

**Practice Series**  
**Illinois Civil Practice Guide**

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## **I. SPECIAL APPEARANCES IN ILLINOIS COURTS**

The Illinois Supreme Court (“Supreme Court”) has created procedures for special types of appearances in Illinois courts.

### **A. OUT-OF-STATE ATTORNEYS**

Illinois Supreme Court Rule 707 (hereinafter all Illinois Supreme Court Rules referred to as “Rules”) sets out the procedures for *pro hac vice* practice before Illinois courts and administrative tribunals. Rule 707 allows an eligible out-of-state attorney to appear in an Illinois proceeding without order of the tribunal, so long as the out-of-state attorney submits a verified Statement, pays certain fees, and associates with an active-status Illinois attorney who also files an appearance. Ill. S. Ct. R. 707(a).

Rule 707(b) lists the requirements to qualify as an eligible out-of-state attorney. The attorney must be authorized to practice in another enumerated jurisdiction; must not be prohibited from practice in any jurisdiction due to discipline; and must not have already entered an appearance under the rule in more than five other proceedings during the same calendar year. Ill. S. Ct. R. 707(b).

Rule 707(d) describes the information that must be provided in the verified Statement, including the attorney’s contact information; the name of the party the attorney represents; a list of other proceedings in which the attorney has appeared pursuant to the rule; a list of jurisdictions where the attorney is admitted; a statement that the attorney submits to the disciplinary authority of the Illinois Supreme Court and has become familiar with the rules of practice in Illinois courts; and the contact information for the associated Illinois attorney. The Attorney Registration & Disciplinary Commission (ARDC) also provides a sample Statement on its website. The Statement must be served upon the ARDC, the associated Illinois counsel, the attorney’s client, and all parties to the proceeding. See Ill. S. Ct. R. 707(d)(1)-(9).

Finally, the out-of-state attorney must register with the ARDC, pay the annual registration fee, and pay an additional fee of \$250 per proceeding (except in certain public interest cases). Ill. S. Ct. R. 707(f), (h).

### **B. LIMITED SCOPE APPEARANCES**

Rule 13 created a procedure for limited scope appearances that are permitted pursuant to Illinois Rule of Professional Conduct 1.2(c). The purpose of limited scope appearances is to expand access to counsel for clients with limited resources. The rule is meant to encourage lawyers to take on limited scope representations by providing clear guidance for how to define the scope of a representation and withdraw from the case once the limited representation is complete.

When an attorney has entered into a written agreement with a client to provide limited scope representation, the attorney must file a Notice of Limited Scope Appearance that identifies the aspects of the proceeding that are subject to the limited

representation. Ill. S. Ct. R. 13(c)(6). A form of the notice, which may be utilized or substantially adopted by litigants, is appended to the rule.

Once the representation described in the notice is complete, the attorney must withdraw by oral motion or written notice. Ill. S. Ct. R. 13(c)(7). The court must allow the withdrawal unless the party objects on the ground that the attorney has not completed the representation, in which case the court must hold an evidentiary hearing on the objection. *Id.* Oral motion is permitted if the attorney completes the representation during a hearing attended by the party the attorney represents. Ill. S. Ct. R. 13(c)(7)(i). Otherwise, the attorney should file a written Notice of Withdrawal of Limited Scope Appearance and serve it on the judge and the parties. Ill. S. Ct. R. 13(c)(7)(ii). A form of both the notice and the objection, which again may be utilized or substantially adopted by litigants, are appended to the rule.

If the attorney later undertakes an additional aspect of the proceeding, a new notice of limited appearance must be filed. Ill. S. Ct. R. 13(c)(6).

Rule 137 clarifies that an attorney may assist a self-represented person in drafting or reviewing a pleading without making a limited scope appearance or otherwise noting the attorney's involvement, so long as the self-represented person signs the pleading. Ill. S. Ct. R. 137(e).

## II. 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 the Illinois Official Reporter. For example, *People v. Doe*, 123 Ill. App. 3d 456 (1st Dist. 2009).

Illinois court decisions are no longer published in printed Illinois reporters and only are 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:	<i>People v. Doe</i> , 2018 IL 12345, ¶ 15
Appellate Courts:	<i>People v. Doe</i> , 2018 IL App (1st) 12345, ¶ 15
Subsequent opinion under same docket number:	<i>People v. Doe</i> , 2018 IL App (1st) 12345-B, ¶ 15
Rule 23 opinions:	<i>People v. Doe</i> , 2018 IL App (1st) 12345-U, ¶ 15

### **III. 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.*

Under Illinois law, jury cases where the claim for damages is \$50,000 or less are tried by a jury of six, unless either party demands a jury of 12. *See Kakos v. Butler*, 2016 IL 120377, ¶¶ 6, 36. In 2015, the Illinois legislature amended Illinois law to state that all civil jury cases will receive a six member jury, and alternate jurors may be requested for an additional fee. *See* 735 ILCS 5/2-1105(b). The Illinois Supreme Court struck down this amendment in *Kakos v. Butler*, thereby reinstating a party's right to demand a jury of 12 members. 2016 IL 120377, ¶¶ 28, 34.

### **IV. COUNTING TIME UNDER ILLINOIS LAW**

The time within which any act provided by law is to be done is calculated by excluding the first day and including the last, unless the last day is a Saturday, Sunday, or holiday as defined by statute, and then it shall also be excluded. 5 ILCS § 70/1.11. If the day succeeding such Saturday, Sunday, or holiday is also a Saturday, Sunday, or holiday, then the succeeding day is also excluded. *Id.* Thus, under this provision, Saturdays, Sundays, and holidays that fall in the middle of the time period are counted.

### **V. PLEADINGS**

#### **A. FORM OF PLEADINGS**

##### **i. Titles and Signature Blocks in 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).

All documents filed or served by an attorney must include the attorney's name, business address, email address, and telephone number. Ill. S. Ct. R. 131(d)(1). Attorneys must designate a primary email address to which documents may be served, and may designate up to two secondary email addresses. Ill. S. Ct. R. 131(d); see also Ill. S. Ct. R. 11(c) (listing the alternative methods of service, including email transmission to the designated primary and secondary addresses).

Documents filed or served by an unrepresented party must include the unrepresented party's mailing address and telephone number. Ill. S. Ct. R. 131(d)(2). An unrepresented party may designate an email address to which documents may be served, but it is not required. *Id.* If an unrepresented party does not designate an email address for service, then the method of service upon and by that party must be made pursuant to a method specified in Rule 11 other than email. Ill. S. Ct. R. 131(d)(2).

## **ii. Electronic Filing of Pleadings**

All documents in civil cases must be filed electronically with the clerk of court using an electronic filing system approved by the Illinois Supreme Court. Ill. S. Ct. R. 9(a), (e). The rule exempts from this requirement (1) documents filed by a self-represented litigant incarcerated in a local jail or correctional facility at the time of the filing; (2) wills; (3) documents filed under the Juvenile Court Act of 1987; (4) documents filed by a person with a disability that prevents e-filing; and (5) documents in a specific case, upon good cause shown by certification. Ill. S. Ct. R. 9(c).

Absent a statute, rule, or court order requiring a document to be filed by a particular time of day, a document is considered timely if submitted before midnight in the court's time zone on the date on which the document is due. Ill. S. Ct. R. 9(d). If a document is untimely due to technical failure of a court-approved electronic filing system, or if a document is rejected by the clerk and is therefore untimely, a filing party may seek appropriate relief from the court, upon good cause shown. Ill. S. Ct. R. 9(d)(1)-(2).

Documents filed electronically must conform to the technical specifications contained in the eFileIL Electronic Document Standards, available at <http://efile.illinoiscourts.gov>. Ill. S. Ct. R. 10(c).

## **iii. Substance of Pleadings**

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. 735 ILCS § 5/2-612(b). Defects in form or substance are waived if no objection is raised in the trial court. *Id.* § 5/2-612(c). If a pleading is insufficient in form or substance, the court may order a 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).

#### **iv. Personal Identifying Information in Pleadings and Filings**

Rule 138 prohibits the disclosure in pleadings, and in other documents or exhibits filed with the court, of “personal identity” information, such as Social Security and taxpayer identification numbers, driver’s license numbers, financial account numbers, and debit and credit card numbers. See *also* Ill. S. Ct. R. 15 (addressing confidential treatment of social security numbers). Rule 138(c) provides instructions for how to redact this information; generally, only the last four digits of a number should be used.

If the filing of documents that contain unredacted information is ordered by the court or required by law, the personal identity information must be filed in a separate document titled “Notice of Confidential Information Within Court Filing.” Ill. S. Ct. R. 138(c). A form of the notice is appended to the rule. The clerk will impound the document containing the personal identity information, and the actual filings in the case should contain only redacted information with a reference to the impounded document. The personal identity information may be accessed by the parties, the court, the clerk, and appropriate justice partners such as a sheriff, guardian ad litem, or child support enforcement personnel. Ill. S. Ct. R. 138(d). The need for unredacted information is most likely to arise in family law or guardianship cases.

Rule 364 provides the same privacy protections in appellate courts as are provided in civil cases under Rule 138. Rule 364 goes beyond Rule 138, also prohibiting the disclosure of the name of a juvenile involved in proceedings under the Juvenile Court Act or the Adoption Act, and the name of a recipient of mental health services involved in proceedings under the Mental Health and Developmental Disabilities Code, the Mental Health and Developmental Disabilities Confidentiality Act, or from actions for collections of fees for mental health services. See Ill. S. Ct. R. 364(b)(5), 341(f). In such appeals, rather than redacting the name, the individuals should be identified by first name and last initial, unless using the first name would create a substantial risk of revealing the individual’s identity, in which case initials should be used. Ill. S. Ct. R. 364(c)(5).

## **B. THE COMPLAINT**

### **i. Generally**

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 when 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. 735 ILCS § 5/2-603(b). A complaint that 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).

Except in personal injury cases, every count of a complaint or counterclaim must request specific remedies the party believes it should receive from the court. 735 ILCS § 5/2-604.2(a). In a personal injury action, a party may not claim an amount of money unless necessary to comply with the circuit court rules about where a case is assigned. *Id.* If a complaint is filed in a personal injury action that contains an amount claimed and the claim is not necessary to comply with the circuit court rules about where a case is assigned, the complaint shall be dismissed without prejudice on the defendant’s or court’s motion. *Id.*

Relief may be pleaded in the alternative. *Id.* § 5/2-604.2(b). A request for a remedy that is not supported by complaint or counterclaim’s allegations may be objected to by motion or an answering pleading. *Id.* Except in cases of default, the remedies requested from the court do not limit the remedies available, but the court may, by proper order and upon just terms, protect adverse parties against prejudice by reason of surprise when granting relief that is not requested in the pleadings. *Id.* § 5/2-604.2(c). In the case of default, if a remedy is sought in a pleading that is beyond what the defaulted party requested, notice shall be given to the defaulted party as provided by Rule 105. *Id.*

### **ii. Medical Malpractice Cases**

A plaintiff alleging medical, hospital, or other healing art malpractice must attach to his or her complaint an affidavit stating that the affiant has consulted with a healthcare professional who, after reviewing the medical record and relevant material, has determined in a written report that there is a “reasonable and meritorious cause” for filing the complaint. 735 ILCS § 5/2-622(a)(1). The plaintiff must also attach the healthcare professional’s written report, attesting to the basis of this determination. *Id.* Section 2-622(a)(2) allows for a 90-day extension to these requirements if the plaintiff could not obtain the report before the expiration of the statute of limitations. Failing to file a certificate required by this Section is grounds for dismissal. *Id.* § 5/2-622(g). The first dismissal on the basis of noncompliance must be without prejudice. See *Lee v.*

*Berkshire Nursing & Rehab Ctr., LLC*, 2018 IL App (1st) 171344, ¶ 20 (finding that the trial court abused its discretion by dismissing plaintiffs' complaint with prejudice and not affording them the opportunity to refile their complaint with the Section 2-622 report and affidavit). The First District noted that the purpose of Section 2-622(g) was "to screen and deter frivolous or nonmeritorious medical negligence claims" and is "not a substantive defense which may be employed to bar plaintiffs who fail to meet its terms." *Id.* ¶ 14.

In actions on account of bodily injury or physical damage to property based on negligence, or product liability based on strict liability, punitive damages should not be pleaded in the complaint. *Id.* § 5/2-604.1; *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997) (invalidating 1995 amendment to this section). Instead, the party seeking punitive damages should file a pretrial motion and request a hearing on punitive damages. 735 ILCS § 5/2-604.1. 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 after discovery closes. *Id.*

### iii. Amendments

A party who files an amended pleading waives any objection to the trial court's ruling on a former complaint; and, if the amendment does not refer to or adopt the prior pleading, the earlier pleading is considered abandoned and withdrawn for most purposes. *Compare Bonhomme v. St. James*, 2012 IL 112393, ¶¶ 17, 19 (plaintiff abandoned the counts in her second amended complaint that were dismissed with prejudice and waived any appellate review of their dismissal when she filed a third amended complaint which in no way referenced or incorporated those counts), *with James v. SCR Med. Transp., Inc.*, 2016 IL App (1st) 150358, ¶ 33 (noting that, by incorporating and restating dismissed counts from his second amended complaint into his third amended complaint, plaintiff preserved arguments appealing the dismissal of those counts).

## 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.*

A plaintiff may choose to verify a complaint in order to compel the defendant to respond with a verified pleading. If a pleading is verified, every subsequent pleading also must be verified, unless the court excuses verification. *Id.* When a subsequent pleading is not verified, the unverified pleading must be disregarded as if the pleading was never filed. *Pinnacle Corp. v. Vill. of Lake in the Hills*, 258 Ill. App. 3d 205, 209 (2d Dist. 1994). However, where a party files an unverified answer in response to a verified complaint, and no objection to the unverified answer is asserted, the objection is waived. *In re Cty. Collector*, 295 Ill. App. 3d 711, 718 (1st Dist. 1998).

Verification should be done cautiously, as 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.*

Last year, the Code of Civil Procedure was amended to no longer require pleadings, affidavits, or other documents filed in any court of Illinois to be sworn before an authorized person as long as they are certified pursuant to the verification by certification requirements set out in 735 ILCS § 5/1-109, unless otherwise stated by an Illinois Supreme Court Rule.

#### **D. AFFIDAVIT REGARDING DAMAGES SOUGHT**

Rule 222(b) states: “Any 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.” If the damages sought do not exceed \$50,000, then Rule 222’s limited and simplified discovery procedures apply. (See Section VII.E. below.) The Rule further provides that if the damages sought do not exceed \$50,000: “Any judgment on such claim which exceeds \$50,000 shall be reduced posttrial to an amount not in excess of \$50,000.” Ill. S. Ct. R. 222(b). The purpose of the Rule’s affidavit requirement is to determine the proper court division and scope of discovery at the outset of the litigation.

The Fourth District 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). The First District distinguished *Grady* in *Dovalina v. Conley*, 2013 IL App (1st) 103127, as limited to reducing judgments over \$50,000 where the plaintiff fails to file an affidavit seeking in excess of \$50,000 *and* actually seeks less than \$50,000 in damages. *Id.* ¶ 24. The court considered that the plaintiff in *Grady* expressly sought \$15,000 in the complaint, and designated her case as a law magistrate case, giving notice to the defendant that she would not seek judgment in excess of \$50,000. *Id.* ¶¶ 24, 27. In contrast, the plaintiff in *Dovalina* sought judgment in excess of \$50,000 from each of three defendants, leading to a possible judgment in excess of \$150,000, and the case was filed in the law division in the sixth municipal district, which hears actions for monetary damages in excess of \$100,000. *Id.* ¶ 25. As a result, the court held that Rule 222 did not apply to the action, and the plaintiff was not barred from recovering in excess of \$50,000, even though he had failed to file the requisite affidavit. *Id.* ¶¶ 26, 29.

## 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. SERVICE OF PROCESS AND PROOF OF SERVICE

Illinois has rules that specifically address service of process on individuals, inmates, corporations, partnerships, and voluntary unincorporated associations. See 735 ILCS § 5/2-203 (individuals); *id.* § 5/2-203.1 (service by special order of court); *id.* § 5/2-203.2 (inmates); *id.* § 5/2-204 (private corporations); *id.* § 5/2-205 (partnerships and partners); *id.* § 5/2-205.1 (voluntary unincorporated associations); *id.* § 5/2-206 (service by publication).

A private corporation should be served by leaving a copy of the process with the corporation's registered agent or any officer or agent of the corporation found anywhere in the state. *Id.* § 5/2-204(1). A corporation may also be served "in any other manner now or hereafter permitted by law." *Id.* § 5/2-204(2).

The summons shall identify the court in which the lawsuit will be heard and include information about the plaintiff's attorney pursuant to Rule 131(d) or the plaintiff if not represented by an attorney. Ill. S. Ct. R. 101(a). All summons issued in civil cases in Illinois must contain the following language:

E-filing is now mandatory for documents in civil cases with limited exceptions. To e-file, you must first create an account with an e-filing service provider. Visit <http://efile.illinoiscourts.gov/service-providers.htm> to learn more and to select a service provider. If you need additional help or have trouble e-filing, visit <http://www.illinoiscourts.gov/faq/gethelp.asp>, or talk with your local circuit clerk's office.

### Ill. S. Ct. R. 101(a).

Service upon an individual defendant must be made either by personal service or "abode" service. *Id.* § 5/2-203(a). Abode service is accomplished when the process server leaves a copy of the summons at the defendant's usual place of abode with someone age thirteen or older who either lives in the home or is a member of the defendant's family. *Id.* The process server must also tell the person the contents of the summons and send a copy to the defendant through the mail. *Id.* The Illinois Court of

Appeals has clarified that a family member need not reside in the household in order to accept service; the statute allows service upon “some person of the family *or* a person residing there.” *Cent. Mortg. Co. v. Kamarauli*, 2012 IL App (1st) 112353, ¶ 21 (emphasis added).

A plaintiff in small claims court (which is available for tort and contract claims that do not exceed \$10,000) may request that the clerk of the court serve the defendant(s) by certified or registered mail in lieu of personal service. Ill. S. Ct. R. 281; Ill. S. Ct. R. 284. For each defendant to be served, the plaintiff must pay a fee of \$2 plus the cost of mailing and file a summons containing an affidavit stating the defendant’s last known mailing address. Ill. S. Ct. R. 284(a).

When service of a document is required, proof of such service must be filed with the clerk of court. Ill. S. Ct. R. 12(a). Proof of service may come:

(1) in the case of electronic service through the court electronic filing manager or an approved electronic filing service provider, by an automated verification of electronic service, specifying the time of transmission and e-mail address of each recipient;

(2) in the case of service by e-mail, by certification under section 1-109 of the Code of Civil Procedure of the person who initiated the transmission, stating the date of transmission and the e-mail address of each recipient;

(3) by written acknowledgment from the person served;

(4) in case of service by personal, office, or residential delivery, by certification under section 1-109 of the Code of Civil Procedure of the person who made delivery, stating the time and place of delivery;

(5) in case of service by mail or by delivery to a third-party commercial carrier, by certification under section 1-109 of the Code of Civil Procedure of the person who deposited the document in the mail or delivered the document to a third-party commercial carrier or courier, stating the time and place of mailing or delivery, the complete address that appeared on the envelope or package, and the fact that proper postage or the delivery charge was prepaid; or

(6) in case of service by mail by a self-represented litigant residing in a correctional facility, by certification under section 1-109 of the Code of Civil Procedure of the person who deposited the document in the institutional mail, stating the time and place of deposit and the complete address to which the document was to be delivered.

Ill. S. Ct. R. 12(b). Service by electronic means or by personal, office, or residential delivery is complete on the day of transmission. Service by delivery to a third-party commercial carrier or courier is complete on the third court day after delivery of the package to the third-party carrier. Service by U.S. mail is complete four days after mailing. Ill. S. Ct. R. 12(c).

## **Key Distinction from Federal Practice:**

**Federal Rule of Civil Procedure 4(e)(2)(B) allows abode service by leaving a copy of the summons and complaint “at the individual’s dwelling or usual place of abode with someone of suitable age and discretion *who resides there.*” (emphasis added).**

### **G. ANSWERING THE COMPLAINT**

#### **i. Time to Appear and Answer**

Rule 181 governs appearances. Where the summons requires an 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 30-day period is computed from, but not including, the day the summons is left with the defendant or its authorized agent, not the day the summons is mailed. *Id.* The defendant may appear 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.*

The Illinois Court of Appeals has clarified that if a party initially appears *pro se* but later retains counsel more than 30 days after receipt of service, counsel must seek leave to file an appearance. *J.P. Morgan Mortg. Acquis. Corp. v. Straus*, 2012 IL App (1st) 112401, ¶ 15.

#### **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(b); Fed. R. Civ. P. 8(b). The Illinois Code of Civil Procedure, however, requires a 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 VI.I. 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.**

**H. 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 party 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.**

**I. COUNTERCLAIMS AND CROSS-CLAIMS**

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

Counterclaims in Illinois are generally permissive, rather than compulsory. However, counterclaims are mandatory in certain circumstances, including when seeking setoff and, in some districts, when alleging legal malpractice in a dispute regarding legal fees. *MidAmerica Bank, FSB v. Charter One Bank, FSB*, 232 Ill. 2d 560, 574-75 (2009) (“A defendant is required to raise a claim for a setoff in the pleadings to give the plaintiff notice and an opportunity to defend against the claim.”); *Kasny v.*

*Coonen & Roth, Ltd.*, 395 Ill. App. 3d 870, 874 (2d Dist. 2009) (“at least in this district, the law is settled that [an attorney’s claim for fees and the client’s claim for malpractice] are the same cause of action, such that ordinarily a counterclaim is mandatory”). In addition, “if the defendant’s claim involves the same operative facts as the plaintiff’s claim, *res judicata* may bar the defendant from raising his or her claim in a subsequent action. . . . Specifically, *res judicata* bars a subsequent action if successful prosecution of that action would in effect nullify the judgment entered in the initial action.” *Oshana v. FCL Builders, Inc.*, 2013 IL App (1st) 120851, ¶ 38 (holding that the counterclaim was not barred by *res judicata*).

A counterclaim must be pleaded as part of the answer and must be designated as a counterclaim. 735 ILCS § 5/2-608(b). The court retains discretion to grant leave to file a counterclaim after the answer is served but will apply the test for amending pleadings under 735 ILCS § 5/2-616, considering the timeliness of the proposed counterclaim and whether other parties would be prejudiced or surprised by the proposed counterclaim. *Scentura Creations, Inc. v. Long*, 325 Ill. App. 3d 62, 72 (2d Dist. 2001) (holding that the trial court abused its discretion by denying the defendant leave to amend the pleadings to include a proposed counterclaim where there was no showing of prejudice or surprise by the proposed counterclaim); *Nat’l Educ. Music Co. v. Rieckhoff*, 292 Ill. App. 3d 260, 263-64 (4th Dist. 1997) (“[A] party does not have an absolute right to file a counterclaim any time he wishes to do so and the timeliness of a request to amend a pleading may be considered by the trial court. . . . Also to be considered is whether other parties have been prejudiced or surprised.”).

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. 735 ILCS § 5/2-608(c).

### **Key Distinctions from Federal Practice:**

**In Illinois courts, claims by a defendant against either a plaintiff or another defendant are referred to as counterclaims. In federal court, claims by a defendant against a plaintiff are referred to as counterclaims, and claims by a defendant against another defendant are referred to as cross-claims.**

**In Illinois courts, there are generally no compulsory counterclaims except in certain cases, such as when seeking setoff or, in legal fee disputes, when alleging legal malpractice. In federal courts, a claim that arises out of the same transaction or occurrence that is the subject matter of the opposing party’s claim is compulsory; it must be stated as a counterclaim or it will be waived. Illinois case law regarding *res judicata*, such as *Oshana*, acknowledge that a counterclaim may be barred by *res judicata* in a subsequent action under a similar but higher standard, *i.e.*, if successful prosecution of that action would nullify the judgment entered in the initial action.**

## **J. 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.

## **K. 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.*

## **L. INTERVENTION**

Intervention is governed by Section 2-408 of the Code of Civil Procedure. 735 ILCS § 5/2-408. 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. *Id.* § 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 or 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).

#### **M. 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(a). 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 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. Ill. S. Ct. R. 137(b). Rule 137 does not limit the available sanctions, but allows for the court to impose an “appropriate sanction” based on the circumstances. *Stiffle v. Baker Epstein Marz*, 2016 IL App (1st) 150180, ¶ 56. 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 attorney’s fees. Ill. S. Ct. R. 137(a). Although a court may impose the drastic sanction of dismissal of the case under Rule 137, such a sanction can only be imposed where the court has found “a clear record of willful conduct showing deliberate and continuing disregard for the court’s authority” and “that lesser sanctions are inadequate to remedy both the harm to the judiciary and the prejudice to the opposing party.” *Stiffle*, 2016 IL App (1st) 150180, ¶ 60 (quoting *Santiago v. E.W. Bliss Co.*, 2012 IL 111792, ¶ 20).

Rule 137(e) clarifies that an attorney may assist a self-represented person by drafting or reviewing a pleading without being required to sign the pleading. The attorney providing assistance may rely on the facts represented by the self-represented person unless the attorney knows those facts to be false. Ill. S. Ct. R. 137(e).

In the past, a common-law rule known as the “nullity rule” provided that any pleading drafted or signed by a non-attorney on behalf of a corporation was null and void as an unauthorized practice of law. The Illinois Supreme Court, however, held that “there is no automatic nullity rule.” *Downtown Disposal Servs. v. City of Chi.*, 2012 IL 112040, ¶ 31. Instead, courts must use discretion and consider the individual circumstances—if the corporation acts diligently in obtaining counsel and fixing the mistake, and the non-attorney’s participation was minimal, nullity is not appropriate. *Id.*

## **VI. MOTIONS**

### **A. DEADLINES AND FORM OF MOTIONS**

Parties should check the local rules of their circuit court and judge's standing orders or individual practices to determine the deadlines for responding to motions and filing a reply brief, as well as any requirements regarding the form and content of motions and notices for motions. For example, Cook County Circuit Court Rule 2.1(d) provides that, for motions other than discovery motions, a responding party has 28 days to respond to a motion and the moving party has 10 days to reply.

### **B. MOTION FOR SUBSTITUTION OF JUDGE**

Section 5/2-1001 of the Code of Civil Procedure governs substitution of judges. 735 ILCS § 5/2-1001. Motions for substitution of a judge may be made for involvement in the action, cause, as a matter of right or in contempt proceedings. *Id.* § 5/2-1001(a). A party may move for substitution for cause at any time by filing a petition that asserts the specific allegations that justify substitution. *Id.* § 5/2-1001(a)(3). The movant must provide "reasonable notice" to the adverse party of a motion for substitution of judge, pursuant to § 5/2-1001(b). *Lindenfelser v. Jones*, 2016 IL App (2d) 151195-U, ¶ 16.

#### **i. Involvement of Judge**

A motion for substitution of the judge may be brought based on the judge being a party or "interested" in the action, the judge's testimony being material to either party; or the judge acting as counsel to either party in connection with the subject matter of the action. *Id.* § 5/2-1001(a)(1).

#### **ii. 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 *Aussieker 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. *Aussieker*, 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 trial or hearing begins and before the judge has ruled on any substantial issue in the case. *Id.* § 5/2-1001(a)(2)(i)-(ii); see also *Schmitt v. Am. Family Mut. Ins. Co.*, 2014 IL App (1st) 13-1666-U, ¶¶ 26-28 (interpreting § 5/2-1001(a)(2)(ii) to require filing "at the earliest practical moment before commencement of trial or hearing," and affirming the denial of a motion for substitution where the motion was brought four months after the start of litigation and after the court had ruled on contested motions regarding whether the plaintiffs were entitled to additional discovery and whether to stay briefing on a motion to dismiss). 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. 735 ILCS § 5/2-1001(a)(2)(iii).

A ruling on a substantial issue that precludes substitution as of right 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). Where a judge recommends a settlement agreement or rules on minor pretrial discovery issues, substitution as a matter of right will probably be allowed. *Id.* at 351 (holding that plaintiff’s motion for substitution of judge was improperly denied where the judge had held a pretrial conference and made a recommendation regarding settlement); *Becker v. R.E. Cooper Corp.*, 193 Ill. App. 3d 459, 463 (3d Dist. 1990). Orders related to scheduling and continuances are also generally not considered substantial rulings. *Dunagan v. Aleksic*, 2015 IL App (1st) 140748-U, ¶ 34 (“Matters of scheduling and continuances are not considered substantial rulings under Section 2-1001(a)(2).” (citing *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶ 58)); *In re Marriage of Crecos*, 2015 IL App (1st) 132756, ¶ 26 (reversing denial of motion for substitution of judge as of right where judge had ruled that there was no emergency and set a briefing schedule on the motion for a preliminary injunction). Nor are contempt rulings considered substantial. *Chavis v. Woodworker’s Shop, Inc.*, 2018 IL App (3d) 170729, ¶ 14 (concluding that a contempt ruling “had nothing to do with the merits” of the case and thus “no ruling was made on a ‘substantial issue’ in the case”). 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 240, 246 (1st Dist. 2006).

However, the majority of Illinois courts, including the First, Second, Third, and Fifth District Appellate Courts, have held that 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. *Bowman v. Ottney*, 2015 IL App (5th) 140215, ¶¶ 10, 17; *Schmitt v. Am. Family Mut. Ins. Co.*, 2014 IL App (1st) 13-1666-U, ¶ 26; *Galvan v. Allied Ins. Co.*, 2013 IL App (2d) 120525-U, ¶ 26; *In re Estate of Hoellen*, 367 Ill. App. 3d at 246; *In re Estate of Gay*, 353 Ill. App. 3d 341, 343-44 (3d Dist. 2004).

The Fourth District Appellate Court has rejected this approach and more strictly followed the substantive ruling requirement of Section 2-1001. *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶ 30; *Ill. Licensed Beverage Ass’n v. Advanta Leasing Servs.*, 333 Ill. App. 3d 927, 933 (4th Dist. 2002); see also *In re P.W.*, 2014 IL App (4th) 130916-U, ¶ 46; *In re McGrath*, 2015 IL App (4th) 140620-U, ¶ 35. For example, in *Schnepf*, the Fourth District Appellate Court expressly rejected the “test the waters” doctrine and held that “it is no longer an appropriate judicial supplement to the substitution-of-judge analysis.” 2013 IL App (4th) 121142, ¶ 30. The *Schnepf* court explained that the “test the waters” doctrine is inconsistent with the requirement that section 2-1001(a)(2) be liberally construed, unnecessary to prevent judge shopping, and allows a judge to “extinguish . . . a party’s ‘absolute’ right to substitution without cause.” *Id.* ¶¶ 53-55. The First District Appellate Court, however, has distinguished *Schnepf* as

“departing from the overwhelming ‘weight of appellate authority’” in rejecting the “test the waters” doctrine. *Schmitt*, 2014 IL App (1st) 13-1666-U, ¶ 26; see also *Colagrossi v. Royal Bank of Scotland*, 2016 IL App (1st) 142216, ¶ 36 (“‘testing the waters’ remains a viable objection to substitution of judge motions as of right in the First District”).

In an appeal of a 2015 Fifth District case, the Illinois Supreme Court expressly declined to address the validity of the “test the waters” doctrine, finding that the doctrine was not at issue because the judge had ruled on substantial issues, such as the disclosure of certain materials in discovery. *Bowman v. Ottney*, 2015 IL 119000, ¶¶ 3, 27. The Fifth District had affirmed the denial of the motion for substitution of judge because the judge had issued substantial rulings in the plaintiff’s previous lawsuit, affording the plaintiff an opportunity to “test the waters,” even though the judge had not issued substantial rulings in the refiled case. *Bowman*, 2015 IL App (5th) 140215, ¶¶ 12-17, 19. The Illinois Supreme Court affirmed the Fifth District’s judgment without addressing the validity of the “test the waters” doctrine, holding that § 5/2-1001(a)(2)(ii) must be read as “referring to all proceedings between the parties in which the judge to whom the motion is presented has made substantial rulings with respect to the cause of action before the court.” *Bowman*, 2015 IL 119000, ¶¶ 1, 21.

In *Williams v. Leonard*, the First District also affirmed a Cook County trial court’s ruling that a defendant may not move for substitution of judge as a matter of right where a plaintiff voluntarily dismissed her case after the trial court ruled on substantive issues and then refiled the same case against the same defendant. 2017 IL App (1st) 172045, ¶ 6 (opinion corrected Feb. 7, 2018). The appellate court explained that a defendant does not retain the right to seek a substitution of judge as a matter of right in the refiled case in this situation and that a refiled case is not a new and separate case for purposes of 735 ILCS 5/2-1001(a)(2). *Id.*; but see *Vill. of East Dundee v. Vill. of Carpentersville*, 2016 IL App (2d) 151084, ¶ 17 (reversing denial of a motion to substitute judge in a refiled case that was previously *involuntarily* dismissed, and was thus not dismissed and refiled as a form of procedural gamesmanship).

### iii. 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)(ii). A judge who is not named in the petition will conduct a hearing to determine whether cause for substitution exists. *Id.* § 5/2-1001(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).

“The denial of a motion for substitution of judge for cause is not a final order. Instead, it is an interlocutory order that is appealable on review from a final order.” *Inland Commercial Prop. Mgmt., Inc. v. HOB I Holding Corp.*, 2015 IL App (1st) 141051,

¶ 19 (citation omitted). For example, in *Inland Commercial*, the court held that an order denying substitution of the judge was not a final order because it did not result in a determination of the merits or resolve absolutely and finally the rights of the parties. *Id.* ¶ 20. The court held that it lacked jurisdiction to review the order even though the district court had entered a Rule 304(a) finding, as an order does not become final simply by including the statutory language. *Id.* ¶¶ 21, 24.

#### **iv. In Contempt Proceedings**

A defendant in a contempt proceeding arising from the defendant's attack on the character or conduct of a judge arising otherwise in open court and who fears he or she will not receive a fair and impartial trial before that judge may move for substitution. 735 ILCS § 5/2-1001(a)(4).

#### **v. Recusal**

Rule 63 requires a judge to disqualify himself or herself in a proceeding in which the judge's "impartiality might reasonably be questioned." Ill. S. Ct. R. 63(c)(1). This includes but is not limited to proceedings where:

- (1) the judge has a personal bias or prejudice about a party or a lawyer in the case;
- (2) the judge has personal knowledge about disputed facts in the case;
- (3) the judge was previously a lawyer for one party in the case;
- (4) within the last 3 years, the judge practiced law in a private law firm with an attorney now representing a party in the case, or represented a party to the case as a private attorney in the preceding 7 years;
- (5) the judge has been a key witness in the case;
- (6) the judge knows that he or she, the judge's spouse, parent, child, or other family member has an economic interest in the case that could be substantially affected by the case; or
- (7) the judge, his or her spouse, or a person with a third degree relationship with the judge is a party, lawyer, material witness, or has interest in the case.

*Id.* Once a judge has recused himself or herself, the recused judge no longer has the power to enter further substantive orders in the case absent, where applicable, a Rule 63(d) remittal. *In re Marriage of Peradotti*, 2018 IL App (2d) 180247, ¶ 29. Rule 63(d) provides that a disqualified judge "may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification." Ill. S. Ct. R. 63(d). If the parties have not waived disqualification, a recused judge cannot reconsider his or her recusal, as that would be a substantive decision. *Id.* (reversing denial of a motion for substitution of judge for cause when petitioner's prior judge recused himself then reinstated himself absent a Rule 63(d) remittal).

### **C. 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(a). 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.*; *id.* § 5/2-619.1.

If the facts that support a motion to dismiss or to quash are not apparent from the pleadings, the motion must be supported by an affidavit that sets forth the bases for the motion. *Id.* § 5/2-301(a). 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. Sworn or certified copies of any documents upon which the affiant relies must 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-6).

The court should rule on an objection to personal jurisdiction without considering the merits of the underlying 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 raised. *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).

### **D. 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:

[E]very 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 residence 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 reasonable attorney's fees. *Id.*

#### **E. 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 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 residence 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.

## **F. BILL OF PARTICULARS**

Within the time a party is required to respond to a pleading, the party may file and serve a notice demanding a bill of particulars. 735 ILCS § 5/2-607(a). A bill of particulars may be demanded when a pleading lacks detail to which the responding party is entitled. *Id.* The notice should point to specific defects in the pleading and identify the information the responding party is seeking. *Id.* A party may also choose to file a motion for a more definite pleading under 735 ILCS § 5/2-615(a).

For example, in *Hemingway v. Skinner Engineering Co.*, 117 Ill. App. 2d 452, 460-61 (2d Dist. 1969), the defendant demanded 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. 735 § 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 file the bill of particulars 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).

## **G. 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.* at 1005 (citing *LaSalle Nat’l Bank v. Helry Corp.*, 136 Ill. App. 3d 897, 905 (1st Dist. 1985)).

## **H. 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 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; see *Wells Fargo Bank, N.A. v. Norris*, 2017 IL App (3d) 150764, ¶ 20 & n.3 (noting amendment to this section stricken in its entirety). 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).

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). This similarly applies to different complaints essentially alleging the same causes of action. For example, a lawsuit for a breach of a promissory note and a prior foreclosure complaint assert the same cause of action when the foreclosure complaint requests a deficiency judgment based on the same default of the same note. See *First Midwest Bank v. Cobo*, 2018 IL 123038, ¶ 42 (holding that the single re-filing rule barred breach of promissory note claim because it was the third attempt to collect from the same defendants based on the same default of the same promissory note). This rule also bars the re-filing of a complaint that was (1) previously filed in Illinois state court and voluntarily dismissed without prejudice, then (2) re-filed once in federal district court, where the court granted summary judgment on the federal claims and declined to exercise jurisdiction over the remaining state claims. See *Bush v. J&J Transmissions, Inc.*, 2017 IL App (3d) 160254, ¶ 7. The court in *Bush* explained that “[a]ll three of the complaints contemplated the same set of facts,” and “Plaintiff exercised his one opportunity to refile his complaint

when he filed it in the [federal] district court.” *Id.* ¶ 10. A stipulated dismissal of a federal lawsuit also constitutes voluntary dismissal and counts towards the single re-filing rule. See *Dvorak v. Granite Creek GP Flexcap I, LLC*, 908 F.3d 248, 251 (7th Cir. 2018). In *Dvorak*, the plaintiff (1) originally filed suit in federal court but stipulated to dismissal without prejudice; (2) re-filed the same suit in state court, which dismissed one of the claims; and (3) then re-filed the remaining claims in federal court. *Id.* at 250. Because the court counted the stipulated dismissal as a voluntary dismissal, it concluded that the re-filing in state court was plaintiff’s third lawsuit, which was barred by the single re-filing provision of Section 13-217. *Id.* at 251.

## **I. 2-615, 2-619 & 2-619.1 MOTIONS 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. Or, a combined motion may argue for the dismissal of plaintiff’s claims pursuant to Section 2-615, Section 2-619, and Section 2-1005 (summary judgment), together in one single motion. *Id.* § 5/2-619.1. Such a combined motion, however, must clearly specify which part of the motion relies on each section. *Id.*

### **i. 2-615 Motion to Dismiss**

A Section 2-615 motion argues that the plaintiff has not alleged a 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. *Id.* 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 & Tr. 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 provides for possible relief other 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.

## ii. 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 has discretion to grant leave to file a Section 2-619 motion unless 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. Sworn or certified copies of any documents upon which the affiant relies must be attached to the affidavit. *Id.*; *Doe v. Coe*, 2017 IL App (2d) 160875, ¶¶ 10, 19 (referring to the language in Rule 191 as

the “attached-papers requirement” (quoting *Robidoux v. Oliphant*, 201 Ill. 2d 324, 344 (2002))). 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. Ill. S. Ct. R. 191. When an affidavit supporting a motion to dismiss is not challenged or contradicted by counter affidavits or other proof, the facts in the supporting affidavit are deemed admitted. 735 ILCS § 5/2-619(c); *Raintree Homes, Inc. v. Vill. of Long Grove*, 209 Ill. 2d 248, 262 (2004).

### **iii. 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 judgment) as a single motion. 735 ILCS § 5/2-619.1. 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).

### **iv. Partial Motions to Dismiss and Answering**

A defendant may also file a partial motion to dismiss certain counts of the plaintiff’s complaint if the complaint has multiple counts. Whether the defendant must answer the remaining counts not subject to the motion in the time allotted by the rules is an issue that Illinois courts have not addressed in a reported decision. Although under the federal rules, most federal district courts have held that a partial motion to dismiss suspends the defendant’s obligation to answer the counts not subject to the motion, that view may not be favored by Illinois state courts, nor supportable under the applicable Illinois rules. Accordingly, if a defendant seeks to not answer the remaining counts while a motion to dismiss is pending, the authors’ recommended practice is for the defendant to timely obtain agreement from the plaintiff, and court order, to extend the time to answer the other counts to the complaint or, absent agreement, move for an extension of time from the court if there is a good faith basis for the request.

#### **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 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.**

### **J. 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.*

#### **K. MOTION FOR EXTENSION OF TIME**

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.*

#### **L. MOTION FOR SUMMARY JUDGMENT**

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. For instance, Cook County Circuit Court Rule 2.1(f) requires that all summary judgment motions be filed and noticed for hearing no later than forty-five (45) days before the trial date, except by prior leave of court and for good cause shown or unless a deadline for dispositive motions is otherwise specified in the case management order.

##### **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). Facts in an affidavit in support of summary judgment which are not contradicted by a counter affidavit are admitted and must be taken as true for purposes of the motion. *US Bank, Nat'l Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 31. 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. Sworn or certified copies of any documents upon which the affiant relies must 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 a 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.*

A party is generally not limited to one motion for summary judgment. Instead, Illinois courts have held that “Section 2-1005 of the Code of Civil Procedure places no limit on the number of motions for summary judgment that may be brought by a party.” *Lawrence & Allen, Inc. v. Cambridge Human Res. Grp., Inc.*, 292 Ill. App. 3d 131, 136-37 (2d Dist. 1997); see *Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905, 909 (1st Dist. 1994); *Nationstar Mortgage, LLC v. Dodge*, 2018 IL App (2d) 180002-U, ¶ 56.

### **iii. Amendment of Pleadings Before or After Summary Judgment**

Before or after the entry of summary judgment, a court “shall permit pleadings to be amended upon just and reasonable terms.” *Id.* § 5/2-1005(g). The Illinois Supreme Court held that the trial court must permit amendment “if it will further the ends of justice.” *Loyola Academy v. S&S Roof Maint., Inc.*, 146 Ill. 2d 263, 272-73 (1992). To determine whether the trial court abused its discretion in denying a motion to amend after summary judgment, courts consider the following factors: “(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified.” *Id.* at 273.

## **M. MOTION TO VACATE A DEFAULT JUDGMENT**

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 a 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 Dev. 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: (1) whether the movant acted with due diligence; (2) whether a meritorious defense exists; (3) the severity of the penalty as a result of the default; and (4) 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).

## **N. MOTION TO WITHDRAW**

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)(2). 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.* 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 to file, within 21 days after entry of the order of withdrawal, 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. Ill. S. Ct. R. 13(c)(4). 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. Ill. S. Ct. R. 13(c)(5). 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 granting it would delay the trial of the case or would otherwise be inequitable. Ill. S. Ct. R. 13(c)(3).

## **VII. DISCOVERY**

### **A. COMMENCING CASE MANAGEMENT AND DISCOVERY**

Pursuant to Rule 201(d), prior to the time all defendants have appeared or are required to appear, 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). After that time, discovery may begin automatically.

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, including but not limited to issues involving electronically stored information (ESI) and preservation.

*Id.*

If any party intends to request preservation or production of potentially burdensome categories of ESI, then the party should raise that intention at the initial case management conference. See Committee Comments to Ill. S. Ct. R. 201(c)(3) (rev. May 29, 2014). Also, at the conference, the court should issue an order that details any action taken by the court and any agreements reached by the parties, and outlines 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 not later than 60 days prior to the expected trial date, 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**

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 and should avoid discovery requests that are disproportionate in terms of burden or expense. *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)(1). “Documents” under Rule 201 include but are not limited to “papers, photographs, films, recordings, memoranda, books, records, accounts, communications and ESI as defined in Rule 201(b)(4).” *Id.* ESI includes “any writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations in any medium from which electronically stored information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.” Ill. S. Ct. R. 201(b)(4).

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). In making a protective order, the court may determine whether the likely burden or expense of proposed discovery, including ESI, outweighs the likely benefit. Ill. S. Ct. R. 201(c)(3). The court’s consideration will include the amount in controversy, the resources of the parties, the importance of the issues in the litigation and the importance of the requested discovery in resolving the issues. *Id.* Certain categories of ESI may not be discoverable if they are considered disproportionately burdensome, including but not limited to fragmented data on hard drives, data in metadata fields, backup data that is substantially duplicative of data that is more accessible elsewhere, legacy data and various other types of ESI. See Committee Comments to Ill. S. Ct. R. 201(c)(3) (rev. May 29, 2014).

## **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**

Rule 201(m) establishes that no discovery may be filed with the clerk of the circuit court except where required by order of the court. Local rules may not require the filing of discovery. Instead, under Rule 201(m), a party serving discovery shall file a certificate of service of discovery document and service of discovery shall be made in the manner provided for service of documents in Rule 11. However, Rule 201(o) requires that discovery requests to non-parties be filed with the clerk of the circuit court in accordance with the procedure set forth in Rule 104(b).

## **D. ASSERTING PRIVILEGE FOLLOWING DISCOVERY DISCLOSURE**

Rule 201(p) provides procedures for asserting attorney-client privilege or work product protection after information has been inadvertently produced in discovery. The party claiming the privilege must notify any party that received the information of the

claim and the basis for it. Ill. S. Ct. R. 201(p). After being notified, the receiving party must return, sequester or destroy the information and any copies; must not use or disclose the information until the claim is resolved; must take steps to retrieve the information if it was disclosed to any third parties; and may promptly present the information to the court under seal for a determination on the claim of privilege. *Id.* The party making the claim must also preserve the information until the claim is resolved. *Id.* These procedures are the same as those provided in Federal Rule of Civil Procedure 26(b)(5)(B). They have no effect on the court's substantive determination regarding whether the information is privileged or whether the privilege has been waived.

Rule 201(p) works in conjunction with Illinois Evidence Rule 502, which provides that an inadvertent disclosure of privileged information in an Illinois proceeding will not result in waiver if the holder of the privilege took reasonable steps to prevent disclosure and takes reasonable steps to rectify the error, including following the steps outlined in Rule 201(p). Ill. R. Evid. 502(b).

#### **E. MANDATORY DISCLOSURES IN CERTAIN TYPES OF CASES**

Mandatory disclosures are required in: (1) cases subject to mandatory arbitration,<sup>2</sup> (2) civil actions seeking money damages not exceeding \$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;

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<sup>2</sup> Pursuant to 735 ILCS § 5/2-1001A, the Illinois Supreme Court may provide for mandatory arbitration for any case in which a claim does not exceed \$50,000 or where the court determines that no greater amount appears to be in controversy. Mandatory arbitration cannot apply to cases seeking relief 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.

- the identity and address of each person expected to testify as an expert witness in addition to the expert disclosures required by 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 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).

## **F. DOCUMENT REQUESTS**

### **i. Serving Requests for Production**

Any party may request "specified documents, including ESI as defined under Rule 201(b)(4), objects or tangible things, or to permit access to real estate" from any other party pursuant to Rule 214. The written requests must allow a reasonable time, not less than 28 days after service of the request 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 they will make the documents available for inspection or copying or furnish copies of the documents as part of the 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.* The affidavit of completeness along with copies of identifications and objections must be served on all parties entitled to notice. *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 the party claims 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 the 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).**

**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, as the Illinois rules require.**

### **iii. Electronically Stored Documents**

Rule 214 requires the party responding to document requests to produce all ESI in a form in which it is ordinarily maintained or in reasonably usable form, unless the request specifies a form. A party may object to a request on the basis that the burden or expense of producing the requested materials would be disproportionate to the likely benefit, in light of the factors set out in Rule 201(c)(3). Ill. S. Ct. R. 214(c).

## **G. INTERROGATORIES**

### **i. Serving Interrogatories**

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). The fact that the same counsel represents multiple parties does not change that each of those parties may serve up to 30 interrogatories. A copy of the interrogatories must be served on all parties of record. Ill. S. Ct. R. 213(a). 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 is 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. See, e.g., *Braveman v. Hursey*, 2012 IL App (5th) 090397-U, ¶ 16. 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 prior answers when new or additional information becomes known to that party. Ill. S. Ct. R. 213(i). The definition of “seasonably” 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.

## **H. 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. If the type is not specified, then the deposition will be a discovery deposition only. Ill. S. Ct. R. 202. The same witness may be deposed in both an evidence and discovery deposition, but the depositions must be taken separately unless otherwise stipulated or ordered. *Id.* If an evidence deposition is to be taken within 21 days of trial, a discovery deposition of the same witness is not permitted unless otherwise stipulated or ordered. *Id.* No discovery deposition of any party or

witness shall exceed three hours regardless of the number of parties involved in the case, except by stipulation of all parties or by court order upon showing that good cause warrants a lengthier examination. Ill. S. Ct. R. 206(d). The three-hour limit does not apply to evidence depositions.

Evidence deposition testimony may generally 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 county or otherwise cannot be served with subpoena after reasonable efforts. *Id.* Evidence deposition testimony from a physician or surgeon, however, may be introduced at trial without regard to availability. *Id.* In contrast, discovery deposition testimony usually may not be introduced at trial except to be used for (1) impeachment; (2) a statement 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 the testimony may be admitted as evidence at trial if the deponent is unavailable under Rule 212(b). In contrast, 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.*

During an evidence deposition, the examination and cross-examination must be as if the deponent is testifying at trial; 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. However, 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 do not exceed \$50,000. Ill. S. Ct. R. 222(f)(3).

## **ii. Method of Taking Depositions**

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.

If either 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). Rule 206(g) provides specific procedures to be followed by the operator recording the deposition to ensure the recording's validity, security, and authenticity. Rule 206(a) allows parties who object to recording to seek a protective order using the procedures outlined in Rule 201. Ill. S. Ct. R. 206(a)(2). 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. *Id.*

## **iii. Records Depositions**

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 certain date. Ill. S. Ct. R. 204(a)(4). The requested documents or materials must be served on the requesting party at least 3 days prior to the scheduled deposition. *Id.* 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**

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 the 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.* Each

discovery deposition of a corporate representative is limited to three hours, except by stipulation of all parties or by order upon a showing that good cause warrants a lengthier examination. Ill. S. Ct. R. 206(d).

#### **v. Interstate Deposing or Subpoenaing of Witnesses**

Illinois adopted the Uniform Interstate Depositions and Discovery Act in 2016. 735 ILCS § 35/1. Under the Act, out-of-state litigants seeking to subpoena a person who lives in Illinois must submit a subpoena issued by the foreign state to a clerk in the Illinois county in which discovery is sought. *Id.* § 35/3(a). The clerk will then issue an Illinois subpoena for service upon the individual in Illinois, which must be served consistent with Rules 204 and 237 and 735 ILCS § 5/2-1101. 735 ILCS §§ 35/3(b), 35/4. A subpoena issued under this statute may not require compliance outside of the deponent's county of residence within Illinois. *Id.* § 35/9.5. The courts have yet to update local rules and Rule 204(b) to reflect this statute. Under Rule 204(b), out-of-state litigants were required to 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. We expect that the Supreme Court Rule will be updated to conform with the Act.

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 an application 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.

#### **vi. 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 physician must be paid a reasonable fee for the time spent testifying. Unless the physician was retained by a party for the purpose of rendering an opinion at trial, the fee should be paid by the party requesting the deposition. *Id.*

#### **vii. 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.*

## I. REQUESTS TO ADMIT

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). The fact that the same counsel represents multiple parties does not change that each of those parties may serve up to 30 requests for admission. A party must serve requests for admission separately from other discovery. Ill. S. Ct. R. 216(g). Both the request for admission and the response, sworn statement of denial or written objection must be served on all parties entitled to notice. Ill. S. Ct. R. 216(a), (c). Pursuant to 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 document, 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 \$50,000 or less in damages, and cases to collect taxes not in excess of \$50,000, requests for admission must be filed more than 60 days prior to the trial date or leave of court is required. Ill. S. Ct. R. 222(f)(5).

## J. 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. 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 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 subject to the limitations of Rule 201(c), which allows for protective orders when the burden or expense of the proposed discovery outweighs the benefits. Ill. S. Ct. R. 204(a). Deponents must respond to the subpoena upon receipt of notice and payment of 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 VII.H.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 to be served upon the attorney or party requesting the deposition by a certain date. Ill. S. Ct. R. 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 the scheduled deposition. The responding 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.*

## **K. EXPERT DISCLOSURES**

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.* Rule 208(e) 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.

In a case of first impression in April 2019, the First District held that, where a previously disclosed testifying expert is timely withdrawn before disclosing his or her report in discovery, the expert may be redesignated as a Rule 201(b)(3) consultant and thereby entitled to the consultant's privilege against disclosure, absent exceptional circumstances. *Dameron v. Mercy Hosp. & Med. Ctr.*, 2019 IL App (1st) 172338, ¶ 55 (petition for leave to appeal granted, 135 N.E.3d 565 (table)).

### **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 Federal Rules, there is no case law or rule that protects drafts of testifying expert reports or communications with testifying experts from discovery by the opposing party. 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 Rule 201(b) and the absence of an express provision protecting testifying expert draft reports and communications with testifying experts, 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 protections 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 to 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.

## **L. 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 Rule 219(c). This relief may include:

- staying further proceedings until the order or rule is complied with;
- barring the offending party from filing any other pleading relating to any issue to which the refusal or failure relates;
- barring the offending party from maintaining any particular claim, counterclaim, third-party complaint or defense relating to that issue;
- barring a witness from testifying concerning that issue;
- entering a default judgment against the offending party or dismissing the offending party's action with or without prejudice as to any claims or defenses asserted in any pleading to which that issue is material;
- striking any portion of the offending party's pleadings relating to that issue, and if appropriate, entering judgment as to that issue; and
- 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).

## **M. PROTECTIVE ORDERS**

Pursuant to 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).

## **VIII. SETTLEMENT: PAYMENT DEADLINES**

The payment of settlements in personal injury, property damage, wrongful death and tort actions that involve a claim for money damages is governed by 735 ILCS § 5/2-2301.

Section 2-2301 requires a settling defendant to tender a release to the plaintiff within 14 days of written confirmation of the settlement. *Id.* § 5/2-2301(a). Once the plaintiff tenders the executed release and any necessary lien protection documentation, the defendant has 30 days to pay the amount of the settlement in full. *Id.* § 5/2-2301(d). If the defendant does not pay the settlement within 30 days, the court may enter judgment against the defendant for the amount set forth in the release and order the defendant to pay the costs incurred in obtaining the judgment as well as interest. *Id.* § 5/2-2301(e).

If the settlement requires court approval, the 30-day period for payment will not begin until the plaintiff tenders to the defendant a copy of the court order approving the settlement. *See id.* §§ 5/2-2301(b), (d). The statute also provides instructions for the plaintiff on how to protect third-party rights of recovery or subrogation through lien protection documentation. *See id.* § 5/2-2301(c).

## **IX. TRIAL**

### **A. CONTINUANCES**

Pursuant to 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), (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 there was not enough time 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 seven 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 \$0.20 per mile for travel to and from a deposition or trial. 705 ILCS § 35/4.3. Under comment 3 to Rule 3.4 of the Illinois Rules of Professional Conduct, it is also permissible to compensate a fact witness for “reasonable expenses incurred in providing evidence,” such as “reimbursement for reasonable charges for travel to the place of a deposition or hearing or to the place of consultation with the lawyer,” reimbursement for “reasonable related out-of-pocket costs, such as for hotel, meals or child care,” and “compensation for the reasonable value of time spent attending a deposition or hearing or in consulting with the lawyer.”

## **C. JURY SELECTION**

### **i. Order of Proceeding**

Unless otherwise agreed by all parties or ordered by the court, jury selection proceeds in the same order as the pleadings. Ill. S. Ct. R. 233. In typical cases, therefore, plaintiffs act first. However, “[i]n consolidated cases, third-party proceedings, and all other cases not otherwise provided for,” the court determines the order. *Id.*

### **ii. Juror Qualifications**

In order to serve on a jury, individuals must satisfy four criteria. They must be (1) inhabitants of the county, (2) of the age of 18 years or upwards, (3) “[f]ree from all legal exception, of fair character, or approved integrity, of sound judgment, well informed, and able to understand the English language, whether spoken or written form or interpreted into sign language,” and (4) citizens of the United States of America. 705 ILCS § 305/2.

### iii. Challenges

Parties can attempt to have prospective jurors discharged by challenging them for cause or by using their peremptory challenges. A challenge for cause calls into question the qualifications of a juror. See 735 ILCS § 5/2-1105.1. For example, if a party believes that a prospective juror is younger than 18 years of age, they may submit a challenge for cause and explain the reason that they believe that the individual is not qualified to serve. In contrast, peremptory challenges typically result in the discharge of prospective jurors *without* any explanation by the party submitting the challenge.

In cases with one party on each side, each side is entitled to five peremptory challenges. 735 ILCS § 5/2-1106(a). However, when there is more than one party on each side, the court may allow each side up to three additional challenges. *Id.* The parties should agree on the allocation of peremptory challenges, but if they cannot, the court will do so for them. *Id.* Each side must end with an equal number of peremptory challenges. *Id.*

Although parties typically do not need to explain the reasoning behind their peremptory challenges, there are some reasons for which potential jurors cannot be excluded. Individuals may not be excluded from serving on juries on the basis of race, color, sex, sexual orientation, national origin, religion or economic status.<sup>3</sup> 705 ILCS § 305/2. If it appears that a party is attempting to discharge prospective jurors on an impermissible basis, the opposing party can raise an objection under *Batson v. Kentucky*, 476 U.S. 79 (1986). The trial court may also raise a *Batson* challenge. See, e.g., *People v. Rivera*, 221 Ill. 2d 481, 504 (2006) (holding that courts have standing to “raise *Batson* issues *sua sponte*”). A *Batson* challenge triggers “a methodical three-step approach”:

First, the moving party must meet his burden of making a *prima facie* showing that the nonmoving party exercised its peremptory challenge on the basis of race. . . . If a *prima facie* case is made, the process moves to the second step, where the burden then shifts to the nonmoving party to articulate a race-neutral explanation for excusing the venireperson. . . . Once the nonmoving party articulates its reasons for excusing the venireperson in question, the process moves to the third step, where the trial court must determine whether the moving party has carried his burden of establishing purposeful discrimination. . . . At the third step, the trial

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<sup>3</sup> 705 ILCS § 305/2 incorporates the definitions contained in 775 ILCS § 5/1-103 (Illinois Human Rights Act) to define “religion,” “sex,” “sexual orientation” and “national origin.” As such, religion “includes all aspects of religious observance and practice, as well as belief,” national origin means “the place in which a person or one of his or ancestors was born”; sex means “the status of being male or female”; and sexual orientation means “actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person’s designated sex at birth.” 775 ILCS § 5/1-103.

court evaluates the reasons provided by the nonmoving party as well as claims by the moving party that the proffered reasons are pretextual.

*Fleming v. Moswin*, 2012 IL App (1st) 103475-B, ¶¶ 35-36 (citing *Mack v. Anderson*, 371 Ill. App. 3d 36 (1st Dist. 2006)).

There are also timing restrictions on parties' use of peremptory challenges. "Once a juror has been accepted and sworn, neither party has the right to peremptorily challenge that juror." *People v. Peeples*, 205 Ill. 2d 480, 520 (2002). The court, however, "retains the right to dismiss a selected and sworn juror for cause." *Id.*

## **D. 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 use of evidence for a limited purpose, and "[o]n the substantive law applicable in the case," such as the elements of the claim. 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).

Rule 239(a) provides:

Whenever Illinois Pattern Jury Instructions (IPI), Civil, contains an instruction applicable in a civil case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the IPI instruction shall be used, unless the court determines that it does not accurately state the law. The most current version of the IPI Civil instructions is maintained on the Supreme Court website. Whenever IPI does not contain an instruction on a subject on which the court determines that the jury should be instructed, the instruction given in that subject should be simple, brief, impartial, and free from argument.

Ill. S. Ct. R. 239(a).

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(c). 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. Ill. S. Ct. R. 239(b). 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 give those additional instructions 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**

Rule 239 instructs courts to use the 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**

In actions on account of bodily injury or physical damage to property based on negligence, or product liability based on strict liability, the court should instruct the jury that the defendant will not be held liable if the jury finds the plaintiff’s contributory fault is more than 50%. 735 ILCS § 5/2-1107.1; *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997) (invalidating 1995 amendment to this section).

## **E. SPECIAL INTERROGATORIES**

In Illinois state court, general verdicts are required unless “the nature of the case requires otherwise.” 735 ILCS § 5/2-1108. Within the discretion of the court, the jury may be asked to make specific findings on any material question(s) of fact. *Id.* Any party may request special interrogatories. *Id.* If the jury’s answer to a special interrogatory is inconsistent with the general verdict, the court shall direct the jury to

further consider its answers and verdict. *Id.* If, in the discretion of the court, the jury is unable to render a general verdict consistent with any special finding, the court shall order a new trial. *Id.* During closing arguments, the parties shall be allowed to explain to the jury what may result if the general verdict is inconsistent with any special finding. *Id.*

Special interrogatories do not need to include all material issues of fact, and they should 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 quotation marks and 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 whether to submit a special interrogatory to the jury may be reviewed on appeal for an abuse of discretion. *Id.*

## **F. JUROR QUESTIONS TO WITNESSES**

Rule 243 allows the court to permit jurors in civil cases to submit their own written questions for witnesses. See A. Vail & T. Cartwright, "Using Juror Questions During Trial to Your Advantage: Practice Tips for Illinois Supreme Court Rule 243," 101 IJ 624 (Dec. 2013). After the attorneys have finished questioning a witness, the judge will determine whether the jury will be allowed to question the witness. Ill. S. Ct. R. 243(b). If so, the jury will be asked to submit any questions they have for the witness in writing. *Id.* The jurors may not discuss the questions before submitting them. *Id.*

The bailiff will collect the questions and give them to the judge, who will enter them into the record. *Id.* Outside the presence of the jury, counsel will have the opportunity to object to the questions. Ill. S. Ct. R. 243(c). The judge will rule on any

objections and each question will be either admitted, modified or excluded. *Id.* The “limitations on direct examination set forth in Rule 213(g) apply to juror submitted questions.” *Id.* Once the jury has returned, the judge will ask the witness each question and provide counsel an opportunity to ask follow-up questions limited to the scope of the new testimony. Ill. S. Ct. R. 243(d). The court should also advise the jurors that they should not be concerned with why some questions are modified or excluded and that such measures are taken by the court in accordance with the rules of evidence. Ill. S. Ct. R. 243(e).

## **G. MOTION FOR DIRECTED FINDING OR JUDGMENT**

In a non-jury case, at the close of the plaintiff’s case, a defendant may move for a finding or judgment in his or her favor. See 735 ILCS § 5/2-1110. In ruling on a motion for a directed finding or judgment, courts engage in a two-step analysis. First, the court must determine whether the plaintiff presented a *prima facie* case by producing some evidence on every element necessary to his or her cause of action. See *Indeck Energy Servs., Inc. v. DePodesta*, 2019 IL App (2d) 190043, ¶ 57. If not, the trial court must grant the motion. *Id.* If the plaintiff has established the elements of a *prima facie* case, then the trial court must consider and weigh the totality of the evidence, including evidence favorable to the defendant. See *Law Offices of Colleen M. McLaughlin v. First Star Fin. Corp.*, 2011 IL App (1st) 101849, ¶ 39. After weighing all of the evidence, the court then determines, applying the standard of proof required for the underlying cause of action, whether sufficient evidence remains to establish the plaintiff’s *prima facie* case. *Id.* If sufficient evidence exists for the plaintiff’s *prima facie* case to survive, the trial court should deny the defendant’s motion and continue with trial. See *Indeck Energy*, 2019 IL App (2d) 190043, ¶ 57. Where the evidence is insufficient, the trial court should grant the motion and enter a finding or judgment in the defendant’s favor. *Id.*

## **X. JUDGMENT**

### **A. MOTIONS TO VACATE**

#### **i. Within 30 Days of a Final Default Judgment**

Within 30 days, Section 2-1301(e) of the Code of Civil Procedure allows a party to move the court to set aside a default order or judgment “upon any terms and conditions that shall be reasonable.” 735 ILCS § 5/2-1301(e); see also *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 12 (relief under Section 2-1301(e) is available from a nonfinal order of default or default judgment within 30 days of its entry). The standard for Section 2-1301 motions is “whether substantial justice is being done between the parties” and, based on “all of the events leading up to judgment” what is “just and proper based on the facts of the case.” *Larson v. Pedersen*, 349 Ill. App. 3d 203, 207-08 (2d Dist. 2004).

## ii. After 30 Days of a Final Order or Judgment

When more than 30 days but less than two 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), (c). 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.

This two-year limit is inapplicable to motions to vacate a void judgment, which may be brought under Section 2-1401 at any time. See 725 ILCS § 5/2-1401(f); *Sarkissian v. Chi. Bd. of Educ.*, 201 Ill. 2d 95, 104 (2002). In a motion to vacate a void judgment, "the allegation that judgment or order is void substitutes for and negates the need to allege a meritorious defense and due diligence." *Id.* A judgment is void only if the court lacked jurisdiction. *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶¶ 27, 38-39. Where the court possesses jurisdiction, the failure to comply with a statutory requirement or prerequisite does not result in a void order, but rather results in a voidable judgment. *Id.* ¶¶ 27, 37.

## iii. Computing the Two-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 IL 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. Philip Morris, Inc.*, 406 Ill. App. 3d 1228 (5th 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. Philip Morris, Inc.*, 2011 IL 112067 (Garman, J., dissenting on denial of petition for leave to appeal). 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.* ¶¶ 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.* If the court enters judgment pursuant to a post-trial motion, the party against whom the court rules then has 30 days in which to file its own 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.* § 5/2-1202(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 need 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 § 1203(a). *Vanderplow v. Krych*, 332 Ill. App. 3d 51, 53 (1st Dist. 2002).

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 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).

## **XI. APPEALS**

### **A. Types of Appeals and Time for Filing**

#### **i. Appeal as of Right 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). The notice of appeal may be filed by any party or any attorney representing the party, regardless of whether the attorney filed an appearance in the circuit court case being appealed. *Id.*

#### **ii. Immediate Appeal to Illinois Supreme Court**

Pursuant to 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 Rule 21(d), 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.*

If a party files a post-judgment motion, and the court strikes the post-judgment motion rather than granting or denying it, the 30-day time for appeal begins running when the court enters its order striking the motion. The only way to seek reconsideration of the post-judgment motion is to file, within 30 days of the strike order, a motion to vacate the striking order and to reinstate the post-judgment motion. *Won v. Grant Park 2, LLC*, 2013 IL App (1st) 122523, ¶ 29. Other motions—such as a motion to set a hearing or a motion for reconsideration—will have no effect, and the court will lose jurisdiction after 30 days unless a motion to vacate the striking order or a notice of appeal is filed. See *id.* ¶¶ 24-26, 29.

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

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 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 or allocation of parental responsibilities 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 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 appoint a receiver or sequestrator
- giving 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 Rule 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* or allows or denies a motion to transfer a case to another county within the State on such grounds;
- denies a motion to dismiss on the grounds that the defendant has done nothing which would subject the defendant to the jurisdiction of an Illinois court;
- grants or 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;
- affects the care and custody of or the allocation of parental responsibilities for unemancipated minors or the relocation (formerly known as removal) of unemancipated minors;
- remands the proceeding for a hearing *de novo* before an administrative agency;
- grants a motion to disqualify an attorney;
- denies or grants certification of a class action; or
- denies a motion to dispose under the Citizen Participation Act (735 ILCS 110/1 *et seq.*).

## **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). A party may appeal by filing an application for leave to appeal within 30 days of the trial court’s order or making of the prescribed statement. Ill. S. Ct. R. 308(b). 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. Ill. S. Ct. R. 308(d).

## **vii. Appealing a Temporary Restraining Order**

Under 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)(1). The petition should be filed with the record, including the notice of interlocutory appeal, the TRO or the proposed TRO, the complaint, the motion requesting 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. Ill. S. Ct. R. 307(d)(2). 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. Ill. S. Ct. R. 307(d)(3). The appellate court will render a decision within five business days of the filing of the petition. Ill. S. Ct. R. 307(d)(4). The appellate court may vary these rules in its discretion. Ill. S. Ct. R. 307(d)(5).

## **B. Filing the Appeal: Additional Required Documents**

After filing a timely notice of appeal, the appellant must file two primary documents: the docketing statement and the record on appeal. The Rules impose several requirements for filing these documents, but counsel should make sure to check the appellate court’s local rules as well. Additionally, the appellant must, within 7 days of filing the notice of appeal, file a notice of filing in the reviewing court and serve the notice of appeal upon every other party. Ill. S. Ct. R. 303(c). Proof of service shall be filed with the notice. *Id.*

### **i. Docketing Statement**

Within 14 days after filing the notice of appeal, the appellant must file a docketing statement. Ill. S. Ct. R. 312(a). For permissive interlocutory appeals under Rule 306 or certified questions under Rule 308, the docketing statement must be filed along with the petition or application for leave to appeal, respectively. *Id.* For interlocutory appeals as of right, the docketing statement must be filed within 7 days from the filing of the notice of appeal. *Id.* The docketing statement must be prepared by utilizing or substantially adopting the form provided in the Appendix to the Rules. *Id.* The docketing statement should be accompanied by the required filing fees if they have not already been paid. Ill. S. Ct. R. 312(b). With the docketing statement and filing fee, the appellant shall include a certification attaching any written requests for preparation of the record (which should indicate whether documents filed under seal are to remain sealed). *Id.* To the extent the appellant already has possession of certified copies of all transcripts to be used on appeal, the appellant may also include a file-stamped notice of filing transcripts with the circuit court. See Ill. S. Ct. R. 323.

### **ii. The Record on Appeal**

In an appeal as of right after entry of final judgment, the record on appeal must generally be filed within 63 days after the filing of the notice of appeal. Ill. S. Ct. R. 326. Special rules for filing the record in interlocutory appeals and certified questions are provided in Rules 306, 307, and 308.

The clerk of the trial court or administrative agency shall prepare and certify the record on appeal. Ill. S. Ct. R. 324. The record must include the notice of appeal; the judgment appealed from; the entire common law record, including filings, orders, and exhibits; and any report of proceedings requested by the appellant. Ill. S. Ct. R. 321, 324. Rule 324 provides specific guidelines for preparing and certifying the record on appeal, including that the record comply with the Standards and Requirements for Electronic Filing the Record on Appeal.

The report of proceedings consists of portions of the transcript that the appellant wishes to include in the record on appeal. Within the time for filing the docketing statement, the appellant must submit a written request to the court reporting personnel to prepare a transcript of the selected portions. Ill. S. Ct. R. 323(a). The appellee may also designate additional portions of the proceedings to be transcribed. *Id.*

After the requisite fees have been paid and the record has been prepared, the clerk of the trial court shall file the record on appeal with the reviewing court. Ill. S. Ct. R. 325.

### **C. Briefs**

The appellant's opening brief is due within 35 days of the filing of the record on appeal (or certificate in lieu thereof). Ill. S. Ct. R. 343(a). The appellee's response brief is due within 35 days of the due date of the appellant's brief, and the appellant's reply within 14 days from the due date of the appellee's brief. *Id.* A cross-appellant should

file a single brief as both appellee and cross-appellant at the time the appellee's brief is due. Ill. S. Ct. R. 343(b).

Rule 341 provides detailed requirements for the format and length of briefs; in general, the appellant and appellee's briefs are limited to 50 pages, and the reply brief is limited to 20 pages. Ill. S. Ct. R. 341(b)(1). Alternatively, the appellant and appellee's briefs are limited to no more than 15,000 words, and the reply brief to 6,000 words. *Id.*

#### **D. Oral Argument**

A request for oral argument shall be made at the bottom of the cover page on the party's brief. Ill. S. Ct. R. 352(a). Oral arguments are limited to 20 minutes for the main argument of each side and 10 minutes for the appellant's rebuttal. Ill. S. Ct. R. 352(b).

#### **E. Appealing an Appellate Court Decision to the Illinois Supreme Court**

In any case not appealable from an appellate court as a matter of right, a party must file a petition for leave to appeal to the Illinois Supreme Court. Ill. S. Ct. R. 315(a). Such a petition must be filed within 35 days after either the judgment or a subsequent order denying a petition for rehearing. Ill. S. Ct. R. 315(b).

A party can appeal an appellate court decision to the Illinois Supreme Court as a matter of right in cases in which a U.S. or Illinois statute is held invalid or in which a question under the U.S. or Illinois Constitution arises for the first time. Ill. S. Ct. R. 317. Such an appeal as of right is initiated by filing a petition for leave to appeal styled as a "Petition for Appeal as a Matter of Right." *Id.* Leave to appeal can be sought in the alternative, but such a request must be included in the same petition. *Id.*

An appeal shall also lie upon the certification of an appellate court that a case it decided involves a question of such importance that it should be decided by the Illinois Supreme Court. Ill. S. Ct. R. 316.