall be made subject to the court's ruling at a later time.

iii. Records Depositions

Illinois Supreme Court Rule 204(a)(4) allows for records depositions. Under that rule, the relevant notice, order, or stipulation to take a deposition may specify that the appearance of the deponent is excused and that no deposition will be taken if copies of specified documents or tangible things are served on the party or attorney requesting them by a date certain. The requested documents or materials must be served on the requesting party at least 3 days prior to the scheduled deposition. Ill. S. Ct. R. 204(a)(4). The responding party must file a certificate of compliance with the court. *Id.* Reasonable costs incurred by the deponent for production of the documents or materials must be paid by the requesting party, and all other parties must pay the reasonable expenses for copying and delivery of the materials they receive. *Id.* For records depositions, subpoenas must be filed with the clerk of the circuit court with the required notice no less than 14 days prior to the scheduled deposition. *Id.*

iv. Deposing Corporate Representatives

Illinois Supreme Court Rule 206(a)(1) allows for deposing representatives of public or private corporations, partnerships, associations, or government agencies. The party seeking the deposition must provide a notice of deposition to and/or subpoena the organization and “describe with reasonable particularity matters on which examination is requested.” Ill. S. Ct. R. 206(a)(1). Upon receipt of the notice and subpoena, the organization must designate one or more of its officers, directors, or managing agents or other persons to testify and must describe the matters on which each designated representative will testify. *Id.* The subpoena should advise a nonparty organization of its duty to designate people to testify on its behalf, and those people are required to testify about matters known or reasonably available to the organization. *Id.*

v. Deposing or Subpoenaing Out of State Witnesses

Where an action is pending outside of Illinois and a party seeks to depose a person who lives in Illinois, that party must petition the circuit court in the county in which the deponent resides, is employed, transacts business in person, or can be found for a subpoena to compel the appearance of the deponent or an order to compel the deponent’s giving of testimony. Ill. S. Ct. R. 204(b). Notice to the deponent is not required for the court to hear the petition. *Id.*

Therefore, to depose or obtain documents from a third party who resides outside of Illinois in connection with a matter pending in Illinois state court, consult the state and local rules of practice and procedure where the third party resides. Each state has a statute or rule on deposing witnesses in the state for litigation pending out of state. Some states require a petition or to apply for a subpoena. Also, local counsel may need to be retained because some states may require a new case to be opened in their state courts. Other states require a commission or letter rogatory from the court where the litigation is pending that authorizes the out-of-state deposition.

1. Deposing Physicians

A court order is required to subpoena a non-party physician for a discovery deposition in his or her professional capacity, unless the parties agree and the deponent consents to the deposition. Ill. S. Ct. R. 204(c). The party requesting the deposition must pay the physician a

reasonable fee for his or her testimony unless the physician is being deposed for the purpose of rendering an opinion at trial. *Id.*

2. Enforcing Compliance

If a non-party deponent refuses to appear for deposition, the party requesting the deposition may move the court for a rule to show cause or an order of contempt against the deponent. Ill. S. Ct. R. 204(d). The party seeking the deposition must personally serve the rule or order upon the non-party deponent and demonstrate proof of personal service in order for the court to order a body attachment for noncompliance with a subpoena or discovery order. *Id.*

H. REQUESTS TO ADMIT

Illinois Supreme Court Rule 216 governs requests to admit. Each party may serve no more than 30 requests for admission, unless the parties agree to or the court orders additional requests. Ill. S. Ct. R. 216(f). A party must serve requests for admission separately from other discovery. Pursuant to Illinois Supreme Court Rule 216(g), requests to admit must include a warning on the front page in 12-point or larger font in boldface which reads:

WARNING: If you fail to serve the response required by Rule 216 within 28 days after you are served with this paper, all the facts set forth in the requests will be deemed true and all the documents described in the requests will be deemed genuine.

In cases subject to mandatory arbitration, civil actions seeking less than \$50,000 in damages, and cases to collect taxes not in excess of \$50,000, requests for admission need to be filed more than 60 days prior to the trial date or leave of court is required if within 60 days of trial. Ill. S. Ct. R. 222(f)(5).

Cook County Circuit Court Local Rule 3.1(c) requires requests to admit to be filed with the Clerk of the Court. Within 28 days thereafter, the answering party must serve a sworn statement denying the facts sought to be admitted, explaining in detail why the party cannot truthfully admit or deny them, or objecting to them.

I. ISSUING SUBPOENAS AND SUBPOENAS DUCES TECUM

i. Overview

Section 2-1101 of the Code of Civil Procedure authorizes the clerk of any Illinois court in which an action is pending or any attorney admitted to practice in Illinois, as an officer of the court, to issue subpoenas for witnesses and to counties in a pending action. 735 ILCS § 5/2-1101. Further, a court order is not required for the clerk or an attorney to issue a subpoena *duces tecum*. *Id.*

Upon a motion showing good cause, the court may quash or modify a subpoena or subpoena *duces tecum* or may condition the denial of the motion to quash or modify a subpoena *duces tecum* upon payment in advance by the person on whose behalf the subpoena is issued of the reasonable expense of producing the requested evidence. *Id.*

ii. Compelling the Appearances of Deponents

Subpoenas for deposition testimony are governed by Illinois Supreme Court Rule 204. Subpoenas may require deponents to produce documents or tangible evidence that relate to any of the matters within the scope of the deposition examination. Ill. S. Ct. R. 204(a). Deponents must respond to the subpoena upon receipt of notice and witness fee and mileage costs. Ill. S. Ct. R. 204(a)(2). Witnesses in Illinois are entitled to \$20 per day and \$0.20 per mile for travel to and from deposition or trial. 705 ILCS § 35/4.3. Service upon an officer, director, or employee of a party is sufficient to require the appearance of an organizational deponent. Ill. S. Ct. R. 204(a)(3).

iii. Production of Documents in Lieu of Deposition

As mentioned in Section G. iii. above, in lieu of a deponent's appearance, the party requesting the deposition may specify that no deposition will be taken if the deponent causes copies of specific documents and tangible evidence are served upon the attorney or party requesting the deposition by a date certain. Ill. S. Ct. Rule 204(a)(4). In the case of third party witnesses, a subpoena rather than a notice of deposition needs to be served, and a copy of the subpoena, along with the notice, shall immediately be filed with the court upon issuance and not less than 14 days prior to scheduled deposition. That party must serve all requesting parties of record with the responsive documents or make the evidence available to inspection 3 days prior to the deposition date as noticed, and must file a certificate of compliance with the court. *Id.* Reasonable charges by the deponent for production shall be paid by the requesting party, and by other parties requesting copies of the production. The use of this procedure does not preclude a party from taking the deposition or limiting the scope of the deposition. *Id.*

J. EXPERT DISCLOSURE

Upon written interrogatory, a party must provide the identities and addresses of witnesses who will testify at trial including lay witnesses, independent experts, and controlled experts. Ill. S. Ct. R. 213(f).

i. Independent Experts

Independent experts are not the party, the party's current employee, or the party's retained expert. Ill. S. Ct. R. 213(f)(2). For each independent expert, the party must disclose the subjects on which the expert will testify and the opinions the party expects to elicit. *Id.*

ii. Controlled Experts

Controlled experts are the party, the party's current employee or the party's retained expert. Ill. S. Ct. R. 213(f)(3). For each controlled expert, the party must identify:

- the subject matter on which the witness will testify;
- the conclusions and opinions of the witness and the bases therefore;
- the qualifications of the witness; and
- any reports prepared by the witness about the case.

Id. A recent amendment to Illinois Supreme Court Rule 208 provides that each party shall bear the expense of all fees charged by his or her controlled expert witness(es), unless manifest injustice would result.

iii. Disclosing Draft Expert Reports and Correspondence with Experts

Rule 213 requires disclosure of “any” reports prepared by a controlled expert about the case, but does not expressly address draft reports. Similarly, the rule requires disclosures of the “bases” for the expert’s conclusions, but does not address whether correspondence with counsel must be disclosed.

Unlike the revised Federal Rules, there is no case law or rule that protects from discovery by the opposing party drafts of expert reports or communications with testifying retained experts. To the contrary, there is Illinois authority to support that those communications are not privileged when an expert is designated to testify at trial. *People v. Wagener*, 196 Ill. 2d 269, 275-76 (2001) (finding that communications between criminal defendant raising insanity defense and psychiatric experts were not privileged because the experts testified at trial). Given the broad scope of permissible discovery in Illinois pursuant to Supreme Court Rule 201(b) and the absence of an express provision protecting draft reports and communications, counsel should assume that those materials are subject to discovery.

At least one Illinois secondary source suggests a form expert discovery interrogatory that seeks draft reports. *See S. Ct. 204(8) Expert Riders-Forms*, 13 ILPRAC Rule 204(8) (2008).

To address this issue and protect expert draft reports and communications, counsel may seek a stipulated agreement from opposing counsel that draft reports and correspondence with testifying experts will not be produced unless the correspondence is relied upon by the expert in forming his or her opinion. In this way, the parties can effectively adopt the new provision of Federal Rule 26.

iv. Rebuttal Experts

Rebuttal expert reports are not specifically governed by Rule 213, but generally, a party seeking to submit a rebuttal expert report may argue for its admission based on the party’s need to “explain, repel, contradict or disprove” new evidence introduced by the opposing party. *Flanagan v. Redondo*, 231 Ill. App. 3d 956, 967 (1st Dist. 1991). Even if the expert report is not disclosed in response to an interrogatory served upon the party, circumstances may arise during the litigation that give rise for the need for rebuttal evidence to respond to an affirmative matter or defense raised by the opposing party. *Id.* The court in its discretion will determine whether to allow this rebuttal expert evidence by weighing factors such as the party’s good faith in discovery disclosures, and the unfair surprise or prejudice that the opposing party will suffer. *Id.* at 965-67.

K. MOTIONS TO COMPEL/SANCTIONS FOR NON-COMPLIANCE

Before seeking an order compelling a party’s compliance with discovery, counsel must attempt to confer with opposing counsel to reach an agreement. Ill. S. Ct. R. 201(k), 219(a). Each motion must include a statement “that counsel responsible for trial of the case after

personal consultation and reasonable attempts to resolve differences have been unable to reach an accord or that opposing counsel made himself or herself unavailable for personal consultation or was unreasonable in attempts to resolve differences.” Ill. S. Ct. R. 201(k). If the court finds that a party’s refusal to answer or comply with a discovery request was without substantial justification, the court will require the offending party, or its counsel, to pay reasonable expenses incurred in obtaining the order, including attorney’s fees. Ill. S. Ct. R. 219(a) If on the other hand, the court denies the motion and finds it was made without substantial justification, the court will require the moving party to pay reasonable expenses incurred by opposing the motion, including attorney’s fees. *Id.*

If a party fails to comply with rules governing discovery, requests to admit, or pretrial procedure, the opposing party may also move the court to order appropriate relief as outlined in Illinois Supreme Court Rule 219(c). This relief may include:

- further proceedings being stayed until the order or rule is complied with;
- the offending party being barred from filing any other pleading relating to any issue to which the refusal or failure relates;
- the offending party being barred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;
- a witness being barred from testifying concerning that issue;
- a default judgment being entered against the offending party or the offending party’s action being dismissed with or without prejudice as to any claims or defenses asserted in any pleading to which that issue is material;
- any portion of the offending party’s pleadings relating to that issue being stricken, and if appropriate, judgment being entered as to that issue; and
- a court including in a judgment the imposition of prejudgment interest (that may include any period of pretrial delay attributable to discovery abuses) in those situations in which a party who has failed to comply with discovery has delayed the entering of a money judgment.

Id.

The court may issue sanctions, upon motion or *sua sponte*, against the non-compliant party in lieu of or in addition to the requested relief. *Id.* Whether sanctions are warranted depends on the good faith of the party offering the evidence, equal opportunity and access of the opponent to the evidence before trial, and any unfair surprise or prejudice to the opponent. The court may order suppression of any evidence obtained through abuse of the discovery procedures in addition to appropriate sanctions for this behavior. Ill. S. Ct. R. 219(d). Finally, a party cannot avoid compliance with discovery deadlines, orders, or rules, by voluntarily dismissing a lawsuit. Ill. S. Ct. R. 219(e).

L. PROTECTIVE ORDERS

Pursuant to Illinois Supreme Court Rule 201(c)(1), the court may at any time *sua sponte* or upon motion of any party or witness enter a protective order to “prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression.” A protective order may deny, limit, condition, or regulate discovery as the court deems just. Ill. S. Ct. R. 201(c)(1).

M. DISCOVERY DISPUTES

Parties are required to make reasonable attempts to resolve discovery disputes without engaging the court. Discovery motions must include a statement that counsel personally consulted with opposing counsel but they were unable to resolve the disagreement, or that opposing counsel made himself or herself unavailable for personal consultation or was unreasonable in attempts to resolve differences. Ill. S. Ct. R. 201(k).

VI. TRIAL

A. CONTINUANCES

Pursuant to Illinois Supreme Court Rule 231, a party may seek a continuance of the trial for: (1) absence of material evidence, or for certain other causes, including (2) a party whose presence is necessary is in military service and his service materially impairs his ability to prosecute or defend the action, or (3) a party or his attorney is a member of the General Assembly that is in session when the continuance is sought. Ill. S. Ct. R. 231(a) and (c). An amendment is not cause for continuance unless the affected party files an affidavit that it is unprepared to proceed with the trial because of the amendment. Ill. S. Ct. R. 231(d).

If either party applies for a continuance because material evidence is absent, the party must supply an affidavit showing that due diligence was exercised to try to obtain the evidence or that time lacking to obtain the evidence. Ill. S. Ct. R. 231(a). The affidavit must also demonstrate the facts established by the missing evidence, and if the evidence is witness testimony, the affidavit must provide the name and residential address of the witness, or if not known, a statement that due diligence was used to ascertain the address. *Id.* Finally, the affidavit must state that the evidence can be procured if more time is allowed. *Id.*

The court will deny a continuance if it finds that the evidence would not be material or if the other party will admit the affidavit into evidence as proof of what the absent witness would testify if present. Ill. S. Ct. R. 231(b). The court may continue a trial on its own motion as well. Ill. S. Ct. R. 231(e).

B. COMPELLING APPEARANCES OF WITNESSES AT ARBITRATION OR TRIAL

Service of a subpoena to compel the appearance of a non-party witness at trial may be sent via certified or registered mail and must be received at least 7 days before the date on which appearance is required. Ill. S. Ct. R. 237(a). Payment of the witness fee and mileage must accompany the subpoena. *Id.* By statute, witnesses in Illinois are entitled to \$20 per day and \$.20 per mile for travel to and from deposition or trial. 705 ILCS § 35/4.3.

C. JURY INSTRUCTIONS

i. Overview

The court may instruct the jury before opening arguments on “cautionary or preliminary matters,” such as the burden of proof, the credibility of the witnesses, and the elements of the

claims and defenses, and “[o]n the substantive law applicable in the case.” Ill. S. Ct. R. 239(d). Also, during the trial, the court is free to give appropriate instructions. Ill. S. Ct. R. 239(f).

At the close of evidence or if the court requests them prior to the close of evidence, each party may submit written instructions of reasonable length and must tender copies to the court and counsel for other parties. 735 ILCS § 5/2-1107(c). The court will hold a jury instruction conference outside of the presence of the jury to settle any disputes over jury instructions, and the court must inform counsel of the proposed instructions prior to closing arguments. *Id.* All objections and rulings on jury instructions during the conference should be shown in the report of proceedings. Ill. S. Ct. R. 239(c).

The court will use its copy to mark each instruction “refused,” “given,” or “withdrawn.” 735 ILCS § 5/2-1107(a). The original jury instructions will be given to the jury and should not state authority or have numbered pages, while the copies of the jury instructions should indicate the party which submitted them and have numbered pages. Ill. S. Ct. R. 239(b). Each instruction should be labeled to indicate whether it conforms with or departs from the Illinois Pattern Jury Instruction (“IPI”) by stating, “IPI No. __,” “IPI No. __ Modified,” or “Not in IPI.” *Id.* Generally, where an instruction has case law support, parties will note the case law citation on the copies of the instruction that they submit to the court to reference during the jury instruction conference.

The court may direct counsel to prepare jury instructions at any time before or during trial. *Id.* Counsel should mark these instructions “Court’s Instructions,” but may object during the jury instruction conference to any instructions prepared at the court’s request. *Id.* If the court determines after closing arguments that additional instructions are needed, the court may hold another conference and approve additional jury instructions. 735 ILCS § 5/2-1107(c). The court should instruct the jury after closing arguments are complete. *Id.*

Before closing arguments and in the presence of the jury, the court may repeat the instructions given before the opening arguments. Ill. S. Ct. R. 239(e). The court may choose to read the jury instructions before or after the closing arguments. *Id.* Whether or not the court reads the instructions prior to closing arguments, the court should read the instructions to the jury after closing arguments and must distribute a written copy of the instructions to the jury. *Id.* Jurors should not have a copy of the written instructions prior to the parties’ closing arguments. *Id.*

ii. Illinois Pattern Jury Instructions

Illinois Supreme Court Rule 239 instructs courts to use the Illinois Pattern Jury Instructions (“IPI”) in civil cases where the court determines that the jury should be instructed on the subject matter of the pertinent IPI and the court finds that the IPI accurately states the law. Ill. S. Ct. R. 239(a). If the IPI does not contain an instruction on a subject matter that the court determines the jury should be instructed, the court should give an instruction that is “simple, brief, impartial, and free from argument.” *Id.*

iii. Jury Instructions in Tort Cases

Jury instructions in tort actions should inform the jury that compensatory or punitive damages awards are not taxable. 735 ILCS § 5/2-1107.1. The jury should not be instructed that the defendant will not be held liable if the jury finds the plaintiff's contributory fault is more than 50%. *Id.* Further, the jury should not be instructed as to any limitations on noneconomic or punitive damages. *Id.* Rather, the court should reduce any award in excess of the damages limitation prior to entering judgment. *Id.*

D. SPECIAL INTERROGATORIES

In Illinois state court, general verdicts are required unless “the nature of the case requires otherwise.” 735 ILCS § 5/1108. The court may require special interrogatories, or the parties may request special interrogatories that ask the jury to make specific findings on any material question(s) or fact. *Id.* Where a party requires a special interrogatory in proper form, the trial court must submit the interrogatory to the jury. *Id.* If the jury's answer to a special interrogatory is inconsistent with the general verdict, the special finding of fact controls, and the court may enter judgment in accordance with the special interrogatories. *Id.*

Special interrogatories do not need to include all material issues of fact, but they include only those material issues that one or more party requires to be answered to ensure the accuracy of the jury's reasoning. The Illinois Supreme Court has addressed the weight and form of special interrogatories, stating:

A special interrogatory serves as guardian of the integrity of a general verdict in a civil jury trial. It tests the general verdict against the jury's determination as to one or more specific issues of ultimate fact. A special interrogatory is in proper form if (1) it relates to an ultimate issue of fact upon which the rights of the parties depend, and (2) an answer responsive thereto is inconsistent with some general verdict that might be returned. Special findings are inconsistent with a general verdict only where they are clearly and absolutely irreconcilable with the general verdict. If a special interrogatory does not cover all the issues submitted to the jury and a reasonable hypothesis exists that allows the special finding to be construed consistently with the general verdict, they are not absolutely irreconcilable and the special finding will not control. In determining whether answers to special interrogatories are inconsistent with a general verdict, all reasonable presumptions are exercised in favor of the general verdict.

Simmons v. Garces, 198 Ill. 2d 541, 555 (2002) (internal citations omitted).

Special interrogatories should be tendered to the court, objected to, ruled on, and submitted to the jury in the same manner and procedure as are jury instructions. 735 ILCS § 5/2-1108. The court's decision to submit or refuse to submit a special interrogatory to the jury is appealable as a question of law. *Id.*

E. JUROR QUESTIONS TO WITNESSES

On July 1, 2012, a new rule (Illinois Supreme Court Rule 243) will take effect that will allow jurors in civil cases to pose their own questions to a witness. It has been reported that Rule 243 will operate as follows:

“At the conclusion of questioning of a witness by attorneys, the trial judge will determine whether the jury will be afforded the opportunity to question the witness. If questions are deemed appropriate by the trial judge, jurors will be asked to submit any question they have for the witness in writing. No discussion regarding the questions is allowed between jurors. The bailiff will collect any questions and present them to the judge who will mark them as exhibits and make them part of the record.

The judge will read the questions to all the attorneys outside the presence of the jury, and give counsel an opportunity to object to the question. The trial judge will rule on any objections and the questions will either be admitted, modified or excluded.

The trial judge will ask each question that is permitted and will instruct the witness to answer only the question presented. The judge will then provide all counsel with an opportunity to ask follow-up questions limited to the scope of the new testimony.”

(See ISBA Illinois Lawyer Now, “New Rule to allow jurors to question witnesses in civil trials,” Apr. 4, 2012.)

VII. JUDGMENT

A. MOTIONS TO VACATE

i. Within 30 Days of a Final Order or Judgment

Within 30 days, Section 2-1301(e) of the Code of Civil Procedure allows a party to move the court to set aside the final order or judgment “upon any terms and conditions that shall be reasonable.” 735 ILCS § 5/2-1301(e). The standard for Section 2-1301 motions is “whether substantial justice is being done between the parties and whether it is reasonable under the circumstances to proceed to trial on the merits.” *Larson v. Pedersen*, 349 Ill. App. 3d 203, 207-208 (2d Dist. 2004).

ii. After 30 Days of a Final Order or Judgment

When more than 30 days but less than 2 years have passed since the entry of a final order or judgment, a party may move to vacate under Section 2-1401 of the Code of Civil Procedure. 735 ILCS § 5/2-1401(a). The moving party must set forth specific factual allegations to show: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the trial court in the original action; and (3) due diligence in filing the Section 2-1401 petition for relief. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). The court’s decision is discretionary. *Id.* at 221.

iii. Computing the 2 Year Period for Filing a Motion to Vacate

Section 2-1401(c) states, “the petition must be filed not later than 2 years after the entry of the order or judgment.” 735 ILCS § 5/2-1401(c). There is some disagreement as to whether the clock starts running on the same day that the order or judgment is entered or on the first day after the order or judgment is entered.

The First District has held that the two year period begins from the day after the entry of the judgment or order and extends to the two year anniversary of that order or judgment. *See Parker v. Murdock*, 2011 Ill. App. (1st) 101645, ¶21 (holding that defendant’s section 2-1401 petition filed on October 13, 2006 was timely where the default judgment against defendant was entered on October 13, 2004). The Fifth District implicitly held the same in *Price v. Fruth*, 2011 Ill. App. Unpub. Lexis 186, at *18 (2d Dist. 2011), where that appellate court ruled that the two year limitations period was not triggered by the Illinois Supreme Court’s order remanding the matter and instead was triggered by the trial court’s dismissal of the matter on remand. The Illinois Supreme Court denied the defendant’s petition for leave to appeal the Fifth District’s holding, but Justice Garman’s dissent indicates that this issue is not yet settled. *See Price v. Fruth*, 2011 Ill. 112067. Justice Garman noted that the defendant’s motion to vacate may have been one day late, because the district court’s dismissal was entered on December 18, 2006, and the defendant’s motion was filed on December 18, 2008. *Id.* at ¶¶ 9-11.

Therefore, the conservative approach is to file a motion to vacate no later than the day before the two-year anniversary of the order or judgment sought to be vacated.

B. POST-TRIAL MOTIONS

i. Jury Trials

Post-trial motions in jury trials are governed by Section 2-1202 of the Code of Civil Procedure. 735 ILCS § 5/2-1202. If any party has made a motion for directed verdict during trial upon which the court has ruled or reserved ruling, that party must renew its request in a post-trial motion or the motion will be waived. *Id.* § 5/2-1202(a). If a motion for directed verdict is not made during the trial, a party may still move for judgment notwithstanding the verdict. *Id.* § 5/2-1202(b).

Post-trial motions must be filed within 30 days after the entry of judgment or the discharge of the jury, if no verdict is reached. *Id.* § 5/2-1202(c). The court may allow extensions sought within the 30-day period. *Id.* The party against whom the court rules in a post-trial motion has 30 days from the entry of the judgment in which to file a post-trial motion. *Id.*

Each party is limited to one post-trial motion. In a single motion, the moving party must raise (1) reserved motions for directed verdict or motions for judgment notwithstanding the verdict, (2) motions in arrest of judgment, and (3) motions for a new trial. *Id.* § 5/2-1202(b). The motion must include points relied upon and specific grounds for the relief sought. *Id.* The moving party must state the relief desired and may seek relief in the alternative or conditioned upon the denial of other relief. *Id.* For example, “a new trial may be requested in the event a request for judgment is denied.” *Id.* The court is required to rule on all of the relief sought in

post-trial motions, *Id.* § 5/1202(f), and the moving party should insist upon the court ruling on all relief as failure to do so could result in waiver.

Generally, a post-trial motion must precede an appeal. Two exceptions are where the court directs the verdict and where the court grants a partial summary judgment prior to commencement of the jury trial. In these circumstances, the losing party may appeal directly and must not file a post-trial motion to preserve the record. *See Mohn v. Posegate*, 184 Ill. 2d 540, 546-47 (1998).

A timely-filed post-trial motion will stay enforcement of the judgment. 735 ILCS § 5/1202(d). It also extends the time for appeal, which will begin to run only after the court rules on the post-trial motion. Ill. S. Ct. R. 303(a)(1). If multiple parties file post-trial motions, the time for appeal begins to run after the entry of an order disposing of the last pending, timely-filed post-trial motion. Ill. S. Ct. R. 303(a)(2). A motion to reconsider a post-trial motion does not toll the time to appeal. *Id.*

ii. Bench Trials

Post-trial motions following bench trials are governed by Section 2-1203 of the Code of Civil Procedure. Any party may file a post-trial motion within 30 days after the entry of judgment. 735 ILCS § 5/2-1203(a). The court may grant extensions requested within the 30-day period. *Id.* A party may move (1) for rehearing or retrial, (2) for modification of judgment, (3) to vacate the judgment, or (4) for other relief. *Id.* Other relief has been interpreted to mean relief that is similar in nature to the forms of relief otherwise specified in Section 1203(a). *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 461-62 (1990).

In non-jury cases, post-trial motions do not have to specify the grounds relied upon for the relief requested. *Kingbrook, Inc. v. Pupurs*, 202 Ill. 2d 24, 31 (2002). A post-trial motion in a non-jury trial does toll the time within which a party may appeal pursuant to Illinois Supreme Court Rule 303(a) so long as it requests at least one of the forms of relief stated above.

A motion that is timely filed after judgment is entered in a non-jury case will stay enforcement of the judgment “except that a judgment granting injunctive or declaratory relief will be stayed only by a court order that follows a separate application that sets forth just cause for staying the enforcement.” 735 ILCS § 5/2-1203(b).

C. APPEALS

i. Time to Appeal after Entry of Final Judgment

Every final judgment of a circuit court is appealable as of right by filing a notice of appeal. Ill. S. Ct. R. 301. After a final judgment has been entered, the appellant must file a notice of appeal with the clerk of the circuit court within 30 days after the entry of the final judgment, or if a post-judgment motion has been filed, within 30 days after the entry of the order disposing of the last pending post-judgment motion directed against the final judgment or order. Ill. S. Ct. R. 303(a)(1).

ii. Immediate Appeal to Illinois Supreme Court

Pursuant to Illinois Supreme Court Rule 302, certain cases are directly appealable to the Illinois Supreme Court, including:

- cases in which a federal or Illinois statute has been held invalid;
- cases brought under Illinois Supreme Court Rule 21(c), which authorizes the “chief judge of each circuit [to] enter general orders in the exercise of his or her general administrative authority” including assignment of judges, divisions, and times and places of holding court; or
- cases in which the public interest requires prompt adjudication.

iii. Appeal After Post-Judgment Motions Granted or Denied

To appeal an amended judgment resulting from a successful post-judgment motion, the appellant must file a notice of appeal within 30 days of the entry of the order or amended judgment. Ill. S. Ct. R. 303(a)(2). But, if the post-judgment motion is denied, the notice of appeal of the judgment is deemed to also be an appeal of the denial of the post-judgment motion. *Id.*

iv. Appeal of Final Judgments That Do Not Dispose of an Entire Proceeding Case

With some exceptions, if a court enters a final judgment as to some but not all parties or as to some but not all claims pending in the lawsuit, an appeal may be taken of that final judgment only if the court makes an express finding that “there is no just reason for delaying either enforcement or appeal or both.” Ill. S. Ct. R. 304(a). Just as with final judgments, the notice of appeal must be filed within 30 days of the date that the final judgment that does not dispose of the entire case is entered. *Id.* In the absence of this specific finding, the judgment disposing of some parties or some claims is subject to revision at any time before the entry of a judgment adjudicating all of the claims against all of the parties. *Id.*

Certain types of limited adjudications are not subject to the express finding set forth in Illinois Supreme Court Rule 304(a) as described above. They include judgments or orders that are entered:

- in the administration of an estate, guardianship, or similar proceeding which finally determines a right or status of a party;
- in the administration of a receivership, rehabilitation, liquidation, or other similar proceeding which finally determines a right or status of a party and which is not appealable under Rule 307(a);
- to grant or deny relief in a petition to vacate under 735 ILCS § 5/2-1401;
- in a proceeding under 735 ILCS § 5/2-1402;

- finding a person or entity in contempt of court; or
- to determine or modify custody under the Illinois Marriage and Dissolution of Marriage Act or the Illinois Parentage Act.

Ill. S. Ct. R. 304(b)(1)-(6).

v. Interlocutory Appeals

Under Illinois Supreme Court Rule 307(a), interlocutory appeals as of right are permitted from an interlocutory order of court:

- granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction;
- appointing or refusing to give other or further powers or property to a receiver or sequestrator already appointed;
- placing or refusing to place a mortgagee in possession of a mortgaged premises;
- appointing or refusing to appoint a receiver, liquidator, rehabilitator, or other similar officer for a bank, savings and loan association, currency exchange, insurance company, or other financial institution, or granting or refusing to grant custody of the institution or requiring turnover of any of its assets;
- terminating parental rights or granting, denying, or revoking temporary commitment in adoption proceedings; or
- determining issues raised in proceedings to exercise the right of eminent domain.

Under Illinois Supreme Court 306(a), an interlocutory appeal may be available with leave of the appellate court from an order of the circuit court that:

- grants a new trial;
- allows or denies a motion to dismiss on the grounds of *forum non conveniens*;
- denies a motion for transfer of venue based on the assertion that the defendant is not a resident of the county in which the action was commenced and no other legitimate basis for venue in that county has been offered by plaintiff;
- grants or denies a motion for transfer of venue based on the assertion that the defendant has done nothing which would subject the defendant to the jurisdiction of an Illinois court;
- affects the care and custody of unemancipated minors;
- remands the proceeding for a hearing *de novo* before an administrative agency;
- grants a motion to disqualify an attorney; or
- denies or grants certification of a class action.

vi. Certified Questions

If the trial court finds that an order involves a “question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation,” the trial court may certify the question to the appellate court. Ill. S. Ct. R. 308. A party may appeal by filing an application for leave to appeal within 14 days of the trial court’s order or making of the prescribed statement.

Id. If leave to appeal is granted, the appellant must file a brief within 35 days of the date the appellate court grants leave to appeal. *Id.*

vii. Appealing a Temporary Restraining Order

Under Illinois Supreme Court Rule 307(d), a party appealing a TRO must file a petition with the appellate court within two days of the entry or denial of the TRO. Ill. S. Ct. R. 307(d). The petition should be filed with the record, including the notice of interlocutory appeal, the TRO, and any necessary supporting documents. *Id.* The record must be authenticated by the clerk of the court or affidavit of the attorney. *Id.* The petitioner may file a memorandum of support not exceeding 15 pages also within two days of the entry or denial of the TRO. *Id.* The respondent may file a memorandum with the same limitations in response to the petition within two days after the petition is filed. *Id.* Replies, extensions, and oral arguments are not permitted. *Id.* The appellate court will render a decision within five days of the filing of the petition. *Id.* The appellate court may vary these rules in its discretion. *Id.*