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Illinois civil procedure oddities potpourri

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Knowing and understanding the Code of Civil Procedure, the Supreme Court Rules, the applicable local rules and the case law interpreting the rules and how they interact is critical to effectively practicing law.

As the Illinois Supreme Court stated in *Bright v. Dicke*, 166 Ill.2d 204, 210 (1995): "the rules of court we have promulgated are not aspirational. They are not suggestions. They have the force of law, and the presumption must be that they will be obeyed and enforced as written." There is no reason to believe that the same does not apply to the Code of Civil Procedure or to the local rules.

In law school, a professor suggested reviewing a rule of civil procedure and a rule of professional conduct every morning as a way to remind one's self of the rules. Not a bad suggestion. The rules, however, sometimes play out in interesting and unexpected ways and raise questions that, in some cases, have not yet been answered. Below are some of those questions.

Is a counterclaim a proper method of joinder, such as with a class action? Under 735 ILCS 5/2-608 a defendant can bring claims against a plaintiff or a defendant by counterclaim. The rule speaks of claims a defendant has, but it does not speak of parties who have not already been named as being able to be joined in a class. Accordingly, though class action counterclaims are filed, it is not at all clear that it is proper.

In a similar vein, why are all cross-claims (that is claims between defendants) called counterclaims under 735 ILCS 5/2-608(a)? The rule acknowledges the existence of cross claims and even uses the term, but then says they will still be called counterclaims.

Illinois makes a distinction between orders of default and default judgments, where a party is merely in default, that party admits the allegations against them, though those admissions are not binding on the other defendants. *Universal Cas. Co. v. Lopez*, 376 Ill.App.3d 459, 465 (1st Dist. 2007); *Heman v. Jefferson*, 136 Ill.App.3d 745, 753 (4th Dist. 1985). Can a defaulted party be deposed by a non-defaulted co-defendant in a case and thus have the opportunity to contradict what that party has admitted by defaulting? If so, what is the point of an order of default if there is no material effect in the litigation of that party having admitted all of the allegations of the complaint?

A corollary to that point is this: if a defendant who has been defaulted has not admitted the allegations of the complaint sufficiently to bind them such that they can be deposed, can the defaulted party be served with requests to admit and have those facts deemed admitted if they are not answered? There is no doubt that admissions from a request to admit are admissible as evidence against all parties, including those who did not default.

Rule 191(b) is the means by which a party opposing a dispositive motion can take the initial step in resisting the motion by requesting discovery. As discussed in this space on July 15, the rule requires that the affiant set forth what the affiant expect the person or persons to be deposed to testify to. But can a Rule 191(b)

affiant contend, as a basis to seek discovery, that the affiant in support of the motion is going to testify at deposition contrary to the averments in the affidavit supporting the motion?

Under 735 ILCS 5/2-1005, a defendant may file a motion for summary judgment at any time. For the purposes of a counterclaim, is the plaintiff a defendant? And if so, can a counter-defendant limit discovery to the issues pursuant to Rule 191(b) based upon the fact that not all parties have been served and discovery cannot be conducted otherwise pursuant to Rule 201(d) (which does not allow any discovery to proceed until the time for all parties to appear has expired)?

Moving beyond the rules (but only slightly), the secretary of state has passed an administrative rule stating that he will not accept service of process outside of those areas specifically enumerated by the General Assembly. Ill. Admin. Code tit. 2 Sec. 552.10 (2019). This rule attempts to overrule the ability of a judge to appoint the secretary as agent of service of process consistent with due process under 735 ILCS 5/2-203.1 and is in contradiction of the plain language of the statute and the cases interpreting it. *Sutton v. Ekong*, 2013 IL App (1st) 121975, Para. 18; *Silverberg v. Haji*, 2015 IL App (1st) 141321, Para. 62-63. This would seem to be a usurpation of the separation of powers provided under the Illinois Constitution for the General Assembly to make the law and the courts to interpret it. Ill. Const. 1970, Article II, sec. 1.

Procedure often has substantive effect on the course and outcome of the litigation. Thorough knowledge of procedure can sometimes be used to advance a client's position. In several places, the Illinois Supreme Court Rules and the Code of Civil Procedure make clear that the judge's role is to apply those rules to do "justice between the parties." Supreme Court Rules 213 and 218 and 735 ILCS 5/2-603. But does that proviso only apply to the rules in which that statement is made? Doubtful.
