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A procedural recipe for change: How you too can change precedent

At the time of this writing, millions are flocking to the polls to elect our next president. Both candidates promised change, and so change we might receive.

Change in the common law is possible too. The fight for change is a daunting task as there are certainly many barriers and speed bumps one encounters along the way. But rest assured that Illinois law is elastic enough for change-makers to maneuver.

Circuit courts must obey decisions of the appellate court. *Jachim v. Townsley*, 249 Ill. App. 3d 878, 882 (2nd Dist. 1993). If the subject appellate decision is on your side, you are in luck, and you will win your issue. But just as often the binding case will be against you. And it is at these times you can fight for change, and follow the subtle recipe that Illinois law has revealed.

There are five ingredients.

First, Rule 137 gives you the permission to seek change in the law. Subsection (a) buries the permission in a rule that prohibits bad lawyering. "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, information and belief formed after reasonable inquiry it 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, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Ill. Sup. Ct. R. 137 (2016).

It is a bit funny that the first ingredient is buried in a rule that promises punishment if your legal arguments are not well-tethered. But there it is nonetheless — you can make "good-faith argument for the ... reversal of existing law." Ill. Sup. Ct. R. 137 (2016). The vast majority of attorneys find Rule 137 useful to their practice for myriad other reasons, but those eight words are the Supreme Court's official blessing to fight to change existing common law.

Second, understand that arguments not made in the trial court are waived on appeal. Stop and process that for a moment. Rule 137 lets you argue for reversal of existing law, but those arguments must be first made in the circuit court, where you are destined to lose. See *Jachim*, 249 Ill. App. 3d at 882.

This is popularly understood as "preserving the issue for appeal" I suppose, but do not forget this vital ingredient. You must first ask the circuit court to reverse existing law — something it cannot do, before you can try to change the law later on appeal. See *People v. Jackson*, 199 Ill. 2d 286 (2002) ("Because defendant waived her *Apprendi* challenge, we need not reach the merits of this argument, nor need we address the state's arguments that any *Apprendi* error was harmless, or that *Apprendi* was wrongly decided").

Third, the Supreme Court has signaled that a good-faith attempt at reversing existing common law is an extraordinary enough justification for interlocutory appeal.

"If a trial judge entertains genuine doubt about the continued vitality of a reviewing court decision, he may, if he wishes to expedite resolution of the issue in a complex or protracted case, rule in accordance with existing law and then enter the finding required by Rule 304 for an immediate appeal of a final judgment disposing of fewer than all the claims or all the parties in the matter, or certify the particular question for purposes of a permissive interlocutory appeal, as provided by our Rule 308 (134 Ill.2d Rules 304, 308). Because of our system of precedent, he may not, however, disregard binding authority." *State Farm Fire and Casualty Co. v. Yapejian*, 152 Ill. 2d 553 (1992).

This third ingredient tells you that your pleas to the circuit court to reverse existing law are not completely for naught. Rather, it appears that the more convincing you are to the circuit court that a binding appellate decision is phooey, the better shot you will have at getting the issue up on appeal.

THE PROCEDURAL THICKET

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You should press your case to the circuit court, and in the process you are hoping to convince the circuit court to "entertain[] genuine doubt about the continued vitality of a reviewing court decision."

If you can accomplish that, your time was well spent, and under *State Farm*, you can ask the court to make the appropriate findings to facilitate the interlocutory appeal, whether it be via Rule 304 or 308, straight to the appellate court.

The fourth ingredient is knowing that the appellate court is free to disregard its own decisions. *Mueller v. Board of Fire & Police Commissioners*, 267 Ill. App. 3d 726, 732 (2nd Dist.1994) ("The doctrine of stare decisis is not an inflexible rule requiring a reviewing court to blindly follow its own precedents"). See also *In re Application of County Treasurer*, 292 Ill. App. 3d 310, 315 (2nd Dist. 1997) (one appellate district is not bound by another district).

This is a very powerful rule to remember. No matter how old, or useful, or established a controlling appellate court decision seems to be, it is only one brave lawyer away from being neutralized by a successful appeal.

This means that neither opposing counsel nor the circuit court can tell you that an appeal would be fruitless, or a waste of time, or like running uphill.

Not a chance.

Your appeal is a chance to write on a blank slate. The issue on appeal will not be whether the circuit court was right or wrong, but whether the appellate decision in question was correctly decided. *Schramer v. Tiger Athletic Association of Aurora*, 351 Ill. App. 3d 1016 (2nd Dist. 2004) ("The question before us, therefore, is not whether *Widmer* was binding in the trial court, but whether it was correctly decided. As explained below, we conclude that it was not").

Sure you may not entirely reverse the appellate decision that stands in your way, *In re Marriage of Gutman*, 232 Ill.2d 145 (2008) ("A panel, division, or district of the appellate court has no authority to overrule another panel, division or district"), but if you convince the appellate court to go your way, you will win your case, leaving behind a a split of authority for all future cases. *Gutman*, 232 Ill. 2d at 145 ("The *Knoerr* panel created a conflict of authority by disagreeing with a decision from another panel of a court of equal stature. We conclude, therefore, that the appellate court decision we are reviewing remains in effect").

The fifth and final ingredient is that the Supreme Court is quite interested in resolving splits of authority in the appellate court. See Ill. R. 315 (2016) (indicating that one of the factors the Supreme Court considers when reviewing petitions for leave to appeal is "the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the appellate court").

The very fact that you stubbornly persuaded the circuit court and the appellate court to question the vitality of a binding appellate decision is the very reason why the Supreme Court will ask you to come to Springfield to talk it over.

Our next president will have a plan for change. I've given you mine. Keep these five ingredients in mind next time you need to change the common law in order to prevail under the common law.