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Bench & Bar

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Stepping Up May Need to Step Out

BY MICHAEL G. CORTINA

We see it on a daily basis in courtrooms throughout the state. A case is called, and an attorney walks to the bench, states her name, and informs the court that she is "stepping up" for the attorney of record for one reason or another. The step-up attorney does not have an appearance on file, but she is representing the party before the court in whatever the proceedings are for that day. While this is a very common practice, should it even exist?

Causation

The attorneys who have the engagement with the clients take their duty to be in court quite seriously and spend a great deal of time finding coverage so that their cases move forward. The last thing that they want is for their cases to be dismissed for want of prosecution, so they insure that a licensed attorney will appear in court for the client's case.

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Relief at Last

BY CHIEF JUSTICE LLOYD A. KARMEIER

Each July since becoming Chief Justice, I have had the privilege of attending the annual meeting of the Conference of Chief Justices, an organization founded in 1949 to provide an opportunity for the highest judicial officers of U.S. states and territories to meet and discuss matters of importance to their judicial systems. At these meetings, it is not at all unusual to hear representatives from other jurisdictions complain how dysfunctional their courts have become. Fortunately, that has not been a problem here. Now, and throughout my tenure on the Illinois Supreme Court, its members have carried out their Constitutional responsibilities in a collegial, cooperative and completely professional way. If any dysfunction has plagued us, it has come from the other branches of government.

Regular readers of this column will know what I mean. Year in and year out, conflict between the executive branch and the General Assembly exacerbated the state's financial woes and sent the courts scrambling to find new strategies for meeting their obligations under the law. At one point, the state went nearly 800 days without a full budget. For five straight years, the Supreme Court's appropriation level remained flat as the expenses we were required to meet continued to mount. We were rapidly approaching the breaking point, especially with respect to reimbursement for probation services.

Fortunately, there has been a dramatic change. This year – for the first time – I was able to report to my colleagues at the Conference of Chief Justices that Illinois

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high-volume attorneys are generally the ones that utilize step-up counsel. There are only so many of these attorneys to go around, and they are simply unable to be in two places at once. Consumer collection attorneys find themselves needing others to appear in court for them because of the venue restrictions in the Fair Debt Collection Practices Act; foreclosure firms must sue in the county where the real estate is located under Illinois' venue statute; multiple cases on the same date and time, but in multiple counties, happens quite often. These are just some of the reasons why step-up attorneys are used. Using step-up counsel is not done out of laziness or lack of concern for the case; it is just the opposite—attorneys work to find coverage and use step-up attorneys in order to insure that their cases are able to move through the system as efficiently as possible even though they are not able to attend that particular hearing.

Application of Rules

Rule 1.3 of the Rules of Professional Conduct requires attorneys to "act with reasonable diligence and promptness in representing a client." The very first comment to Rule 1.3 states, *inter alia*, "[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." By hiring step-up counsel, an attorney is doing what she can to comply with Rule 1.3. The attorney is circumventing a personal inconvenience—the location of the court and the cost of hiring another attorney to step-up—in order to insure that the client's case is diligently and promptly pursued. In other words, the attorney maintains her duty to the client despite the inconvenience and cost of finding and paying for another attorney to cover the case when she cannot be present.

Illinois Supreme Court Rule 13(c)(1), however, states: "*Addressing the Court*. An attorney shall file a written appearance or other pleading before addressing the court unless the attorney is presenting a motion for leave to appear by intervention or otherwise." It seems quite clear that stepping up for another attorney when the step-up counsel has no relationship to the client or the case, or have an appearance on file in the case, is not an action contemplated by this Rule. Simply put, this rule requires that an attorney addressing the court must have an appearance on file for the party that the attorney is representing that day. However, there are other parts of Rule 13(c) that may be of assistance in this analysis.

Illinois Supreme Court Rule 13(c)(6),[1] enacted in 2013, allows for attorneys to appear for clients in a "limited scope." Under this Rule, attorneys no longer have all-or-nothing appearances, and can appear for discrete parts of a case. An attorney can appear for a client for something as simple as a status hearing held on a particular date, or for something as broad as defending against counterclaims filed by defendants. While the Illinois Supreme Court has provided for attorneys to appear on behalf of clients in civil cases in a limited fashion, step-up attorneys rarely, if ever, file limited scope appearances. The likely reason that limited scope appearances are not often used by step-up counsel is that they do not have a relationship with the client, but only have a relationship with the attorney that represents the client. Rule 13(c)(6) requires that the limited scope attorney have a relationship with the *client*, not the client's attorney. If step-up attorneys do not have a written agreement with the party being represented, which is a requirement for a limited scope appearance under Rule 13(c)(6), they are unable to file a limited scope appearance. Thus, the paucity of their use.

Effects of Strict Reading

What would happen to solo practitioners whose business model anticipates the use of step-up attorneys for their high-volume practice if such

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counsel were not allowed to appear for them in court? For example, many firms that focus on real estate foreclosures have only a handful of attorneys on staff and rely heavily on step-up attorneys to handle routine matters such as status dates, summons return dates, or obtaining briefing schedules. The primary firms often only appear in court for contested or dispositive matters and use step-up counsel for everything else. If such a firm is based in Chicago, it is just not cost effective to drive or even fly to the opposite end of the state for a status hearing on one case. What makes matters worse for foreclosure attorneys is that many of the larger loan servicers will only give foreclosure cases to firms that can cover the entire state, and most law firms do not have enough offices, attorneys, or staff to have their own attorneys appear in every county of Illinois at any given time. It would seem that a strict reading of Rule 13(c)(1) would effectively dismantle small firms with a high-volume practice.

There are also a number of attorneys that readily appear in court as step-up attorneys and make a decent living off of simply appearing in court for another attorney that cannot make it on any particular day. A strict reading of Rule 13(c)(1) would likely strike a massive blow to the business practices of these step-up attorneys.

Alternatives

We are in the 21st century. Appearing telephonically in federal court for routine matters has been available for several years. Many state courtrooms utilize third-party businesses to allow attorneys to appear by phone for many parts of a case. The downsides of appearing telephonically are that it must be arranged ahead of time, and it costs money each time an attorney utilizes the call-in service. Regardless of the needed planning and the required cost, if all courtrooms in the state utilized some form of remote appearance technology, then step-up counsel may not be needed. This would not cure the problem of being required to appear in multiple courthouses at the same time, or being required to appear in person for contested matters, but it would eliminate part of the impetus that drives the hiring of step-up attorneys.

Another alternative is a bit more drastic, but also seems to be what was contemplated when the rules for appearing in court were drafted—local attorneys should be used for local cases. An attorney in Cook County can either hire local counsel in a distant county so that local counsel can file an appearance and appear in court, or the attorney could refuse to take a case if she cannot appear for it on her own and does not wish to hire local counsel. This approach would disrupt the business models of many attorneys that rely on step-up counsel and could even force companies that require their firms to appear across the state to re-think this requirement. That is, however, what the rules seem to require.

Conclusion

It is seldom harmful if an attorney helps another by stepping-up on a case for the attorney who is unable to appear herself for whatever reason. Step-up counsel is an integral part of the business model of many small firms that operate high-volume practices, and also ensures that a client's case is never dismissed for want of prosecution. However, Rule 13(c)(1) makes it very clear that any attorney that appears for a client in a civil matter must have an appearance on file. Technology is available that would allow attorneys to appear remotely, and courts and counsel alike should utilize this technology to the greatest extent possible. Unless the Illinois Supreme Court Rules change to allow step-up counsel, attorneys should consider revising their business models to adopt the utilization of technology or hire local counsel that can file an appearance in the case. Courts should also implement the use of cost-effective technology as much as possible since we are, after all, in the computer age. ■

1. "*Limited Scope Appearance*. An attorney may make a limited scope appearance on behalf of a party in a civil proceeding pursuant to Rule of Professional Conduct 1.2(c) when the attorney has entered into a written agreement with that party to provide limited scope representation. The attorney shall file a Notice of Limited Scope Appearance, prepared by utilizing, or substantially adopting the appearance and context of, the form provided in the Article I Forms Appendix, identifying each aspect of the proceeding to which the limited scope appearance pertains. An attorney may file a Notice of Limited Scope Appearance more than once in a case. An attorney must file a new Notice of Limited Scope Appearance before any additional aspect of the proceeding in which the attorney intends to appear. A party shall not be required to pay more than one appearance fee in a case." IL Sup. Ct. R 13(c)(6) (West 2019).

Relief at Last

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could not only boast of a functional court, but also of a government that was finally able to provide the judicial branch with a timely and workable budget. For Fiscal Year 2020, our appropriation from the General Revenue Fund was increased to $405,321,200, a figure that is $60.5 million higher than each of the previous five years.

While substantial, this long overdue increase is hardly a windfall. Rather than fund new initiatives, it will be used primarily to catch up on existing financial responsibilities that have continued to rise even as our budget remained stagnant. Most significant will be the change in our level of probation reimbursement, which had fallen far below statutory requirements. In the 2019 fiscal year, the allocation to probation was $82,825,500. This year, FY 2020, it will be $132,000,000, an increase of nearly 60%. At this new level, the court will once again be able to provide full funding for authorized probation officer positions and enable counties to establish some badly needed new positions.

The FY2020 appropriation will also provide sufficient resources for us to fund all judicial positions authorized by law, along with the statutorily-determined cost of living increases, assuming we continue the current austerity measure of holding vacancies open for 30 days, which we plan to do. We will likewise have adequate resources to meet

our payroll for non-judicial personnel; to maintain operational expenses for the Supreme Court, the five Appellate Districts, and the Administrative Office of the Illinois Courts; to continue reimbursement to circuit courts for use of certified and registered court interpreters; to reimburse counties for authorized appointments of counsel and expert witnesses pursuant to the Sexually Violent Persons Commitment Act; to pay annual stipends to each circuit court clerk as provided by law; and to cover projected expenses for continuation of the Court's critically-important e-filing initiative. With respect to that last item, I am pleased to report that an important milestone has just been reached. This summer, DuPage fully transitioned into the Court's e-FileIL system for civil cases, meaning that the system now includes every county in every circuit in the State of Illinois.

Our success in obtaining a workable budget after so many years was the result of a combination of many factors. General improvement in the State's economic condition certainly played a part. Of equal or greater importance, however, were the tireless efforts by officials and staff representing the court, the legislature and the Governor's office to share relevant information and to educate one another on the problems and priorities of their respective branches of government. With respect to the Judicial Branch, I would like to give special recognition to my colleagues on the Supreme Court; Marcia Meis, Director of our Administrative Office; Jim Morphew, our liaison to the Legislature; and the staff of the Administrative Office, particularly Rich Adkins, Kara McCaffrey and Chris Bonjean. Through your efforts we have taken a major step forward in our ongoing effort to provide the residents of this State with a judicial process that is efficient, effective and fair as guaranteed by the U.S. and Illinois Constitutions. Thanks to all of you.■

This article originally appeared in Illinois Courts Connect*, the monthly e-newsletter of the Illinois Supreme Court. It is republished here with permission.*

Recent Appointments and Retirements

1. Pursuant to its Constitutional authority, the supreme court has appointed the following to be circuit judge:
   - Sheree D. Henry, cook County Circuit, August 2, 2019
   - Emily Sutton, 9th Circuit, August 12, 2019

2. The circuit judges have appointed the following to be associate judge:
   - Joseph C. Pedersen, 23rd Circuit, August 1, 2019
   - Tyler R. Edmonds, 8th Circuit, August 4, 2019
   - Nigel D. Graham, 9th Circuit, August 26, 2019
   - Curtis S. Lane, 9th Circuit, August 26, 2019
   - Veronica Armouti, 3rd Circuit, August 30, 2019
   - Evan Lee Owens, 2nd Circuit, August 30, 2019

3. The following judges have retired:
   - Hon. Timothy R. Neubauer, Associate Judge, 2nd Circuit, August 3, 2019
   - Hon. Mark A. Drummond, Circuit Judge, 8th Circuit, August 4, 2019
   - Hon. Peter Flynn, Cook County Circuit, Third Subcircuit, August 31, 2019
   - Hon. K. Patrick Yarbrough, 17th Circuit, August 31, 2019■