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## Waters Dark and Deep: The Continuing Validity of the “Testing the Waters” Doctrine in Illinois

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# Waters Dark and Deep: The Continuing Validity of the “Testing the Waters” Doctrine in Illinois

Alex S. Moe\*

*Substitutions of judge in Illinois civil proceedings are characterized as a right, but that was not always the case. Under prior versions of the substitution statute, judges could deny a substitution request if the party seeking it had “tested the waters,” or had a chance to determine the judge’s opinion as to an aspect of the case’s merits. The modern substitution statute grants each party one substitution as of right, largely displacing the “testing the waters” doctrine. Our appellate courts today are split on the issue of whether the doctrine is still viable: while most apply it without questioning its validity, the Fourth District has rejected the doctrine as fully obsolete, holding that it serves no purpose to fulfill the letter or spirit of the modern substitution statute.*

*This Article proposes that the “testing the waters” doctrine, while uncommon today, still has a place in Illinois at the margins of equity, permitting courts to deny an otherwise proper substitution where a strict application of the statute would be abusive or unfair. The modern “testing the waters” doctrine can be applied in the same manner as it has been historically, but it has new relevance in today’s complex civil litigation. By looking to the totality of the circumstances surrounding a substitution, the doctrine gives courts a way to curb procedural abuses of the statute. Whatever its application, a modern doctrine should be narrowly applied, for reasons of practicality and public policy. Though “testing the waters” remains a niche doctrine, there still is, and should be, a place for it in Illinois civil proceedings.*

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\* The author is a judicial law clerk with the Circuit Court of Cook County and a recent graduate of Loyola University Chicago School of Law. The views expressed in this Article are the author’s and his alone, and should not be construed as endorsed by either the Judge whom he serves or the court. Special thanks to the staff of the *Loyola University Chicago Law Journal*, particularly Erica Bury and Ben Barnett, for this opportunity, and to David Griffin and Talar Khosdeghian for their invaluable assistance.

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## INTRODUCTION

Illinois has always permitted substitutions of judge in civil actions, and those substitutions have always been limited. The specific statutory wording has changed several times in the past two centuries, but the purpose of the substitution provisions has remained the same: to grant every party one substitution of judge, while at the same time preventing parties from exercising that right to "judge-shop," to delay proceedings,

or to otherwise abuse the procedural mechanism of substitution. Because the specific wording of the statute did change, but its purpose did *not*, Illinois courts developed the equitable “testing the waters” doctrine as a direct implementation of the statute’s purpose, allowing courts to bar substitutions of judge where to permit a substitution would be abusive or unfair.

In 1993, the substitution statute underwent its most significant revision as part of the statewide conversion to the Illinois Compiled Statutes. The text of the statute was altered and reorganized, but relatively few substantive changes were made. The 1993 amendments have nevertheless triggered a split in appellate authority regarding whether the “testing the waters” doctrine remains good law. The Fourth District has offered detailed criticism of the doctrine, concluding that it is no longer viable in light of the amendments. The remaining four appellate districts have recognized the Fourth District’s dissent, but have continued to apply the doctrine without significant discussion. The Illinois Supreme Court has recognized the split in authority, but has declined to resolve it.

This Article proposes that the “testing the waters” doctrine remains good law under the modern text of the substitution statute. It addresses and rejects the Fourth District’s detailed criticism, looking to the historical development of the substitution statute to conclude that the 1993 amendments were not intended to, and did not, affect the doctrine. It further reasons that the doctrine can not only continue to be applied in the same manner it has been for the better part of a century, but it can also provide a powerful tool with which to curb procedural abuse in the substitution context.

The Article concludes on a pragmatic note, advising caution in application of the doctrine. When in doubt, parties and judges alike should err in favor of permitting substitutions. But this deference cannot and should not be absolute, and though applications of the “testing the waters” doctrine may ultimately be few and far between, it still has an appropriate place in Illinois law.

### I. SUBSTITUTIONS PAST: THE VENUE ACT

Prior to 1993,<sup>1</sup> parties to Illinois civil litigation could seek a substitution of judge through the provision known as the Venue Act.<sup>2</sup>

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1. See *infra* note 84 and accompanying text (discussing implementation and effective date of statutory amendments).

2. Ill. Rev. Stat., ch. 110, ¶ 2-1001 (1991). The Venue Act was never formally labeled as

The Venue Act encompassed two primary elements: first, a change in the place of trial (i.e., “venue” in the modern sense of the word); and second, a substitution of judge.<sup>3</sup> Though the purposes were different, the procedural mechanism was the same: a petition for a change of venue, if granted, would result in a substitution of judge.<sup>4</sup>

The Venue Act itself dates back, in one form or another, nearly two hundred years, and over that has time remained remarkably unchanged.<sup>5</sup> In its most mature form, the Venue Act in 1991 provided, in relevant part:

Change of venue. (a) A change of venue in any civil action may be had in the following situations:

[ . . . ]

(2) Where any party or his or her attorney fears that he or she will not receive a fair trial in the court in which the action is pending, because the inhabitants of the county are or the judge is prejudiced against him

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such, but the name stuck for obvious reasons. *See, e.g.*, *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶ 32, 996 N.E.2d 1131, 1136 (discussing the name of the statutory section in question).

3. *See* Harry G. Fins, *The Illinois Code of Civil Procedure and the Task Ahead*, 34 DEPAUL L. REV. 859, 871 (1985) (discussing the counterintuitive naming conventions of the Venue Act); *see also* 735 ILL. COMP. STAT. 5/2-106 (2016) (stating the modern transfer act that provides for changes in venue); 735 ILL. COMP. STAT. 5/2-1001 (2016) (stating the modern substitution of judge provision).

4. This Article follows the pre-1993 convention of referring to substitutions of judge under the Venue Act as petitions for a “change of venue.” “Substitution of judge” refers to motions brought under the post-1993 substitution of judge statute.

5. The first enactment of the Venue Act by that name was February 23, 1819, as “An act directing the mode of changing the venue.” In 1827, it was fleshed out as a proper subheading (“Venue”) under the then-alphabetical Illinois Revised Statutes. Ill. Rev. Stat., Venue, § 1 (1827). In 1845, the text was substantially expanded, with the provisions expanded and broken out into distinct subsections. Ill. Rev. Stat., ch. 105 (1845). The 1845 revisions did not affect the operative portions of the text, and instead simply fleshed out existing text by codifying what presumably had been obvious—for example, where the 1827 Venue Act provided that a case would be transferred “to some [other] county,” the 1845 version dedicated a section to determining the destination court. *Compare* Ill. Rev. Stat., Venue, § 1 (1827), *with* Ill. Rev. Stat., ch. 105, § 2 (1845). The year 1865 saw minor revisions. Ill. Rev. Stat., Venue, § 1 (1865) (changes of venue from the superior court of Chicago taken to circuit court of Cook County, and vice versa). By 1874, venue was given a freestanding chapter, 146. Ill. Rev. Stat., ch. 146 (1874). The 1931 revisions tied the timeliness element to the court’s term. Ill. Rev. Stat., ch. 146, ¶¶ 5–7 (1931). The 1934 revisions removed the term language, tying timeliness to the date of service. Ill. Rev. Stat., ch. 146, ¶¶ 6–7 (1934). Changes in 1971 removed specific deadlines and pegged timeliness to the new “substantial issue” element. Ill. Rev. Stat., ch. 146, ¶ 3 (1971). The year 1977 saw the Venue Act incorporated into the chapter on court procedure generally. Ill. Rev. Stat., ch. 110, §§ 501–538 (1977). Shortly thereafter, the “Procedure” chapter was reformulated as the Illinois Code of Civil Procedure, renumbering the chapter along more logical lines. Ill. Rev. Stat., ch. 110, § 2-1001 (1981). The 1993 conversion to Illinois Compiled Statutes substantially modified the Venue Act, *see infra* note 84 (discussing the amendments), but retained the numbering, yielding the now-familiar 735 ILL. COMP. STAT. 5/2-1001 (2016).

or her, or his or her attorney, or the adverse party has an undue influence over the minds of the inhabitants. In any such situation the venue shall not be changed except upon application, as provided herein, or by consent of the parties.

(b) When a change of venue is granted it may be to some other judge in the same county or in some other convenient county, to which there is no valid objection.

(c) Every application for a change of venue by a party or his or her attorney shall be by petition, setting forth the cause of the application and praying for a change of venue, which petition shall be verified by the affidavit of the applicant. A petition for change of venue shall not be granted unless it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case, but if any ground for such change of venue occurs thereafter, a petition for change of venue may be presented based upon such ground.<sup>6</sup>

The Venue Act imposed two primary requirements on petitions for a change of venue: prejudice and timing. Prejudice was always a required element under the Venue Act. Timing was determined by, depending on the version of the Venue Act in question, some combination of specific statutory timing provisions, the equitable “testing the waters” doctrine,<sup>7</sup> and the “substantial issue” test.

### A. Alleging Prejudice

Initially, the primary requirement for a change of venue was that a party allege prejudice on the part of the judge presiding.<sup>8</sup> This may seem strange to the modern eye, but it tracks well with the development of venue provisions. “Venue,” in one form or another, has been around since well before the common law arrived in North America.<sup>9</sup>

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6. Ill. Rev. Stat., ch. 110, ¶ 2-1001 (1991). Omitted subsection (a)(1) concerned when a judge may have an interest in pending litigation, and is textually identical to the modern provision for the same, 735 ILL. COMP. STAT. 5/2-1001(a)(1) (2016). Ill. Rev. Stat., ch. 110, ¶ 2-1001(a)(1) (1991). Omitted section (d) concerned bias for county inhabitants; (e) concerned notice; (f) provided for equitable conditions on the transfer; (g)–(i) concerned expenses; (j), (k), and (n) concerned transcripts and court files; (l) provided for waiver of pre-transfer procedural defects; (m) provided special conditions for direct civil contempt proceedings; and (o) concerned the proper location for recordation of judgments. Ill. Rev. Stat., ch. 110, ¶ 2-1001 (1991). See generally *infra* note 87 (describing operative sections of the modern substitution statute).

7. See *infra* note 32 (discussing the naming convention of the doctrine).

8. E.g., Ill. Rev. Stat., Venue, § 1 (1827).

9. E.g., 4 Edw. IV c. 5 (1464), in 3 STATUTES AT LARGE, 379 (Danby Pickering ed., London, C. Eyre & A. Strahan 1762) (“And if it happen any Suit or Action to be taken [by the present ordinance], that the said Issue be triable and tried in the County, and of the Venue, where the said Seisin shall be had, and in none other place.”).

Changing venue primarily concerned itself with prejudice from the population; this was one of the driving motives for federal diversity jurisdiction.<sup>10</sup> Early county courts only had one judge, meaning that a change of venue and substitution of judge would be functionally identical.<sup>11</sup> Tacking the provisions to each other would have been quite logical.<sup>12</sup>

The problem with prejudice is one familiar to any party contemplating a substitution for cause: how does one tactfully tell a judge that he or she is biased when the judge believes otherwise?<sup>13</sup> Substitutions of judge *for cause* impose a very high burden on the pleading party, requiring “such deep-seated favoritism or antagonism that would make fair judgment impossible.”<sup>14</sup>

The Venue Act’s prejudice requirement resolved this difficulty by eliminating the delicate dance entirely: though a party was required to *allege* prejudice on the part of the judge, the party was not required to *prove* prejudice.<sup>15</sup> Indeed, courts were explicitly barred from

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10. 28 U.S.C. § 1332 (2012); *see also* Guaranty Trust Co. v. York, 326 U.S. 99, 111–12 (1945) (discussing the purpose of diversity jurisdiction as established by the Framers to circumvent fears of local bias).

11. ILL. CONST. of 1848, art. V, §§ 16–17 (noting that there shall be one county court per county, and one county judge per county court in Illinois); ILL. CONST. of 1870, art. VI, §§ 12–13 (creating circuit courts, one judge per court).

12. Such combined local bias-judicial bias venue provisions are found in other laws contemporary to Illinois’ 1819 Venue Act. *Accord, e.g.*, Act of Mar. 1, 1813, ch. VI (“An Act directing the mode of changing the Venue”), *reprinted in* THE LAWS OF INDIANA TERRITORY, 1809–16, at 306–08 (1934) (providing for change of venue where a party fears an unfair trial due to interest or prejudice of judge). Whereas Indiana started building a body of law for statehood prior to its admission in 1816, Illinois did so on a slightly later schedule, passing significant legislation immediately after its admission in 1819. *See generally* NATHANIEL POPE, LAWS OF THE TERRITORY OF ILLINOIS (1815) (no territorial provisions for venue).

13. Then as now, if a judge recognizes that he or she may be biased, the judge must recuse him or herself. ILL. SUP. CT. R. 63(c). Therefore, if a party seeks a substitution for cause, it is because the judge has *not* recused himself or herself, presumably believing that he or she is not, in fact, biased. Modern substitutions for cause sidestep this problem by requiring a petition for cause to be heard by a different judge. 735 ILL. COMP. STAT. 5/2-1001(a)(3) (2016); *see also In re Marriage of O’Brien*, 912 N.E.2d 729, 737–44, 393 Ill. App. 3d 364, 371–81 (2d Dist. 2009), *aff’d*, 2011 IL 109039, 958 N.E.2d 647 (describing procedure for substitutions for cause).

14. *Eychaner v. Gross*, 799 N.E.2d 1116, 1146–47, 202 Ill. 2d 228, 280–81 (2002); *accord Litesky v. United States*, 510 U.S. 540, 555 (1994) (denying disqualification for bias of federal district judge, and discussing judicial policy concerns underlying substantially the same issue).

15. *E.g.*, *Rosewood Corp. v. Transamerica Ins. Co.*, 311 N.E.2d 673, 675, 57 Ill. 2d 247, 250–51 (1974) (“The trial judge has no discretion as to whether or not the change will be granted and cannot inquire as to the truthfulness of the allegations of prejudice.”); *see also Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶ 33, 996 N.E.2d 1131, 1136–37 (discussing the irrational effects of judicial gloss of the Venue Act’s pleading requirements). Here and elsewhere, this Article refers to relatively modern case law to interpret significantly older statutes. This is largely intentional. Recent cases tend to be more accessible to the reader and provide more relevant

considering the truthfulness of the allegations or even whether they were brought in good faith<sup>16</sup>—a sort of deferent absolutism perhaps more appropriate in a criminal case than a civil one.<sup>17</sup> Thus, in a practical sense, the mere pleading of prejudice was sufficient to sustain a petition for change of venue; the fact of the *allegation* was all that mattered.<sup>18</sup>

This interpretation, while sensible on its face—if a judge truly were prejudiced, allowing that judge any discretion to deny the change of venue could be disastrous—ultimately rendered the operative core of the Venue Act meaningless. Because the allegation had to be made but not proven,<sup>19</sup> to call the system open to abuse would be generous.<sup>20</sup>

### B. Timing

The clearly stated purpose of the Venue Act was to guarantee parties a fair trial by establishing a mechanism through which an *unfair* trial could be avoided. It was not intended to grant a party an affirmative advantage in proceedings, and Illinois courts have long recognized that such use is, in fact, abuse.<sup>21</sup>

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context for their applications of the Venue Act. Most importantly, the underlying principles (e.g., the prejudice requirement) have remained essentially the same throughout the period of their validity.

16. *Hoffmann v. Hoffmann*, 239 N.E.2d 792, 794, 40 Ill. 2d 344, 347–48 (1968).

17. Indeed, the *Hoffmann* court quoted a criminal case at length for such absolutist language. *Id.* at 794, 40 Ill. 2d at 347 (citing *People v. Shiffman*, 182 N.E. 760, 762, 350 Ill. 243, 246 (1932)). *Hoffmann* was a family law matter concerning a divorce; *Shiffman* was a criminal case charging grand larceny. Though the mechanism might be the same, one might expect the policy considerations to differ between the two contexts. Even early versions of the Venue Act distinguished between civil and criminal petitions, though the mechanism for each was quite similar. Ill. Rev. Stat., Venue, §§ 1, 2 (1827).

18. Courts (and petitioners) generally analyze petitions for a change of venue as a two-tiered argument; if a petition does not meet the standards for a change of venue as of right, it converts to a petition for a change of venue for cause, with the attendant requirements. See, e.g., *In re Custody of Santos*, 422 N.E.2d 985, 986, 97 Ill. App. 3d 629, 630 (3d Dist. 1981) (noting that absent a showing of actual prejudice, post-substantial issue petition is untimely).

19. To be sure, petitions seeking a change of venue under the Venue Act needed to be verified, with attestation imposing requirements of truthfulness not necessarily read into unverified pleadings. Ill. Rev. Stat., ch. 110, ¶ 2-1001(c) (1991); see also Ill. Rev. Stat., ch. 110, ¶ 2-605(b) (1991) (providing for verification of pleadings); 735 ILL. COMP. STAT. 5/2-605 (2016) (modern provision for verification of pleadings); *Talbot v. Stanton*, 64 N.E.2d 388, 388–89, 327 Ill. App. 491, 492–93 (1st Dist. 1946) (affirming verification as a required element of a verified petition to change venue).

20. See *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶ 33, 996 N.E.2d 1131, 1136–37 (doing exactly that). Certainly it is unfair to imply that such allegations were baseless, or that petitioners regularly hoodwinked or exploited courts. That said, the fact that such a loophole existed was certainly disconcerting.

21. E.g., *Richards v. Greene*, 78 Ill. 525, 528 (1875) (“Such a practice would lead to endless

The Venue Act therefore provided for additional limitations addressing the timeliness of a petition to change venue. Timeliness started as a strict determination based on a date certain, but later versions shifted to a “substantial issue” threshold test. All the while, as the statutory language matured, courts developed the “testing the waters” doctrine as an equitable gap-filler.

### 1. Strict Timeliness Limitations

Though the very first implementations of the Venue Act were silent as to timeliness,<sup>22</sup> by 1845 there were statutory timeliness limitations in place that pegged timeliness to a date certain.<sup>23</sup> These first limitations provided that an application was timely if made during the first term of court, and that petitions filed thereafter needed to be based on new facts not previously available.<sup>24</sup> This construction looks quite similar to the modern section 2-1401 provision for post-judgment relief.<sup>25</sup> It also makes sense in the venue context: if there were genuine prejudice on the part of the population or judge, such prejudice would likely be apparent, and a good-faith petition to change venue would reasonably be expected to be brought at the first possible opportunity. It would be unlikely that genuine prejudice materialized after the first term—and, if it did, a change of venue was still possible, if only more difficult.<sup>26</sup>

By 1934, tying timeliness to court terms was no longer effective, as county courts no longer sat discrete terms. The references to court terms were removed, but timeliness remained pegged to a date certain. Under the 1934 revisions, a petition was now timely if brought within “thirty days after the return day on which the defendant is required to appear,” again with an exception for new facts diligently discovered.<sup>27</sup> This tied the timeliness of a petition to change venue to an appearance; in general terms, if a defendant could be defaulted, he or she was presumptively barred from petitioning for a change of venue.<sup>28</sup>

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delay in the trial of causes, and it is not authorized by the statute, and can not be encouraged.”).

22. The 1827 version was silent on the issue. Ill. Rev. Stat., Venue, § 1 (1827). At one paragraph long, however, it was silent on a number of issues.

23. Ill. Rev. Stat., ch. 146, ¶¶ 6–7 (1874).

24. Ill. Rev. Stat., ch. 146, ¶¶ 6–7 (1874). The statutory provision itself is phrased in the triple negative.

25. See 735 ILL. COMP. STAT. 5/2-1401 (2016) (providing for relief from final judgments); see also *Smith v. Airoom, Inc.*, 499 N.E.2d 1381, 1386–87, 144 Ill. 2d 209, 220–23 (1986) (discussing due diligence requirements in bringing a § 2-1401 petition based on new facts).

26. See *supra* note 13 (discussing standards of substitutions for cause).

27. Ill. Rev. Stat., ch. 146, ¶¶ 6–7 (1935).

28. Assuming there was no valid exception met. See *supra* note 24 and accompanying text

This default-centric paradigm of timeliness would remain in effect until 1971, when the Venue Act moved away from strict timing requirements and toward a threshold test examining the judge’s rulings on a “substantial issue” in the case.<sup>29</sup>

## 2. Testing the Waters

Though strict timeliness provisions likely prevented most of the potential abuses of the Venue Act, no rigid timeline could ever bar all improper petitions for a change of venue. This is because not all cases move at the same speed: a thirty-day window might be reasonable in one case, far too generous in another, and overly restrictive in a third. The Venue Act recognized this, granting courts discretion to address the timeliness of petitions,<sup>30</sup> but courts were still keenly aware of the need to articulate a general principle to bound that discretion. As the Illinois Supreme Court stated in 1943:

It would be highly improper to permit an attorney representing parties to a suit to try out the attitude of the trial judge on a hearing as to part of the questions presented and, if his judgment on such questions was not in harmony with counsel’s view, to then permit counsel to assert that the court was prejudiced and that a change of venue must be allowed.<sup>31</sup>

Though the name itself would not appear until 1996, the court was articulating what courts now recognize as the “testing the waters” doctrine.<sup>32</sup> As its name implies, the doctrine holds that a court may, as an exercise of its equitable powers, deny an otherwise timely petition

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(untimely petitions to change venue permissible in cases of new facts not previously available). Note that, though the time limit is given in terms of a *defendant’s* default, it still applied to either party. Therefore, even if a defendant promptly appeared, a petition brought by *either* party beyond the default period would be presumptively barred. Then as now, it was likely defendants who sought a change of venue, but those few plaintiffs who did try it were in for a surprise.

29. Ill. Rev. Stat., ch. 146, ¶ 3 (1971); *see also infra* Part I.B.3 (discussing the “substantial issue” test).

30. Ill. Rev. Stat., ch. 146, §§ 6–7 (1935); *see also supra* notes 24–25 and accompanying text (outlining circumstances under which a presumptively untimely petition may be granted).

31. *Comm’rs of Drainage Dist. v. Goebel*, 50 N.E.2d 444, 447, 383 Ill. 323, 328 (1943).

32. The first reference to “testing the waters” as such occurs in the case of *In re Marriage of Roach*, 615 N.E.2d 30, 32–33, 245 Ill. App. 3d 742, 746 (4th Dist. 1993). Though the specific language in prior cases varies, it is quite clear that it is this doctrine to which they refer. Indeed, the “opportunity to form an opinion as to the court’s reaction to [the] claim” language—identical, save for the “testing the waters” tag—appears as a statement of law in earlier cases. *In re Marriage of Kenik*, 536 N.E.2d 982, 985, 181 Ill. App. 3d 266, 271 (1st Dist. 1989). Subsequent references in this Article to pre-1993 cases having applied the “testing the waters” doctrine are a post hoc interpretation; that is, the policy, principle, or rule to which a given court refers may be stated in different terms, but can now be properly understood as a reference to the “testing the waters” doctrine.

for a change of venue if the party seeking that change “has had an opportunity to test the waters and form an opinion as to the court’s reaction to [the] claim.”<sup>33</sup>

The doctrine was expressed in a fairly clear form as far back as 1875, when the Illinois Supreme Court stated that “[a] party can not wait until a cause is on trial, and until the court has intimated an opinion on the merits of the cause, from the evidence, and then obtain a change of the venue.”<sup>34</sup> The doctrine has changed very little, if at all, in the past one hundred and forty-one years, and its policy underpinnings remain unquestionably valid.<sup>35</sup>

Historically, courts tended to keep their “testing the waters” analyses broad, looking to the totality of the circumstances rather than categorically determining what procedural postures were or were not sufficient. For instance, in *Fennema v. Joyce*, the core Venue Act dispute was whether proceedings at a pretrial conference constituted a testing of the waters.<sup>36</sup> The First District held that they were not, but only on the facts presented. The court specifically noted that categorically holding a pretrial conference insufficient could lead to abuse, if a party were to “test the disposition of a trial judge during pre-trial” and then seek a substitution of that judge based on the judge’s indications.<sup>37</sup>

The “testing the waters” doctrine is presented perhaps most clearly in *Hader v. St. Louis Southwestern Railway Co.*,<sup>38</sup> a 1991 case from the Fifth District. In *Hader*, the trial court held a hearing on whether to bar expert witnesses, and the defendant moved for a continuance.<sup>39</sup> Though the court did not rule on the request for a continuance at that time, the hearing itself was lengthy and included discussion with and comments

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33. *In re Marriage of Roach*, 615 N.E.2d 30, 33, 245 Ill. App. 2d 742, 746 (4th Dist. 1993).

34. *Richards v. Greene*, 78 Ill. 525, 528 (1875).

35. The current appellate split looks at whether the doctrine is still good law, not whether it serves a good purpose. See *infra* Part II.B.1 (explaining that the side of the appellate split that opposes the doctrine believes its purpose is adequately served by other elements of the statute); see also *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶ 55, 996 N.E.2d 1131, 1142 (noting that marginal judicial efficiency losses in abandoning the doctrine are tolerable, but that they are still losses); *infra* note 138 (discussing the cost-benefit analysis of the *Schnepf* court).

36. *Fennema v. Joyce*, 258 N.E.2d 156, 158, 6 Ill. App. 3d 108, 111 (1st Dist. 1972). The dispute specifically centered on the “substantial issue” test. See *infra* Part I.B.3. But implicit in the court’s analysis was whether a “testing the waters” analysis would also be satisfied. See *supra* note 32 (discussing naming conventions of the doctrine).

37. *Fennema*, 258 N.E.2d at 158, 6 Ill. App. 3d at 111.

38. *Hader v. St. Louis Sw. Ry. Co.*, 566 N.E.2d 736, 207 Ill. App. 3d 1001 (5th Dist. 1991).

39. *Id.* at 740–41, 207 Ill. App. 3d at 1007–08.

from the judge indicating that he intended to deny the motion.<sup>40</sup> The pending motions were entered and continued, and at the next hearing date the defendant—whose motion for a continuance was still outstanding—moved for a change of venue.<sup>41</sup>

At the ensuing hearing on a change of venue, the plaintiff objected, noting that the defendant had already gotten the “flavor or feeling” of the way the judge intended to rule.<sup>42</sup> The judge denied the change of venue, “surprised both defense attorneys” by granting the pending continuance, and the matter was ultimately settled in good faith.<sup>43</sup>

The settlement apparently did not last, as the case found its way to an appeal. The Fifth District held there had been no issue ruled upon below; to the extent that a continuance would have been substantial,<sup>44</sup> the court had explicitly declined to rule.<sup>45</sup> The appellate court nevertheless found a denial of the petition for a change of venue proper under the “testing the waters” doctrine,<sup>46</sup> as the defense “was clearly testing the temperament of the trial court” as to both the continuance and the underlying motion to bar expert witnesses.<sup>47</sup> Further, the timing of the petition to change venue, coming on the heels of a thoroughly contested motion for a continuance, supported a parallel conclusion that the purpose of the petition was to delay trial.<sup>48</sup>

“Testing the waters” under the Venue Act can best be described as an equitable bar to changes of venue, permitting a court to deny an otherwise proper petition when, though timely on the face of the statute, the request would be an abuse of or inequitable conclusion drawn from the terms of the Venue Act itself.

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40. *Id.* at 740, 207 Ill. App. 3d at 1008. Though the full record is not available, the Fifth District quotes two comments from the judge that encapsulates the flavor of the hearing: “I really haven’t heard anything yet warranting a continuance. . . . I reserve my right if someone shows severe prejudice for the defendant.” *Id.* at 740, 207 Ill. App. 3d at 1008.

41. *Id.* at 740–41, 207 Ill. App. 3d at 1008.

42. *Id.* at 740, 207 Ill. App. 3d at 1008.

43. *Id.* at 738, 740, 207 Ill. App. 3d at 1005, 1008.

44. And it generally would not. *See infra* notes 56–57 and accompanying text (discussing the substantiality of scheduling orders and continuances); *see also* *Becker v. R.E. Cooper Corp.*, 550 N.E.2d 236, 239, 193 Ill. App. 3d 459, 463 (3d Dist. 1990) (noting that scheduling orders do not constitute a “substantial issue”).

45. *Hader*, 566 N.E.2d at 740, 207 Ill. App. 3d at 1008.

46. The appellate court found the denial proper under the “testing the waters” doctrine, but not in such explicit terms. *See supra* note 32 and accompanying text (referring to “testing the waters” as a retroactive name for the doctrine as such).

47. *Hader*, 566 N.E.2d at 741, 207 Ill. App. 3d at 1009.

48. *Id.* at 741, 207 Ill. App. 3d at 1009; *see also* *Hoffmann v. Hoffmann*, 239 N.E.2d 792, 794–95, 40 Ill. 2d 344, 348–49 (1968) (timing of continuance requests and denials supported finding of delay); *infra* Part I.B.4 (discussing delay as independent grounds to deny petition).

### 3. Substantial Issue

Though the “testing the waters” doctrine was well-accepted as an equitable solution to procedural abuse, the Venue Act itself was further modified in an attempt to craft a statutory solution. In 1971, the Venue Act received its first substantive modification in a century: the strict timing language was removed, and in its place appeared the “substantial issue” threshold test.<sup>49</sup> This language—which remained in the Venue Act until its demise in 1993—provided that a petition for a change of venue was untimely unless brought “before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case.”<sup>50</sup>

The “substantial issue” language was an attempt to codify the “testing the waters” doctrine, and it was successful: as emphasis shifted to the “substantial issue” test, the case law on point grew lengthy and varied, though it generally tracked the “testing the waters” doctrine. It would be impossible to pin down a specific test for what is or is not substantial, and courts have not tried; a “substantial issue” is generally an issue “relevant to a resolution of the merits of the action.”<sup>51</sup> The specifics of what are and are not substantial issues will vary from case to case, but—to adapt a similarly flexible test—parties will know a substantial issue in their case when they see it.<sup>52</sup>

Because the “substantial issue” test speaks to the merits of a case, a judgment on the merits is by definition a substantial issue—in a sense, it is the *entirety* of the issue—but so is a default judgment.<sup>53</sup> Other common substantial issues include motions to strike<sup>54</sup> or dismiss.<sup>55</sup>

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49. Ill. Rev. Stat., ch. 146, ¶ 3 (1971).

50. Ill. Rev. Stat., ch. 146, ¶ 3 (1971); *cf.* Ill. Rev. Stat., ch. 110, § 2-1001 (1991) (containing identical language, with an exception for “new fact” petitions). The language of a “substantial issue” is not fixed, and courts have used “substantive ruling,” “substantive issue,” and “substantial ruling” interchangeably as synonyms. See *In re Marriage of O’Brien*, 2011 IL 109039, ¶ 99, 958 N.E.2d 647, 670 (using “substantial ruling”); see also Susan M. Brazas, *Controlling Choice: The Window Narrows for Substitution of Judge*, 2012 EMERGING ISSUES 6637 (Sept. 13, 2012) (“Just as ‘cause’ has been defined more narrowly, ‘substantial issue’ has been defined more broadly . . .”).

51. *Antkiewicz v. Pax Indianapolis, Inc.*, 627 N.E.2d 185, 188, 254 Ill. App. 3d 723, 727 (1st Dist. 1993).

52. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

53. *E.g.*, *Perimeter Exhibits, Ltd. v. Glenbard Molded Binder, Inc.*, 461 N.E.2d 44, 52–53, 122 Ill. App. 3d 504, 514–15 (2d Dist. 1984). Earlier versions of the Venue Act presumptively barred changes in venue after the time for a party to answer had passed, thereby exposing that party to the possibility of default. Ill. Rev. Stat., ch. 146, ¶¶ 6–7 (1934); see also *supra* note 28 (noting the effects of default).

54. *E.g.*, *Heerey v. Berke*, 534 N.E.2d 1277, 1286–87, 179 Ill. App. 3d 927, 943 (1st Dist. 1989).

That said, a ruling on a substantial issue must still be a *ruling*: presentment, absent a ruling, is not sufficient.<sup>56</sup> Likewise, scheduling orders—which only affect *when* the substantial issue will be heard, and not whether it *should* be heard—are generally not substantive.<sup>57</sup>

Where the substantial nature of a ruling is disputed, it is the effects of that ruling that control. Thus, rulings on discovery are not necessarily substantial, if the rulings can be characterized as administrative or otherwise preparatory to trial.<sup>58</sup> Conversely, a determination as to the proper filing date for a routine answer can be substantial.<sup>59</sup> The standard under which a determination on the merits is made is largely irrelevant; so long as *any* determination is made, its degree is secondary.<sup>60</sup>

The “substantial issue” test was well-developed, and though it largely displaced the “testing the waters” doctrine, the one was not exclusive of the other. This is perhaps best exemplified in *In re Marriage of Kozloff*.<sup>61</sup> There, the question concerned petitions following a dissolution decree, which at the time were treated as separate actions, though they stemmed from the same dissolution.<sup>62</sup> Because each petition was a separate action, the First District had reasoned, there *were* no prior rulings to constitute a “substantial issue” for the purposes of the *new* action—and so a change of venue was proper.<sup>63</sup> The Illinois Supreme Court bluntly rejected that rationale by applying the “testing the waters” doctrine, holding that the prior dissolution proceedings constituted testing of the waters with respect to the subsequent petitions,

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55. *E.g.*, Gilliland v. Bd. of Educ., 365 N.E.2d 322, 328, 67 Ill. 2d 143, 157 (1977).

56. *E.g.*, Oberman v. Byrne, 433 N.E.2d 1024, 1026–27, 104 Ill. App. 3d 1046, 1048 (1st Dist. 1982).

57. *E.g.*, Becker v. R.E. Cooper Corp., 550 N.E.2d 236, 239, 193 Ill. App. 3d 459, 463 (3d Dist. 1990).

58. Stoller v. Paul Revere Life Ins. Co., 517 N.E.2d 5, 7, 163 Ill. App. 3d 438, 442 (1st Dist. 1987).

59. Evergreen Sav. & Loan Ass’n v. Hirschman, 249 N.E.2d 248, 251, 110 Ill. App. 2d 242, 247–48 (1st Dist. 1969). Here, it bears note that the trial court resolved the filing date issue in the petitioners’ favor—they *won* their substantial issue.

60. For example, appointment of a receiver over distressed property under the Illinois Mortgage Foreclosure Law requires a showing of “reasonable probability” of success on the merits. 735 ILL. COMP. STAT. 5/15-1701(b)(2) (2016). Yet, though it is anything but dispositive, granting or denying receivership still requires *looking* at the merits, making it a substantial issue for the purposes of the “substantial issue” test. *See generally* MB Fin. Bank v. Sweiss, 998 N.E.2d 713, 406 Ill. App. 3d 1204 (1st Dist. 2011) (accepting, implicitly, that determination on receivership would be a substantial issue so as to render substitution untimely).

61. *In re Marriage of Kozloff*, 463 N.E.2d 719, 722, 101 Ill. 2d 526, 532 (1984).

62. *Id.* at 720–21, 101 Ill. 2d at 529–30.

63. *Id.* at 720–21, 101 Ill. 2d at 529–30.

noting that to hold otherwise “would lead to a serious abuse of the venue act.”<sup>64</sup>

The *Kozloff* court strongly affirmed the principle behind the “testing the waters” doctrine: “This court has long condemned a litigant’s attempt to seek a change of venue after he has formed an opinion, based upon the court’s adverse rulings, that the judge may be unfavorably disposed towards his cause.”<sup>65</sup> Though it did not explicitly discuss the interrelation between the test and the doctrine,<sup>66</sup> the court recognized that a strictly applied “substantial issue” test would be unfair, and that the “testing the waters” doctrine provided a logical gap-filling means to equitably deny the requested change of venue.<sup>67</sup>

#### 4. The Delay Exception

Substantial issues and tested waters aside, courts have always recognized a third ground on which to deny an otherwise proper petition for a change of venue: petitions brought solely for the purpose of delay. Unlike the other grounds for denial, which looked to the timing of the petition or the nature of the court’s previous rulings, the delay exception permitted a court to equitably deny a petition by looking to its *effects* as well as to the prior record of the case.

Specifically, a court was permitted to inquire as to the substance of an allegation of prejudice where the record by itself indicated that the

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64. *Id.* at 721–22, 101 Ill. 2d at 530–31.

65. *Id.* at 721–22, 101 Ill. 2d at 530–31. The court cites a number of cases for the “long condemned” portion of its proposition, including both “substantial issue” and “testing the waters” issues. *See* *People v. Taylor*, 463 N.E.2d 705, 710–11, 101 Ill. 2d 508, 518 (1984) (substantial issue); *Hildebrand v. Hildebrand*, 242 N.E.2d 145, 146, 41 Ill. 2d 87, 90 (1968) (testing the waters; denying petition brought before ruling but after full hearing on merits of case and counterclaim); *People v. Chambers*, 136 N.E.2d 812, 815, 9 Ill. 2d 83, 89 (1956) (testing the waters; denying petition after ruling on motion to suppress evidence); *Richards v. Greene*, 78 Ill. 525, 528 (1875) (testing the waters; denying petition after trial court denied motion to intervene on day of trial). *But see* *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶ 36, 996 N.E.2d 1131, 1137 (characterizing all of the *Kozloff* statements on the doctrine as dicta).

66. Nor could it have, as the “testing the waters” language proper had not yet appeared. *See supra* note 32 (discussing nomenclature of doctrine).

67. Courts prior to *Kozloff* had used the “testing the waters” doctrine in similar way. For example, the Fifth District in *Templeton v. First National Bank* addressed a potential loophole caused by then-recent minor changes to the Venue Act. 362 N.E.2d 33, 36–37, 47 Ill. App. 3d 443, 447 (5th Dist. 1977). The *Templeton* court noted that the substantial issue provision did not directly apply, but denied the petition as untimely, relying on the underlying *principles* of the Venue Act that formed the basis for the “testing the waters” doctrine. *Id.* at 36, 47 Ill. App. 3d at 446–47 (“Read literally, [the new changes] would seem to indicate that a party could now do precisely what the court in *Hildebrand* held was forbidden . . . . We cannot believe that the General Assembly intended to make so drastic a change in the settled law, with such grave potential for abuse.”).

petition was brought solely to delay trial. In *Hoffmann v. Hoffmann*, the petitioner had previously sought, and received, continuances, the last of which was marked “final continuance.”<sup>68</sup> At the trial date, the petitioner was denied another continuance, the case being transferred to another judge for trial that same date.<sup>69</sup> The trial judge denied a renewed motion for a continuance.<sup>70</sup> Petitioner thereupon brought a petition for change of venue, alleging prejudice on the part of the trial judge—prejudice that had allegedly just come to her attention that same day.<sup>71</sup> The trial court denied the petition, finding it brought for the purpose of delay; the appellate court reversed, finding the petition’s timing technically compliant, even if the result was unsatisfying.<sup>72</sup>

On appeal, the Illinois Supreme Court reversed again to deny the petition, finding that it had been made solely for the purpose of delay.<sup>73</sup> Even so, the Supreme Court did not investigate the substance of the allegation of prejudice.<sup>74</sup> Rather, it looked to the face of the record—particularly the multiple previous continuances—and the timing of the petition itself to determine that the primary motive was delay, regardless of the truth of the allegation.<sup>75</sup>

Unsurprisingly, denials for delay were relatively uncommon; when such petitions were denied, there were usually other adequate and independent grounds for denial.<sup>76</sup>

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68. *Hoffmann v. Hoffmann*, 239 N.E.2d 792, 793, 40 Ill. 2d 344, 345–46 (1968).

69. *Id.* at 793, 40 Ill. 2d at 346.

70. *Id.* at 793, 40 Ill. 2d at 346. The trial judge did, however, hold the matter over until the afternoon. *Id.* at 793, 40 Ill. 2d at 346.

71. *Id.* at 793, 40 Ill. 2d at 346–47.

72. *Hoffmann v. Hoffmann*, 230 N.E.2d 77, 79–80, 86 Ill. App. 2d 374, 379–80 (1st Dist. 1967), *reversed*, 239 N.E.2d 792, 40 Ill. 2d 344 (1968).

73. *Hoffmann*, 239 N.E.2d at 794, 40 Ill. 2d at 348–49 (citing *People v. Mosley*, 182 N.E.2d 658, 660, 24 Ill. 2d 565, 569 (1962), and collecting other criminal cases for the same proposition).

74. *Id.* at 794, 40 Ill. 2d at 348–49.

75. *Id.* at 794, 40 Ill. 2d at 348–49. Though, to be fair, given the record in the case—including excerpts from the trial judge’s hearing on the matter—it is quite reasonable to assume that there was no bias, and the allegation of such rang false. Or, perhaps more eloquently, see *People v. Kelly*, 1 N.E.2d 552, 554, 285 Ill. App. 57, 61 (1st Dist. 1936): “Let us look into the record to see whether defendant was seeking to have a trial of the case before a judge who was not prejudiced against him, or whether he was seeking to avoid a trial of the case at all events.”

76. *E.g.*, *In re Marriage of Roach*, 615 N.E.2d 30, 33, 245 Ill. App. 3d 742, 747 (4th Dist. 1993) (denying petition solely for delay, but the petition was also in improper form, lacking an affidavit as the Venue Act required); *see, e.g.*, *Hader v. St. Louis Sw. Ry.*, 566 N.E.2d 736, 739–40, 207 Ill. App. 3d 1001, 1007–08 (5th Dist. 1991) (denying petition under “testing the waters” analysis as “judge shopping,” but also under the realization that the petition was brought for purposes of delay).

### C. An Absolute Right

The right of a party to receive a change of venue was initially construed as absolute: so long as the statute's requirements were met, the change of venue must be granted, regardless of the consequences.<sup>77</sup> Indeed, the original language of the Venue Act provided that the court "shall award a change of venue" so long as an allegation of prejudice was made.<sup>78</sup>

Since then, judicial gloss has backed away from this strict absolutism with both the "testing the waters" doctrine and statutory revisions, which introduced both the "substantial issue" test and changed the operative modal to "may."<sup>79</sup> Though courts have introduced more factors into their analyses of requests to change venue, they have consistently regarded the right *itself* to bring such a petition as an absolute. Not only did the prior absolutist interpretation have judicial momentum, but other factors, such as the principle that venue provisions were to be liberally construed, particularly in situations impeaching the trial judge's impartiality, pushed in favor of maintaining the right as absolute.<sup>80</sup>

Because the right is treated as absolute, there is no "harmless error" calculus where a petition to change venue is wrongly denied. If a petition to change venue is proper, but is not granted, any and all of the judge's subsequent orders in the case are void<sup>81</sup>—they are treated as if the court had no jurisdiction to enter them.<sup>82</sup> Likewise, to the extent

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77. *Knickerbocker Ins. Co. v. Tolman*, 80 Ill. 106, 108 (1875) ("If the statute is harsh, or if it works hardship, the remedy is in the hands of the General Assembly . . .").

78. Ill. Rev. Stat., Venue, § 1 (1827) (emphasis added). It bears note that, from the beginning, each party had the right to only one change of venue, a caveat still in effect today. Ill. Rev. Stat., Venue, § 1 (1827); accord 735 ILL. COMP. STAT. § 5/2-1001(a)(2)(i) (2016).

79. E.g., Ill. Rev. Stat., ch. 146, ¶ 1 (1874).

80. *In re Dominique F.*, 583 N.E.2d 555, 558–59, 145 Ill. 2d 311, 318–19 (1991) (citing *Rosewood Corp. v. Transamerica Ins. Co.*, 311 N.E.2d 673, 675, 57 Ill. 2d 247, 251 (1974)).

81. E.g., *In re Estate of Wilson*, 939 N.E.2d 426, 455, 238 Ill. 2d 519, 568 (2010); *Stoller v. Paul Revere Life Ins. Co.*, 517 N.E.2d 5, 7, 163 Ill. App. 3d 438, 442 (1st Dist. 1987). Note that a substitution itself may not be directly appealed. *Bank of Am., N.A. v. Freed*, 2012 IL App (1st) 110749, ¶ 14, 983 N.E.2d 509, 513–14 (citing *Murges v. Bowman*, 627 N.E.2d 330, 336, 254 Ill. App. 3d 1071, 1080 (1st Dist. 1993)). Nor would Rule 304(a) language render a denial appealable. ILL. SUP. CT. R. 304(a). That said, if the case is brought as an interlocutory appeal on *other* grounds, the substitution may be heard collaterally on appeal, as it might well be fully dispositive of the primary issue appealed. *Freed*, 2012 IL App (1st) 110749, ¶¶ 14–15, 983 N.E.2d at 513–14.

82. But note that a judgment entered by a court following a wrongful denial of a petition to change venue is not void ipso facto; rather, the party challenging the judgment must raise the issue and set aside the judgment, either through reconsideration or (more likely) on appeal. See *Musolino v. Checker Taxi Co.*, 249 N.E.2d 150, 152, 110 Ill. App. 2d 42, 46–47 (1st Dist. 1969)

that other matters may be pending, the petition to change venue must be resolved first, for a grant of the petition would divest the trial court of any jurisdiction other than the bare minimum needed to transfer the case elsewhere.<sup>83</sup>

The severity of these implications—an improperly denied petition could moot months, if not years, of litigation—ensured that the Venue Act, and rulings thereunder, developed slowly and carefully, so as to maintain consistent and equitable results.

## II. SUBSTITUTIONS PRESENT: AS OF RIGHT

Time and tide wait for no legislator, and in 1993 Illinois reorganized its law to the modern form as the Illinois Compiled Statutes.<sup>84</sup> The Venue Act underwent two main changes<sup>85</sup>: first, splitting the mechanism for a substitution of judge from the mechanism for a change of the place of trial; and second, removing the prejudice element from the substitution of judge and casting it explicitly as a matter of right.<sup>86</sup> The modern substitution statute provides, in relevant part:

Substitution of judge. (a) A substitution of judge in any civil action may be had in the following situations:

[ . . . ]

(after finding that trial court improperly denied petition to change venue, appellate court declined to set aside judgment upon finding that petitioner waived her rights by not seeking to vacate the judgment).

83. *Agar Packing & Provision Corp. v. United Packinghouse Workers*, 36 N.E.2d 750, 752, 311 Ill. App. 502, 508 (1st Dist. 1941).

84. The reorganization was prompted by, of all things, a copyright spat between West and Lexis. The old Illinois Revised Statutes were originally codified alphabetically—"A" for "Abatement," "B" for "Bail," "C" for "Courts," and so forth—but new legislation was not always sorted by the General Assembly. Consequently, while the *text* of the statutes was in the public domain, editorial decisions about where the text was placed (and even how the text was numbered!) were not. Work on the reorganization lasted four years, and the new Illinois Compiled Statutes took effect on January 1, 1993. Pub. Act 87-1005, 1992 Ill. Laws 2188 (H.B. 3810). For a thorough description of the reorganization process, see generally ILL. LEGIS. REFERENCE BUREAU, ORGANIZATION OF THE ILLINOIS COMPILED STATUTES (ILCS) (1999), <http://www.ilga.gov/commission/lrb/lrbnew.htm>.

85. For the most part, the reorganization was exactly that, shifting around portions of the law without altering its effect, except for those alterations deemed appropriate. Dismantling the Venue Act was one such alteration.

86. Pub. Act 87-949, § 1, 1992 Ill. Laws 1914, 1914–1915 (S.B. 1720). The substitution of judge provisions remained in the same statutory location the Venue Act would have occupied under the shift to Illinois Compiled Statutes, at 735 ILL. COMP. STAT. 5/2-1001. *See supra* note 5 (describing the history of Venue Act revisions and their enumerated location in the Illinois Revised Statutes). The provisions of the Venue Act genuinely relating to *venue* in the modern sense as a change in the place of trial became 735 ILL. COMP. STAT. 5/2-106.

(2) Substitution as of right. When a party timely exercises his or her right to a substitution without cause as provided in this paragraph (2).

(i) Each party shall be entitled to one substitution of judge without cause as a matter of right.

(ii) An application for substitution of judge as of right shall be made by motion and shall be granted if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case, or if it is presented by consent of the parties.

(iii) If any party has not entered an appearance in the case and has not been found in default, rulings in the case by the judge on any substantial issue before the party's appearance shall not be grounds for denying an otherwise timely application for substitution of judge as of right by the party.<sup>87</sup>

The purpose of the statutory change was to simplify, squaring the text of the statute with the judicial gloss thereupon. Most prominently, the revisions split off the substitution provisions for “venue” in the modern sense of a change in the place of trial.<sup>88</sup> But the substitution statute went further, striking the empty requirement of prejudice and framing a substitution as a matter of right, leaving the “substantial issue” test untouched as the main limit on substitutions.<sup>89</sup> Notably, though courts had been applying the “testing the waters” doctrine as an equitable limitation on a statute that was absolute on its face, the substitution statute did not address, directly or otherwise, the doctrine or its role.

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87. 735 ILL. COMP. STAT. 5/2-1001 (2016). Omitted subsection (1) concerns when a judge may have an interest in pending litigation, and is textually identical to the Venue Act's provision for same, Ill. Rev. Stat., ch. 110, ¶ 2-1001(a)(1) (1991). Omitted subsection (3) provides different statutory standards for substitutions for cause, previously addressed by applying different standards to the same prejudice prong of the Venue Act. See *supra* notes 13–14 (discussing standards for substitution for cause); see also *In re Custody of Santos*, 422 N.E.2d 985, 986, 97 Ill. App. 3d 629, 630 (3d Dist. 1981) (discussing how petitions for change of venue may convert from “as of right” to “for cause” or vice versa). Omitted subsection (4) provides for an absolute right to substitution of judge in direct contempt proceedings stemming from an attack on the judge's character or conduct, in a manner similar to that of the Venue Act's provisions for same, Ill. Rev. Stat., ch. 110, ¶ 2-1001(m) (1991). Omitted sections (b) and (c) provide procedural guidance on the form and effects of a motion to substitute judge, and are functionally identical to the Venue Act's provisions on that point, Ill. Rev. Stat., ch. 110, ¶¶ 2-1001(b), (e). See generally *supra* note 6 (describing operative sections of the Venue Act). It bears note that the quoted text of the substitution statute has remained unchanged since its first implementation in 1993.

88. Indeed, one early proposed amendment to the Venue Act would have *only* changed the terminology. Fins, *supra* note 3, at 871–76. Even the drafters of the modern Code of Civil Procedure, first implemented as part of the Illinois Revised Statutes, recognized that the Venue Act's terminology was incorrect. *Id.* at 859, 871 (the author of that article, Harry Fins, being principal draftsman of the Code and author of the primary Guide to the Code).

89. See *supra* Parts I.A, I.B.3 (prejudice and “substantial issue” test, respectively).

### A. Defining the Right

Though a party's right to a substitution of judge has consistently been held as absolute, the Venue Act's specific wording on the matter shifted between iterations.<sup>90</sup> The substitution statute explicitly defined a substitution without cause as a right, granting one such substitution to each party.<sup>91</sup> Since the 1993 revisions, courts have addressed a number of mechanical questions concerning the extent of the right. Such questions generally fall into three categories: when the right attaches, to whom it attaches, and against whom the right to a substitution of judge can be used.

#### 1. When It Attaches

The right to a substitution attaches liberally, to each and every party, except for intervenors. A party must be of record to be able to exercise its rights; non-record parties may not move to substitute judges.<sup>92</sup> This dichotomy breaks down with intervention, as an intervening party is a quasi-party—though it is not a party to the proceedings, it still takes part in those same proceedings.<sup>93</sup> Because that right to a substitution only attaches once the petition to intervene is granted, if a petition is denied, the unsuccessful intervenor has no right to substitute judge.<sup>94</sup> A successful intervenor would in theory have a right to a substitution of judge, but would likely be unable to access that right, because the granting of a petition to intervene may itself be considered a substantial ruling as to the intervenor.<sup>95</sup>

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90. *E.g.*, *Knickerbocker Ins. Co. v. Tolman*, 80 Ill. 106, 108 (1875) (noting that the right to change of venue is absolute when properly brought); *see supra* Part I.C (discussing the right to a change of venue under the Venue Act).

91. 735 ILL. COMP. STAT. 5/2-1001(a)(2)(i) (2016).

92. This near-tautological proposition dates to the early days of the Venue Act. *E.g.*, *Crowell v. Maughs*, 7 Ill. 419, 422 (1845) (“Our statute only authorizes the parties to obtain a change of venue.”). The principle remains in full force today. *E.g.*, *In re P.W. v. Widmer*, 2014 IL App (4th) 130916-U, ¶¶ 56–57 (finding that prior to becoming a party, the plaintiff had no standing to file a motion for substitution of judge).

93. 735 ILL. COMP. STAT. 5/2-408 (2016) (intervention). “Quasi-party” status is a very old concept with very little modern application. *Bromley Carpet Co. v. Field*, 88 Ill. App. 219, 229 (1st Dist. 1899) (recognizing when intervenors became quasi-parties). *But see In re Valentin*, 2015 IL App (1st) 150639-U, ¶ 7 (representing one of two recorded instances of the term’s use in appellate case law in the past hundred years).

94. *In re Estate of Veatch*, 417 N.E.2d 201, 202–03, 93 Ill. App. 3d 413, 415 (3d Dist. 1981).

95. There is no authority directly on point for this proposition, but there is a substantial circumstantial case for it. *People ex rel. Northbrook v. Highland Park*, 342 N.E.2d 196, 202, 35 Ill. App. 3d 435, 444 (1st Dist. 1976) (disposing of the petition to change venue on other grounds, but noting that, because disposition of intervention was an important aspect of litigation requiring court’s discretion, granting the petition constituted a substantive issue in the case).

This interpretation makes sense for each type of potential intervenor. If a party is a *necessary* party, then it must be joined at some point or other, and could exercise its right to substitute judge after being served and appearing. If a party is *not* a necessary party, then it could theoretically bring its claims in separate proceedings, where it would have a freestanding right to substitute judge. When seeking to permissively intervene, a party already knows who the judge is, and by affirmatively seeking intervention, implicitly accepts that that judge will preside over the case.

## 2. To Whom It Attaches

For non-intervening parties, the right to a substitution of judge attaches very liberally. Each individual party has a right to substitute judge, regardless of whether co-parties join in the request or not.<sup>96</sup> Party status respects the corporate form, and courts may not engage in veil piercing to merge separate corporate entities, despite their similarities.<sup>97</sup> Likewise, parties may have the same counsel, yet have separate rights to a substitution of judge.<sup>98</sup> Because each party has a separate right, there are potentially as many substitutions as there are parties: two parties, two substitutions; seventeen parties, seventeen substitutions.<sup>99</sup> A hundred parties? A shrewd coalition of co-parties might run out of judges in a county to whom the case can be transferred, but the substitution statute provides for transfer to other counties.<sup>100</sup>

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96. *Beahringer v. Hardee's Food Sys.*, 668 N.E.2d 614, 615, 282 Ill. App. 3d 600, 601 (5th Dist. 1996). Note that early versions of the Venue Act granted one change of venue to each *side*, requiring that all co-parties join in a petition. Ill. Rev. Stat., ch. 105, §§ 1, 7 (1845). This simplistic view broke down with the proliferation of complex litigation where parties might share a designation but little else. In 1971, that requirement was eliminated. Ill. Rev. Stat., ch. 146, ¶¶ 6–8 (1971).

97. *Powell v. Dean Foods Co.*, 938 N.E.2d 170, 177, 405 Ill. App. 3d 354, 362–63 (1st Dist. 2010) (finding that corporations with the same owners, officers, and insurance companies, described as “the same company” by an individual who was manager in each, yet were incorporated as separate entities, were different parties with separate rights to substitution of judge), *vacated on other grounds*, 2012 IL 111714, 965 N.E.2d 404.

98. *Behringer*, 668 N.E.2d at 615, 282 Ill. App. 3d at 601 (noting no indication that having the same attorney should in any way affect underlying parties’ rights to substitution of judge).

99. *Aussieker v. City of Bloomington*, 822 N.E.2d 927, 930–32, 355 Ill. App. 3d 498, 502–03 (4th Dist. 2005) (showing that each of seventeen different defendants are entitled to separate substitution of judge). *Aussieker* was overruled by *People v. Dison*, 831 N.E.2d 1206, 358 Ill. App. 3d 794 (4th Dist. 2005), which was itself overruled by *Powell*, 2012 IL 111714, 965 N.E.2d 404, which has since been criticized, but on other grounds.

100. 735 ILL. COMP. STAT. 5/2-1001(c) (2016). This is assuming that all of the motions to substitute judge were proper—failure to properly procedurally set up the motions sank the seventeen potential petitions in *Aussieker*. *Aussieker*, 831 N.E.2d at 930–32, 355 Ill. App. 3d at 502–03. *But see id.* at 932, 355 Ill. App. 3d at 504 (Appleton, J., specially concurring in part and

### 3. Against Whom It May Be Used

A substitution of judge is a judge-specific inquiry, as it is the judge himself or herself who is being removed from the case. Though the substitution statute does not address the matter, it is framed in terms of an individual judge. The motion is timely if presented “before *the judge* to whom it is presented has ruled on any substantial issue.”<sup>101</sup> That same “substantial issue” test does not apply to “rulings in the case *by the judge* . . . before the party’s appearance.”<sup>102</sup> Ultimately, and echoing back to the Venue Act’s roots in alleging prejudice on the part of a judge, it is the judge who matters.

Note that *any* involvement of a judge still “counts” for the purpose of a substitution inquiry, even if that judge’s role was unanticipated or minor. If a coverage judge fills in for the presiding judge, substantial rulings by the coverage judge “count against” the coverage judge, not against the presiding judge. If, later on, the case ended up before that same coverage judge again, a motion to substitute would be untimely, due to that particular judge’s prior rulings.<sup>103</sup>

Because the substitution statute only looks to the present judge’s rulings, “substantial issue” rulings by prior judges are essentially meaningless for the purposes of a motion to substitute judge.<sup>104</sup> Taken to its logical end, this means that a motion to substitute could be brought any time a new judge hears the matter<sup>105</sup>—even years after it was originally filed.<sup>106</sup>

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dissenting in part) (“If a committed plaintiff attracted 1,001 fellow litigants and each was entitled to a change of judge, the administration of justice would become an endless game of roulette where the wheel forever spins with no winner established.”). This is a problem the “testing the waters” doctrine is well-suited to solve. *See infra* Part III.C.2 (discussing potential applications of the doctrine so as to resolve such abuses).

101. 735 ILL. COMP. STAT. 5/2-1001(a)(2)(ii) (2016) (emphasis added).

102. 735 ILL. COMP. STAT. 5/2-1001(a)(2)(iii) (2016) (emphasis added).

103. *City of Granite City v. House of Prayers*, 775 N.E.2d 643, 650–51, 333 Ill. App. 3d 452, 461 (5th Dist. 2002) (describing this same fact pattern). Judges cover for each other on a regular basis, and it is not unusual for a case to have come before a number of different judges participating in various capacities.

104. *See* 735 ILL. COMP. STAT. 5/2-1001(a)(2)(iii) (2016) (discussing “substantial issue” rulings in context with the substitution statute).

105. Judges do not, of course, file an appearance or pleadings in the conventional sense. It is, however, still a decent analogy for a judge’s presence in a case: if a judge has “appeared” but not “pleaded” by making a substantive ruling, he or she may be substituted.

106. This might not be as significant a danger as it might seem. If a judge is new to an old matter—as he or she would have to be, to be subject to substitution—then substitution of that judge does not work a significant loss, as the judge’s institutional knowledge of the case is likely minimal. To the extent that such a practice could be abusive, a “testing the waters” analysis might curb such abuse. *See infra* Part III.C (discussing potential applications of the doctrine).

### B. Testing the Waters?

Prior to the 1993 amendments, the “testing the waters” doctrine was generally recognized yet not widely used.<sup>107</sup> The immediate aftermath of the shift from Venue Act to substitution statute did not change this; indeed, the phrase “testing the waters” itself was introduced in a post-amendment case (albeit one still applying the old Venue Act).<sup>108</sup> Since 2002, however, there has been a sporadic debate in appellate case law over the continued validity of the doctrine. The ensuing appellate split was presented to the Illinois Supreme Court in 2015: the court acknowledged the debate but declined to address it.<sup>109</sup> The validity of the “testing the waters” doctrine thus remains an open question in Illinois law.

#### 1. Rejected as Obsolete by the Fourth District

The Fourth District plays a significant role in the discussion of the “testing the waters” doctrine, because it both named the doctrine and has been its most vocal critic, consistently rejecting the doctrine’s applicability under the substitution statute as amended in 1993.

The “testing the waters” doctrine first appeared by that name in the 1993 case of *In re Marriage of Roach*,<sup>110</sup> in which the defendant petitioned for a change of venue following two rules to show cause entered against him for failure to abide by the terms of the marriage dissolution.<sup>111</sup> In its recitation of law regarding the Venue Act, the Fourth District recognized the existence of the “testing the waters” doctrine, though it ultimately decided the case on other grounds, finding that a substantial ruling had been entered.<sup>112</sup> Because the case arose prior to 1993, it was decided under the Venue Act, but the court commented on the then–freshly amended substitution statute, noting that it “says nothing of situations where a movant has been able to test the waters.”<sup>113</sup>

A decade later, the Fourth District had occasion to readdress the

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107. Specific figures are difficult to come by, as the doctrine itself was often applied in conjunction with, or in support of, textual Venue Act analyses. See *supra* note 67 (discussing use of the doctrine as a gap-filler to support “substantial issue” analysis).

108. Namely, *In re Marriage of Roach*, 615 N.E.2d 30, 32–33, 245 Ill. App. 3d 742, 746 (4th Dist. 1993). *Roach* technically coins the phrase “test the waters,” but the later extrapolation to “testing” is self-evident. See *infra* Part II.B.1 (discussing aftermath of *Roach*).

109. *Bowman v. Ottney*, 2015 IL 119000, ¶ 27.

110. *Roach*, 615 N.E.2d at 33, 245 Ill. App. 3d at 746–47.

111. *Id.* at 30–31, 245 Ill. App. 3d at 744–45.

112. *Id.* at 31, 245 Ill. App. 3d at 746–47.

113. *Id.* at 31, 245 Ill. App. 3d at 746.

doctrine's place under the modern substitution statute in the 2002 case of *Scroggins v. Scroggins*.<sup>114</sup> Recognizing that the “testing the waters” doctrine was viable under the old Venue Act, the court noted, “[t]he present version, however, has adopted a new test.”<sup>115</sup> Specifically, the Fourth District held that the substitution statute requires only that a party's right to substitute be “timely exercised,” and that timeliness is purely a function of whether the judge had ruled on a substantial issue in the case.<sup>116</sup> In other words, the “testing the waters” doctrine was a remnant of the Venue Act, with no place under the substitution statute.<sup>117</sup>

Another decade passed, and the Fourth District remained the only appellate district to have so soundly rejected the “testing the waters” doctrine.<sup>118</sup> Thus, when the Fourth District readdressed the issue in the 2013 case of *Schnepf v. Schnepf*,<sup>119</sup> it not only rejected the doctrine but also did so with a lengthy and quite detailed discussion of the statute itself, explaining how and why the “testing the waters” doctrine should no longer be considered to be good law.<sup>120</sup>

The *Schnepf* discussion began by describing the operation of the Venue Act: an empty allegation of prejudice, with timing constrained by the “substantial issue” test.<sup>121</sup> It then discussed four key cases of the “testing the waters” doctrine: *Fennema v. Joyce*,<sup>122</sup> *In re Marriage of Kozloff*,<sup>123</sup> *In re Marriage of Kenik*,<sup>124</sup> and *Hader v. St. Louis*

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114. *Scroggins v. Scroggins*, 762 N.E.2d 1195, 1198, 327 Ill. App. 3d 333, 336 (4th Dist. 2002).

115. *Id.* at 1197, 327 Ill. App. 3d at 336; see 735 ILL. COMP. STAT. 5/2-1001(a)(2) (2016).

116. *Scroggins*, 762 N.E.2d at 1197, 327 Ill. App. 3d at 336. Setting aside the role of the “testing the waters” analysis, the *Scroggins*’ court’s discussion of whether the “substantial issue” test had been met was concise and textbook in all other respects.

117. *Id.* at 1197, 327 Ill. App. 3d at 336; see also Ill. Licensed Beverage Ass’n v. Advanta Leasing Servs., 776 N.E.2d 255, 260, 333 Ill. App. 3d 927, 933–34 (4th Dist. 2002) (reaffirming *Scroggins* in holding that “the trial court does not have discretion to consider whether the movant had an opportunity to ‘test the waters’”).

118. See *infra* Part II.B.2 (discussing the other side of the appellate split).

119. *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶ 33, 996 N.E.2d 1131, 1137.

120. *Id.* ¶¶ 25–56, 996 N.E.2d at 1135–42. Because the substitution of judge issue was dispositive in the case, it was the only point discussed. *Id.* ¶¶ 24, 58, 996 N.E.2d at 1134, 1142.

121. *Id.* ¶¶ 31–40, 996 N.E.2d at 1136–38; see also *supra* Part I (discussing the Venue Act in detail). The *Schnepf* court did not distinguish between prior versions of the Venue Act, but its case analysis was largely limited to those arising after 1971, when the “substantial issue” test was introduced. Thus, the cases *Schnepf* relied upon were themselves brought under a version of the Venue Act largely identical to the version that the *Schnepf* court cited.

122. *Fennema v. Joyce*, 285 N.E.2d 156, 158, 6 Ill. App. 3d 108, 110 (1st Dist. 1972).

123. *In re Marriage of Kozloff*, 463 N.E.2d 719, 721, 101 Ill. 2d 526, 530 (1984).

124. *In re Marriage of Kenik*, 536 N.E.2d 982, 984, 181 Ill. App. 3d 266, 270 (1st Dist. 1989).

*Southwestern Railway Co.*<sup>125</sup> To the extent that *Fennema*, *Kozloff*, and *Kenik* discussed a form of the “testing the waters” doctrine, the Fourth District stated, such holdings were dicta—all three cases could be disposed of on other grounds of the Venue Act.<sup>126</sup> The *Schnepf* court took a mulligan as to *Hader*, which largely presents as a “testing the waters” case,<sup>127</sup> but wrapped the Venue Act cases up with a well-taken characterization:

What the aforementioned cases have in common is that the party petitioning for a change of venue was required to allege that he feared the trial judge was prejudiced against him, but the procedural facts of the cases suggested a possible ulterior motive behind the party’s desire to be heard in front of a different judge. These decisions reflect the courts’ attempts to stay true to the intended purpose of the [Venue Act], which was to ensure that a litigant “not be compelled to plead his cause before a judge who is prejudiced, whether actually or only by suspicion.”<sup>128</sup>

Having discussed the Venue Act, the Fourth District in *Schnepf* then moved to discuss the 1993 amendments that created the modern substitution statute. It sums up the legislative amendments thusly:

By amending [the Venue Act] to include the right to a substitution of judge without cause, the legislature specifically eliminated the requirement that a party provide a reason for seeking a substitution. By the same token, the legislature saved the courts from inquiring into the motive behind a party’s motion for substitution. The only exception recognized by the supreme court, of course, is when it is shown that the motion was made simply to delay or avoid trial.<sup>129</sup>

With the origin and modern form of the substitution statute discussed, the *Schnepf* court then moved on to the modern application of the “testing the waters” doctrine, starting with its own holding in *Roach*.<sup>130</sup>

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125. *Hader v. St. Louis Sw. Ry. Co.*, 566 N.E.2d 736, 740, 207 Ill. App. 3d 1001, 1008 (5th Dist. 1991).

126. *Schnepf*, 2013 IL App (4th) 121142, ¶¶ 35–38, 996 N.E.2d at 1136–37. *Fennema* tested the limits of the then–recently enacted “substantial issue” test; *Kozloff* discussed when substantial rulings in prior proceedings applied; and *Kenik* contained a substantial issue. *Id.* ¶¶ 35–38, 996 N.E.2d at 1136–37. For a more detailed discussion of *Fennema*, see *supra* notes 36–37; and for *Kozloff*, *supra* notes 61–67.

127. See *supra* notes 38–48 (discussing *Hader*). *Hader* came from the Fifth District, and was therefore only persuasive authority as to the Fourth. The Fourth District was not persuaded. See *infra* note 131 (Fourth District rejecting other districts’ interpretations of its own precedent).

128. *Schnepf*, 2013 IL App (4th) 121142, ¶ 39, 996 N.E.2d at 1138 (internal citations omitted). The exception for delay is long-recognized and generally not controversial. See *supra* Part I.B.4 (discussing the delay exception).

129. *Schnepf*, 2013 IL App (4th) 121142, ¶ 43, 996 N.E.2d at 1139.

130. *In re Marriage of Roach*, 615 N.E.2d 30, 33, 245 Ill. App. 3d 742, 746 (4th Dist. 1993).

The Fourth District criticized other districts' subsequent applications of *Roach*, noting that it had applied the "testing the waters" doctrine under the Venue Act alone, and had never intended the doctrine to continue as a viable defense under the substitution statute.<sup>131</sup>

Having clarified its own prior intent, the Fourth District in *Schnepf* could then directly address the doctrine:

The "test the waters" doctrine was rendered obsolete 20 years ago by introduction of the right to a substitution of judge without cause under the [substitution statute]. The doctrine not only does nothing to advance the functioning of [the statute, but] it affirmatively frustrates its purpose. By inviting the trial judge to make the potentially nuanced, subjective determination of whether he has tipped his hand at some point during the proceedings, the doctrine undermines the movant's right to have the fate of his case placed in the hands of a different judge.<sup>132</sup>

The court then shifted to a discussion of the logical absurdity of the doctrine. Quoting at length from a Third District concurring opinion, the Fourth District noted that it is difficult to provide any meaningful review of a doctrine centered around a subjective determination of a judge "tipping his hand" as to his or her opinion on an issue in the case.<sup>133</sup> Difficulty aside, the *Schnepf* court identified three primary flaws in the application of the "testing the waters" doctrine.

First, the court found the doctrine inconsistent with the general principle that substitution is to be liberally granted.<sup>134</sup> The Venue Act's stated purpose was to avoid prejudice, and the "testing the waters" doctrine was a tool in furtherance of that purpose that could be used to bar changes in venue brought for non-prejudicial reasons, such as delay.<sup>135</sup> Because the modern substitution statute flatly grants parties the right to a substitution, without conditioning that right on prejudice, there is no statutory basis for equitably limiting the statute.<sup>136</sup>

Second, to the extent the doctrine was meant to address a need to

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131. *Schnepf*, 2013 IL App (4th) 121142, ¶¶ 44–49, 996 N.E.2d at 1138–39; *see also Roach*, 615 N.E.2d at 32–33, 245 Ill. App. 3d at 746–47; *supra* notes 110–17 (discussing Fourth District case law since *Roach*); *infra* Part II.B.2 (discussing other districts' applications of the "testing the waters" doctrine).

132. *Schnepf*, 2013 IL App (4th) 121142, ¶ 50, 996 N.E.2d at 1139.

133. *Id.* ¶¶ 51–52, 996 N.E.2d at 1139 (quoting *Hansen v. Hetrick*, 818 N.E.2d 860, 864, 353 Ill. App. 3d 341, 345–46 (3d Dist. 2004) (McDade, J., specially concurring)).

134. *Id.* ¶¶ 51–52, 2013 IL App (4th) 121142, ¶ 53, 996 N.E.2d at 1140; *see, e.g., In re Dominique F.*, 583 N.E.2d 555, 557–58, 145 Ill. 2d 311, 318–19 (1991) (citing *Rosewood Corp. v. Transamerica Ins. Co.*, 311 N.E.2d 673, 675, 57 Ill. 2d 247, 251 (1974)).

135. *Schnepf*, 2013 IL App (4th) 121142, ¶ 53, 996 N.E.2d at 1140.

136. *Id.* ¶ 53, 996 N.E.2d at 1140.

curtail judge-shopping, the “substantial issue” test adequately serves that purpose, as it is both a legislative bright line and largely effective.<sup>137</sup> In most cases, a “substantial issue” analysis will reach the same conclusion as a “testing the waters” one; where it would not, the marginal gains of serving the needs of one case are vastly outweighed by the benefit of not having trial courts engage in an extensive and subjective “testing the waters” analysis.<sup>138</sup>

Third and finally, the *Schnepf* court simply did not approve of the continued existence of a doctrine that could so easily defeat a purportedly absolute right.<sup>139</sup> Under the doctrine, it is the *judge* himself or herself who extinguishes the party’s right to a substitution, based on actual knowledge of the parties. Such a situation could easily be manipulated by the opposing party by inducing the judge to make statements about his or her opinion. Because a “testing the waters” analysis looks to the party’s actual knowledge of the judge’s beliefs, it is affirmatively counterintuitive: if the judge has not revealed his or her position, then the party may take a substitution; but if the judge *has* done so, then the party is locked in, and must remain before that judge.<sup>140</sup> It would not be logical for the legislature to have created such a broad right to substitution, yet allowed that right to be extinguished only by those who would have the most reason to deny its use.<sup>141</sup>

Since *Schnepf*, the Fourth District has reaffirmed its position,<sup>142</sup> but its logic has not found much of a foothold in its sister appellate courts.<sup>143</sup> Nevertheless, the Fourth District’s analysis in *Schnepf* was and remains the most comprehensive treatment of the “testing the waters” doctrine in Illinois case law.

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137. *Id.* ¶ 54, 996 N.E.2d at 1140; *see also, e.g.,* *Hader v. St. Louis Sw. Ry.*, 566 N.E.2d 736, 739, 207 Ill. App. 3d 1001, 1007–08 (5th Dist. 1991) (denying the petition under “testing the waters” analysis as “judge shopping,” among others).

138. *Schnepf*, 2013 IL App (4th) 121142, ¶ 54, 996 N.E.2d at 1140.

139. *Id.* ¶ 55, 996 N.E.2d at 1140.

140. *Id.* ¶¶ 52, 55, 996 N.E.2d at 1140 (quoting *Hansen v. Hetrick*, 818 N.E.2d 860, 864, 353 Ill. App. 3d 341, 345–46 (3d Dist. 2004) (McDade, J., specially concurring)).

141. *Schnepf*, 2013 IL App (4th) 121142, ¶ 55, 996 N.E.2d at 1140.

142. *People v. Widmer*, 2014 IL App (4th) 130916-U, ¶ 46.

143. Indeed, and perhaps because appeals taken on substitution issues are so rare, *Schnepf* itself has, as of this writing in April 2016, only been cited twice for its main proposition, the inapplicability of the “testing the waters” doctrine: first, as a bare “*but see*” aside in the First District case of *Schmitt v. American Family Mutual Insurance Co.*, 2014 IL App (1st) 131666-U; and second, in analysis and rejection by the Fifth District in *Bowman v. Ottney*, 2015 IL App (5th) 140215, 25 N.E.3d 733, which formed the basis for the Illinois Supreme Court’s affirmation on other grounds in *Bowman v. Ottney*, 2015 IL 119000.

## 2. Accepted by the Weight of Appellate Authority

The Fourth District has consistently rejected the “testing the waters” doctrine under the substitution statute, but the First, Second, Third, and Fifth Districts have consistently accepted the doctrine’s application. Unlike the Fourth District’s extensive treatment, however, the other districts have applied the doctrine without much by way of consideration of the potential effects of the 1993 amendments.

The First District initially addressed the “testing the waters” doctrine under the new substitution statute in the 1999 case of *In re Marriage of Abma*.<sup>144</sup> *Abma* was a rarity, a clean presentation of the doctrine: though there had been no substantial ruling, the motion for substitution came after fifteen months of litigation and an extensive pretrial conference.<sup>145</sup> The First District cited *Roach* for the “testing the waters” doctrine, as well as other prior cases discussing the “substantial issue” status of a pretrial conference.<sup>146</sup> Though *Roach* explicitly applied the Venue Act, *not* the new substitution statute,<sup>147</sup> the First District had no problem applying the doctrine under the new statute as it did under the old.<sup>148</sup> Since then, the First District has routinely affirmed the “testing the waters” doctrine as good law.<sup>149</sup>

The Second District, by contrast, has only commented on the validity of the doctrine once,<sup>150</sup> in the 2013 case of *Galvan v. Allied Insurance*

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144. *In re Marriage of Abma*, 720 N.E.2d 645, 649, 308 Ill. App. 3d 605, 609–10 (1st Dist. 1999).

145. *Id.* at 649–50, 308 Ill. App. 3d at 610–11.

146. *Id.* at 649–50, 308 Ill. App. 3d at 611–12.

147. *In re Marriage of Roach*, 615 N.E.2d 30, 32, 245 Ill. App. 3d 742, 746–47 (4th Dist. 1993).

148. The Fourth District did not appreciate the mischaracterization. *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶¶ 45–46, 996 N.E.2d 1131, 1140.

149. See, e.g., *Inland Commercial Prop. Mgmt. v. HOB I Holding Corp.*, 2015 IL App (1st) 141501, 31 N.E.3d 795; *Schmitt v. Am. Family Mut. Ins. Co.*, 2014 IL App (1st) 131666-U (acknowledging and distinguishing *Schnepf*); *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶¶ 13–14, 962 N.E.2d 1071, 1077–78; *Harris v. Owsley*, 854 N.E.2d 774, 781, 367 Ill. App. 3d 240, 246 (1st Dist. 2006). In exactly one case, *Bemis v. State Farm Fire & Casualty Co.*, 905 N.E.2d 285, 290, 388 Ill. App. 3d 687, 693 (1st Dist. 2009) (quoting Ill. Licensed Beverage Ass’n v. Advanta Leasing Servs., 776 N.E.2d 255, 260, 333 Ill. App. 3d 927, 933–34 (4th Dist. 2002)), *vacated on other grounds*, 919 N.E.2d 349 (mem.), the First District’s recitation of law *rejected* the doctrine. The First District later explicitly disavowed its statement in *Bemis*. *LaSalle Bank, N.A. v. Bd. of Dirs. of 420 W. Grant Condo. Ass’n*, 2012 IL App (1st) 112315-U, ¶ 10. As the doctrine had nothing to do with the issue at hand in *Bemis*, this author suspects that language to have been an unfortunate scrivener’s error caused by accidentally using the Fourth District’s boilerplate recitation of law from its opinion in *Advanta*.

150. In one other case, *Spanos v. Segall*, 409 Ill. App. 3d 1172 (2d Dist. 2011), the Second District noted that a “testing the waters” issue was presented, though it resolved the matter on other grounds. The Second District also at one point granted a substitution of judge in a factual

Co., noting without analysis that the doctrine was viable.<sup>151</sup> To be sure, *Galvan* was not a rejection of *Schnepf—Galvan* was issued in April of 2013, and the Fourth District’s decision later that year in September—but, as with the First District’s recitations, there is no indication that the Second District considered the doctrine bad law.<sup>152</sup>

The Third District has addressed the doctrine twice, both times in strong affirmation. In *Hansen v. Hetrick*,<sup>153</sup> the interactions at issue were several off-the-record pretrial conferences: the trial judge denied a motion to substitute judge, noting that at the conferences he had indicated his position as to various matters, thereby implicating the doctrine.<sup>154</sup> The Third District affirmed the denial, noting that the trial judge was in the best position to determine whether the waters had indeed been tested.<sup>155</sup> *Hansen* also contained a special concurrence by Justice McDade, who stated that, though she would reach the same conclusion and deny the substitution, she would reject the “testing the waters” doctrine<sup>156</sup>—reasoning that would later find approval in the Fourth District.<sup>157</sup> But one judge does not a court make, and in a later case, *Ramos v. Kewanee Hospital*,<sup>158</sup> the Third District affirmed the doctrine and applied it quite broadly, holding that substantial rulings in a voluntarily dismissed case constituted testing of the waters so as to bar substitution in a later case brought before the same judge.<sup>159</sup>

The Fifth District, much like the Third, has addressed and applied the doctrine in no uncertain terms. In two separate cases, the court held that a substantial issue had been presented and then followed through by noting that, substantial issue or not, testing of the waters had

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situation that may have implicated the doctrine, though because it did so in an unpublished slip opinion it is unclear what the grounds applied actually were. *Voga v. Voga*, 878 N.E.2d 800, 801, 376 Ill. App. 3d 1075, 1077 (2d Dist. 2007).

151. *Galvan v. Allied Ins. Co.*, 2013 IL App (2d) 120525-U, ¶ 26 (citing *Hansen v. Hetrick*, 818 N.E.2d 860, 862, 353 Ill. App. 3d 341, 343 (3d Dist. 2004)).

152. Given that the reference in *Galvan* to the doctrine consists of one sentence, and it does not appear to have been strongly litigated, it is unlikely that the Second District gave the validity of the doctrine too much consideration.

153. *Hansen*, 818 N.E.2d at 860, 353 Ill. App. 3d at 341.

154. *Id.* at 862, 353 Ill. App. 3d at 342–43.

155. *Id.* at 862–64, 353 Ill. App. 3d at 343–45.

156. *Id.* at 864, 353 Ill. App. 3d at 345–46 (McDade, J., specially concurring).

157. *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶¶ 51–52, 996 N.E.2d 1131, 1141 (“We agree with Justice McDade’s observations and take this opportunity to add some of our own.”).

158. *Ramos v. Kewanee Hosp.*, 2013 IL App (3d) 12000, 992 N.E.2d 103. The appellate panels had some overlap; *Ramos* was penned by Justice Schmidt, who concurred in *Hansen*.

159. *Id.* ¶ 98, 992 N.E.2d at 121. It bears note that *Ramos* posed an extremely complex procedural posture, with a number of different cases presenting overlapping issues, all stemming from the same underlying employment dispute.

occurred.<sup>160</sup> Both applications were highly conventional, and neither raised questions about the validity of the doctrine.<sup>161</sup> In a third case, however, the Fifth District directly addressed the Fourth District's discussion in *Schnepf*. *Bowman v. Ottney*<sup>162</sup> concerned whether substantial rulings in voluntarily dismissed cases could bar a substitution when the case was refiled.<sup>163</sup> The Fifth District recognized the Fourth's discussion in *Schnepf* but rejected it for two reasons: first, its own prior case law holding the doctrine valid;<sup>164</sup> and second, the Third District's extensive analysis in *Ramos* on a similar and more specific issue, which acknowledged the doctrine's validity.<sup>165</sup> Ultimately, the Fifth District affirmed the "testing the waters" doctrine and rejected the Fourth's critique, without significant analysis of *why* the doctrine remained valid. The dissent strongly objected to the majority's relatively brief discussion of law, and would instead have adopted the *Schnepf* analysis, rejecting the doctrine entirely.<sup>166</sup> The plaintiff appealed, and the Supreme Court took up the matter.

### 3. *Bowman*: Wherein the Illinois Supreme Court Punts

In *Bowman v. Ottney*,<sup>167</sup> the Illinois Supreme Court took on the "testing the waters" doctrine for the first and only time since the 1993 amendments to the substitution statute. Though the Fifth District below explicitly affirmed and relied on the doctrine, and the parties argued it before the Supreme Court on further appeal, the court resolved the

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160. *In re Marriage of Reichard*, 2016 IL App (5th) 150139-U, ¶ 10; *City of Granite City v. House of Prayers*, 775 N.E.2d 643, 650, 333 Ill. App. 3d 452, 461–62 (5th Dist. 2002).

161. *City of Granite City*, 775 N.E.2d at 650, 333 Ill. App. 3d at 461–62; *Reichard*, 2016 IL App (5th) 150139-U, ¶ 10. It should be noted that, though *City of Granite City* was decided before *Schnepf*, *Reichard* was a 2016 case, well after *Schnepf*, and bluntly affirmed the doctrine by relying on its own precedent in *City of Granite City*, without any discussion of *Schnepf* or the surrounding discussion. *Reichard*, 2016 IL App (5th) 150139-U, ¶ 10; see also *supra* note 67 and accompanying text (describing use of doctrine as gap-filler to complement the "substantial issue" test).

162. 2015 IL App. (5th) 140215, 25 N.E.3d 733, *aff'd on other grounds*, 2015 IL 119000.

163. *Id.* ¶¶ 1–4, 25 N.E.3d at 734. For a more detailed discussion of *Bowman*, see *infra* Part II.B.3.

164. *Id.* ¶¶ 12–17, 25 N.E.3d at 736–38. Specifically, the court looked to *City of Granite City*, 775 N.E.2d at 650, 333 Ill. App. 3d at 461–62.

165. *Bowman*, 2015 IL App. (5th) 140215, ¶¶ 12–17, 25 N.E.3d at 736–38 (quoting *Ramos v. Kewanee Hosp.*, 2013 IL App (3d) 120001, ¶¶ 20–21, 86, 89, 98, 992 N.E.2d 103, 119–22). The *Bowman* court further relied on the seminal case of *In re Marriage of Kozloff*, 463 N.E.2d 719, 101 Ill. 2d 526 (1984), though it recognized *Kozloff*'s limitations, to resolve the issue in favor of retaining the doctrine.

166. *Bowman*, 2015 IL App. (5th) 140215, ¶¶ 21–25, 25 N.E.3d at 738–39 (Stewart, J., dissenting) (citing *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, 996 N.E.2d 1131).

167. *Bowman v. Ottney*, 2015 IL 119000, *reh'g denied* (Jan. 19, 2016) (No. 119000).

certified question on other grounds, explicitly declining to address the doctrine's continuing validity.<sup>168</sup>

The *Bowman* plaintiff litigated her medical malpractice claim through four years of extensive pretrial proceedings and substantial discovery rulings.<sup>169</sup> The plaintiff then voluntarily dismissed her case.<sup>170</sup> Four months later, she refiled the action in the same county, stating the same cause of action against one of two defendants in the prior case.<sup>171</sup> The second case was assigned to the same judge who had heard the first matter; the plaintiff immediately moved for a substitution as of right, which was denied by the trial court and affirmed on appeal as a “testing the waters” violation.<sup>172</sup>

The Illinois Supreme Court briefly discussed the current substitution statute as well as its predecessor Venue Act, highlighted the operative provisions of each, and concluded that the 1993 amendments changed neither the right to a single substitution nor the “substantial issue” test, noting that “the purpose of the statute remains the same.”<sup>173</sup> The court then focused on the language of the statute itself, which provides that a substitution may be had “in any civil action.”<sup>174</sup> Though *Bowman* presented two separately docketed actions, the cases involved the same cause of action, between the same parties, stemming from the same factual events. The court treated them as representing only one “civil action”—and therefore the substantial rulings in the prior case barred a substitution in subsequent matters.<sup>175</sup>

The court in its discussion engaged in a brief analysis of the parties' proposed interpretations, touching favorably upon various equitable principles intended to curtail abuse of the statute, including limitations to avoid delay<sup>176</sup> and to avoid judge-shopping.<sup>177</sup> To hold as the *Bowman* plaintiff wished would mean that any plaintiff could voluntarily dismiss his or her case before the first judge, refile it before

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168. *Id.* ¶ 27.

169. *Id.* ¶ 3.

170. *Id.*

171. *Id.*

172. *Id.*; see also *Bowman v. Ottney*, 2015 IL App. (5th) 140215, ¶¶ 17–19, 25 N.E.3d 733, 737–38.

173. *Bowman*, 2015 IL 119000, ¶¶ 13–16.

174. *Id.* ¶¶ 10, 22 (citing 735 ILL. COMP. STAT. 5/2-1001(a) (2016)).

175. *Id.*

176. *Id.* ¶ 18. The court cited, inter alia, Venue Act and pre-“substantial issue” cases, including *Hoffmann v. Hoffmann*, 239 N.E.2d 792, 794, 40 Ill. 2d 344, 348 (1968). See also *supra* notes 68–75 and accompanying text (discussing *Hoffmann*).

177. *Bowman*, 2015 IL 119000, ¶¶ 18, 23–25.

a second judge, and then move for a substitution to a third judge, *regardless* of the first proceedings.<sup>178</sup> Such an outcome would be precisely the sort of procedural maneuvering the substitution statute was designed to prevent.<sup>179</sup>

But, much as the Fifth District’s opinion was split, so too was the Illinois Supreme Court’s: Justice Kilbride dissented, advocating for a narrower interpretation of the substitution statute and adoption of the *Schnepf* analysis so as to reject the “testing the waters” doctrine entirely.<sup>180</sup> Justice Kilbride read the substitution statute as unambiguous on its face, limiting the “substantial issue” test only to issues in the current case.<sup>181</sup> Where a *different* case is implicated, the “substantial issue” test cannot function as a bar, and the majority’s application would read crucial language into the statute that is simply not there.<sup>182</sup> Justice Kilbride rejected the “testing the waters” doctrine for much the same reason, agreeing with the Fourth District in *Schnepf* that the doctrine had no basis in the modern text of the substitution statute.<sup>183</sup>

Though the *Bowman* court declined to directly address the “testing the waters” doctrine, it still provided some clues as to the doctrine’s continued viability. Specifically, the court both declined to adopt the strict interpretation advocated by Justice Kilbride, and tangentially endorsed equitable limitations on the statute.<sup>184</sup> The court’s holding

178. *Id.* ¶¶ 21–24.

179. *Id.* ¶ 25. In discussing how issues in prior cases can work to bar a substitution in later, technically distinct, actions, *Bowman* shares more than a passing resemblance to the Illinois Supreme Court’s own precedent in *In re Marriage of Kozloff*, 463 N.E.2d 719, 101 Ill. 2d 526 (1984), which concerned post-marriage dissolution petitions brought as separate actions but all stemming from the same divorce proceedings. Certainly the legal loophole closed out has the same mechanism. Compare *Bowman*, 2015 IL 119000, ¶¶ 21, 25, with *Kozloff*, 463 N.E.2d at 721–22, 101 Ill. 2d at 530–51. Curiously, the *Bowman* court does not give *Kozloff* more than a passing citation.

180. *Bowman*, 2015 IL 119000, ¶¶ 33–42 (Kilbride, J., dissenting). Illinois Supreme Court justices are elected from, and outside the judicial term usually remain in, their home appellate districts. Justice Kilbride hails from the Third District, but participated in neither of the Third District’s two post-1993 rulings on the “testing the waters” doctrine in 2004 and 2013, as he had been elected to the Supreme Court in 2000. See *Hansen v. Hetrick*, 818 N.E.2d 860, 862, 353 Ill. App. 3d 341 (3d Dist. 2004); *Ramos v. Kewanee Hosp.*, 2013 IL App (3d) 120001, 992 N.E.2d 103.

181. *Bowman*, 2015 IL 119000, ¶ 37 (Kilbride, J., dissenting).

182. *Id.* ¶ 36.

183. *Id.* ¶¶ 41–42 (quoting *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶ 50, 996 N.E.2d 1131, 1141). Justice Kilbride’s relatively strict interpretation is by no means without precedent in this area of law. See *Knickerbocker Ins. Co. v. Tolman*, 80 Ill. 106 (1875) (“If the statute is harsh, or if it works hardship, the remedy is in the hands of the General Assembly . . .”).

184. The former, by declining to adopt the rhetoric of the dissent; the latter, by discussing and

was premised on the interpretation of “civil action,” but it also spent time favorably discussing equitable limitations on the statute designed to avoid judge-shopping or delay.<sup>185</sup> Crucially, it noted that “the purpose of the [substitution] statute remains the same [as the Venue Act],” thereby declining to categorically exclude, as the Fourth District would, Venue Act doctrines such as “testing the waters” merely because the statutory language had been streamlined.<sup>186</sup>

Though the Illinois Supreme Court did not foreclose on the viability of the “testing the waters” doctrine, it did not exactly hand down a ringing endorsement thereof. Because both positions on the doctrine can be consistent with *Bowman*,<sup>187</sup> the split in appellate authority remains open.

### III. SUBSTITUTIONS FUTURE: A NECESSARY LIMITATION

The “testing the waters” doctrine was created as an equitable check on the then otherwise unbounded right to seek a change of venue. Even after the Venue Act gained specific statutory limitations, the doctrine remained as a crucial gap-filling provision, allowing courts to deny in equity that which was technically correct but palpably unfair in law.

Continued application of the “testing the waters” doctrine would not only be consistent with two hundred years of substitutions of judge, but would also be a good idea. The test may still be applied where the judge has tipped his or her hand in hearings or other party interactions, but application of the doctrine is particularly appropriate in cases where a party’s ability to test the waters is evident from the bare facts of the record itself. In all cases, however, parties and courts alike should be well-aware of the practical effects of opposing or denying a motion to substitute, and should err on the side of permitting such substitution.

#### A. Schnepf’s Critique Is Largely Inapposite

The Fourth District’s extensive critique of the “testing the waters” doctrine in *Schnepf* offers three main grounds for objection: first, that

approving of equitable limitations as a way to avoid judge-shopping. *Bowman*, 2015 IL 119000, ¶ 18.

185. *Id.* ¶¶ 15, 18.

186. *Id.* ¶ 16. Compare *id.*, with *Schnepf*, 2013 IL App (4th) 121142, ¶ 53, 996 N.E.2d at 1141 (changes in statute affect doctrines that can be used to further its ends). See *supra* notes 134–36 (*Schnepf* court’s discussion of effects of statutory change in language). Note, however, that *Schnepf*’s rejection of the doctrine was multifaceted, and it would reach the same conclusion even under a more liberal interpretation of the statute. *Schnepf*, 2013 IL App (4th) 121142, ¶¶ 50–52, 54–55, 996 N.E.2d at 1141–42 (alternate grounds).

187. See *supra* note 185 (discussing interaction of *Bowman* with grounds raised in *Schnepf*).

the doctrine is inconsistent with the principle of liberal construction; second, that the “substantial issue” test is an adequate bright line to bar inappropriate substitutions; and third, that the doctrine enables abuse by those parties seeking to avoid substitution.<sup>188</sup> None of the three critiques is well-taken: *Schnepf* fundamentally misses the underlying principles and application of the Venue Act, mischaracterizes the scope of the “substantial issue” test, and misunderstands the broader historical purpose of the substitution statute.

To be sure, *Schnepf* raises some good points about the purpose and applicability of the “testing the waters” doctrine under the modern substitution statute. The concerns do not, however, justify the doctrine’s abjuration, but rather underline its continuing importance.

### 1. The Doctrine Comports with the Principle of Liberal Construction

The Fourth District held in *Schnepf* that the “testing the waters” doctrine is generally inconsistent with the principle that substitutions are to be liberally granted.<sup>189</sup> This is true in the most basic sense: the doctrine permits a court to bar a substitution. *Schnepf* argues that the text of the Venue Act authorized the doctrine’s deviation, but that the text of the substitution statute does not.<sup>190</sup> Specifically, because the Venue Act couched changes of venue in terms of prejudice, it authorized the existence of an equitable doctrine that would deny changes of venue brought for other purposes.<sup>191</sup> But because the substitution statute notes no reference to a reason, instead granting the right to substitution as an absolute one, the 1993 amendments removed any possible statutory basis for the continued existence of the doctrine.<sup>192</sup>

This analysis is logical enough in a vacuum, but it is founded on a single flawed presumption: that the requirement of prejudice under the

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188. See *Schnepf*, 2013 IL App (4th) 121142, ¶¶ 53–55, 996 N.E.2d at 1141–42. *Schnepf* also identifies several other minor objections, including obsolescence as a consequence of the 1993 amendments, *id.* ¶ 50, 996 N.E.2d at 1141; an inability to apply the doctrine consistently, *id.* ¶ 51, 996 N.E.2d at 1141; and counterintuitive application, *id.* ¶ 52, 996 N.E.2d at 1141. To the extent that these objections stand alone, they will be discussed as parts of the *Schnepf* critiques on the principle of liberal construction, the adequacy of the “substantial issue” test, and the counterintuitive nature of the test, respectively. *Infra* Parts III.A.1–3.

189. *Schnepf*, 2013 IL App (4th) 121142, ¶ 53, 996 N.E.2d at 1141 (citing *Rosewood Corp. v. Transamerica Ins. Co.*, 311 N.E.2d 673, 674, 57 Ill. 2d 247, 250 (1974)).

190. *Id.* ¶ 53, 996 N.E.2d at 1141.

191. *Id.* ¶ 53, 996 N.E.2d at 1141; see also Ill. Rev. Stat., ch. 110, ¶ 2-1001(a)(2) (1991).

192. *Schnepf*, 2013 IL App (4th) 121142, ¶ 53, 996 N.E.2d at 1141; see also 735 ILL. COMP. STAT. 5/2-1001(a)(2) (2016).

Venue Act was more than a historical artifact, one which has not carried meaning for well over a hundred years. Was the Venue Act's original purpose, relative to substitutions of judge, to protect parties from prejudice on the part of that same judge? Absolutely and undoubtedly, otherwise it would never have been drafted as such.<sup>193</sup>

Though curtailing prejudice may have been the Venue Act's original purpose, the prejudice requirement was effectively gutted: not only was the right to a change of venue absolute, regardless of the purpose for which the change was requested,<sup>194</sup> but "prejudice" itself became hollow, with a party required to only make the allegation.<sup>195</sup> Indeed, for the better part of the Venue Act's time in force, the prejudice requirement was merely a procedural form, as the judge could neither investigate nor question the allegation.<sup>196</sup>

In striking the prejudice requirement, the 1993 amendments did nothing more than bring the law into conformity with generations of fact. Indeed, as the Illinois Supreme Court later recognized in *Bowman*, not only did the amendments not alter the statute's operative provisions, but "the purpose of the statute remain[ed] the same."<sup>197</sup> The *Schnepf* court is technically correct in that the text of the substitution statute offers no purchase for a doctrine intended to buttress a prejudice-oriented statute, but that was never the doctrine's purpose.<sup>198</sup> The "testing the waters" doctrine saw most of its use long after "prejudice" had been rendered defunct as an operative provision; a strictly textual interpretation of the modern substitution statute, in the context of continued application of the doctrine, misses the nuances of application that informed both the statute's predecessor and the amendments that created the modern statute itself.

## 2. The "Substantial Issue" Test Is Necessary, but Not Sufficient

The *Schnepf* critique recognizes the need to limit substitutions of judge, and points to the "substantial issue" test as an adequate statutory

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193. See, e.g., Ill. Rev. Stat. Venue, § 1 (1827).

194. E.g., Ill. Rev. Stat. Venue, § 1 (1827) (change of venue "shall" be granted); see also *Knickerbocker Ins. Co. v. Tolman*, 80 Ill. 106 (1875) (characterizing the right to change of venue, where petition properly made, as absolute); *supra* Part I.C (discussing absolute nature of the right).

195. E.g., *Rosewood Corp. v. Transamerica Ins. Co.*, 311 N.E.2d 673, 675, 57 Ill. 2d 247, 251 (1974); see also *supra* Part I.A (discussing prejudice).

196. See, e.g., *People v. Schiffman*, 182 N.E. 760, 761–62, 350 Ill. 243, 246–47 (1932).

197. *Bowman v. Ottney*, 2015 IL 119000, ¶ 16.

198. See *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶ 53, 996 N.E.2d 1131, 1141–42; see also *infra* Part III.A.2 (discussing purpose of doctrine).

bright line.<sup>199</sup> In large part, this is well and good: after all, the test was introduced for the specific purpose of determining timeliness so as to limit a party's right to change venue.<sup>200</sup> As the culmination of several attempts to determine timeliness by looking to a date certain, the "substantial issue" test has generally been highly effective, and has given rise to a significant body of case law.<sup>201</sup>

By and large, the "testing the waters" doctrine and "substantial issue" test will return the same answer.<sup>202</sup> Ruling on a substantial issue logically requires that a judge tip his or her hand as to that issue.<sup>203</sup> The Fourth District asserts that the number of cases in which there *is* a testing of the waters but there is *not* a substantial issue posed would be small enough so as to not justify deviation from the "substantial issue" mechanism.<sup>204</sup>

To the extent the Fourth District declines to apply the doctrine on principle as a step beyond the statutory text, such a stance is undercut by the fact that the doctrine predated the "substantial issue" test, and the statutory revisions were never intended to affect the doctrine's application.<sup>205</sup> Even so, it would seem that the Fourth District underestimates the number of cases that might present a testing of the waters but no substantial issue; such cases are less frequent, but certainly do exist.<sup>206</sup> When a fact pattern is not captured by, or a party

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199. *Schnepf*, 2013 IL App (4th) 121142, ¶ 54, 996 N.E.2d at 1142 (citing 725 ILL. COMP. STAT. 5/2-1001(a)(2)(ii) (2016)).

200. *See generally supra* Part I.B.3 (discussing the development of the test).

201. *Id.*; *see, e.g.*, *Antkiewicz v. Pax Indianapolis, Inc.*, 627 N.E.2d 185, 188, 254 Ill. App. 3d 723, 727 (1st Dist. 1993) (refusing to categorically define "substantial issue," and instead affirming that each case is to be examined on the totality of its own unique circumstances).

202. Indeed, many applications of the "testing the waters" doctrine have been presented as supplemental to, or in the alternative to, a "substantial issue" analysis. *See, e.g.*, *City of Granite City v. House of Prayers*, 775 N.E.2d 643, 651–52, 333 Ill. App. 3d 452, 461–62 (5th Dist. 2002); *In re Marriage of Kozloff*, 463 N.E.2d 719, 721–22, 101 Ill. 2d 526, 530–31 (1984).

203. It would be a strange ruling indeed that did not actually tell the parties what the judge's decision had been. Theoretically, if neither party understood the ruling and joined in a joint motion for clarification, it could be possible that a substantial ruling did not, in fact, test the waters. At that point, however, if the parties were working together, they could simply jointly move for a substitution—something parties can do at any time, without limitation. 735 ILL. COMP. STAT. 5/2-1001(a)(2)(ii) (2016).

204. *Schnepf*, 2013 IL App (4th) 121142, ¶ 54, 996 N.E.2d at 1142.

205. *See supra* Part I.B.3 (discussing development of the "substantial issue" limitation); *supra* Part III.A.1 (discussing effect of statutory changes on the statute's interpretation); *see also* *Bowman v. Ottney*, 2015 IL 119000, ¶ 16 (establishing that the 1993 amendments did not change statute's purpose).

206. Prior to the introduction of the "substantial issue" test in 1971, *all* analyses were solely of the "testing the waters" type. *See supra* Part I.B.2 (discussing development of "testing the waters"). Such cases are more infrequent today, but still occur. *E.g.*, *In re Marriage of Abma*,

has otherwise circumvented, the “substantial issue” limitations, the “testing the waters” doctrine may be the only grounds upon which a court can render a just result.

Consider the plaintiff’s logic in *Bowman*: a plaintiff could voluntarily dismiss, refile, and then move for a substitution in the new case, *without* triggering the “substantial issue” bar. Such practice is not only lopsided—defendants cannot, of course, voluntarily dismiss cases!—but is also a clear case of trying out the court’s opinion before committing to it, something that courts have long held to be an abuse of the statute.<sup>207</sup> The Illinois Supreme Court decided the *Bowman* appeal on different grounds,<sup>208</sup> but the principle remains: there are potentials for serious procedural abuse of the substitution statute that the “substantial issue” test is simply not designed to catch.<sup>209</sup>

### 3. The Doctrine’s Potential for Abuse Is Acceptable

The *Schnepf* court’s third principal criticism is that the “testing the waters” doctrine is susceptible to abuse by those parties with the strongest interest in denying the right to a substitution of judge.<sup>210</sup> The Fourth District is correct in pointing out that the doctrine is susceptible to abuse; every procedural mechanism holds the potential for abuse. The doctrine is particularly vulnerable because it is premised on actual knowledge of the judge’s opinions regarding a matter; at the risk of mixing metaphors, once the waters have been tested so as to bar a substitution, the bell cannot be unrung, no matter who rang it or why.<sup>211</sup>

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720 N.E.2d 645, 653–54, 308 Ill. App. 3d 605, 614–15 (1st Dist. 1999).

207. See *Comm’rs of Drainage Dist. v. Goebel*, 50 N.E.2d 444, 447, 383 Ill. 323, 328 (1943). The *Bowman* fact pattern is also not unique: see, for instance, *Templeton v. First National Bank*, 362 N.E.2d 33, 47 Ill. App. 3d 443 (5th Dist. 1977), wherein the court closed a then-recent “substantial issue” loophole, noting it did not believe that the General Assembly intended to create such a grave potential for abuse. *Id.* at 35–36, 47 Ill. App. 3d at 446–47.

208. *Bowman*, 2015 IL 119000, ¶¶ 25, 27; see also *supra* Part II.B.3 (discussing *Bowman* in greater detail).

209. See *infra* Part III.C (discussing situations where clear potential for abuse exists, and would be countered by “testing the waters” analysis).

210. *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶ 55, 996 N.E.2d 1131, 1142.

211. The “testing the waters” inquiry is a judge-specific one. See *supra* notes 101–03 and accompanying text. Once the waters have been tested with regards to one judge, that judge may not be the target of a substitution as of right for the remainder of that case, regardless of the capacity or method by which the waters were tested. See *City of Granite City v. House of Prayers*, 775 N.E.2d 643, 650–51, 333 Ill. App. 3d 452, 461 (5th Dist. 2002) (“substantial issue” test, and principles of “testing the waters” doctrine, applied to judge whose previous involvement was solely as a coverage judge). Regarding rung bells, see *United States v. Lowis*, 174 F.3d 881, 885 (7th Cir. 1999), for a summary of the phrase in its conventional context of curative jury instructions.

But the doctrine's broad scope itself provides a remedy: though there is always the potential for abuse, the potential may not be as actual as *Schnepf's* characterization suggests.

*Schnepf* focuses on two possible means of abuse: first, where a judge expresses an opinion on the merits so as to deliberately bar a substitution; and second, where an opposing party lures a judge into doing so.<sup>212</sup> The first possibility misses the point of the substitution statute. Both the “substantial issue” test and “testing the waters” doctrine serve the same purpose: to ensure that substitutions occur *before* a judge becomes overly involved with the case.<sup>213</sup> If a judge has expressed an opinion regarding the merits of the case, then, in a sense, the doctrine's purpose has been met.<sup>214</sup>

More importantly, it is unfair to assume a judge would deliberately express an opinion to “lock in” a case, presumably to rule against a certain party. Judges are rightly presumed to be impartial,<sup>215</sup> and it is improper for a judge to intimate an opinion as to a matter not properly before him or her.<sup>216</sup> Certainly, if a judge is actively plotting against a party, then he or she could abuse the “testing the waters” doctrine so as to force the party to remain subject to his or her will—but a judge who intended such misconduct, in direct violation of the canons of judicial ethics, would not be stopped by the mere presence, or absence, of an equitable doctrine.<sup>217</sup>

To the extent that an opposing party might lure a judge into expressing an opinion on an issue, once again there remains the simple fact that judges go to great pains to avoid doing exactly that. Even if

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212. *Schnepf*, 2013 IL App (4th) 121142, ¶ 55, 996 N.E.2d at 1142.

213. In this respect, *all* modern statutory timing provisions are a good deal more liberal than early iterations, which cut off substitutions as of right on a date certain. *See, e.g.*, Ill. Rev. Stat., ch. 146, ¶¶ 6–7 (1935) (substitutions untimely thirty days after date defendant was required to appear); *see supra* Part I.B.1 (discussing strict timeliness limitations in the history of the Venue Act).

214. *See Liteky v. United States*, 510 U.S. 540, 550–51 (1994) (holding that where the judge is ill-disposed to a party due to knowledge gained through the case, there is no improper “bias or prejudice, since [the judge's] knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task”).

215. *Eychaner v. Gross*, 779 N.E.2d 1115, 1146, 202 Ill. 2d 228, 280 (2002) (discussing background presumptions regarding judicial prejudice); *accord Liteky*, 510 U.S. at 550–54 (discussing sources of judicial prejudice).

216. *See* ILL. SUP. CT. R. 63 (impartiality provisions of the Illinois Code of Judicial Conduct).

217. And, to the extent a party could prove it, such a judge would always be subject to a substitution for cause. *See* 735 ILL. COMP. STAT. 5/2-1001(a)(3) (2016); *Eychaner*, 779 N.E.2d at 1146–47, 202 Ill. 2d at 280–81 (discussing elements of substitution for cause).

such an action were to take place, the remedy for it rests with the judge, who could grant a substitution. After all, the “testing the waters” doctrine is an equitable remedy; to the extent that applying it would be inequitable, the judge would have discretion to not do so.<sup>218</sup>

*B. The Doctrine Remains Viable Based on the Content of Proceedings*

The classic “testing the waters” approach involves a situation where, after the defendant has appeared but before a substantial issue has been raised, the trial judge tips his or her hand as to the merits of the case.<sup>219</sup> At that point, though no substantial issue has been raised, the defendant has a sense of which way the judge is leaning.<sup>220</sup> Because the defendant knows or suspects which way the judge will rule on the merits, he or she might move for a substitution of judge, in the hopes that the next judge is more favorably disposed toward him or her. The “testing the waters” doctrine bars such a substitution on equitable grounds, for to grant it would be to allow the defendant a second bite at the apple.

The above description of the doctrine’s operation has, for decades, tracked the stated policy concern of the Illinois Supreme Court to avoid judge-shopping.<sup>221</sup> The doctrine was applied easily enough to cases brought under the Venue Act.<sup>222</sup> The 1993 amendments that crafted the modern substitution statute stripped the Venue Act’s functionally inoperative “prejudice” language, reorganizing the statutory text to comport with the manner in which courts had been applying it for, in some respects, more than a century.<sup>223</sup>

The 1993 amendments gave no indication that the “testing the waters” doctrine had been abolished or otherwise superseded. The substitution statute’s fundamental purpose remains the same as that of

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218. This would be a matter of first impression in appellate case law, but it tracks from the equitable nature of the doctrine. Furthermore, even if such a decision were technically incorrect, it would be likely to stand: only the moving party has standing to challenge a substitution of judge. *Powell v. Dean Foods Co.*, 2012 IL 111714, ¶¶ 42–43, 47, 965 N.E.2d 404, 413. If the substitution were truly improperly *granted*, the only party with standing to appeal it—the movant—would have no reason to do so.

219. *E.g., In re Marriage of Abma*, 720 N.E.2d 645, 308 Ill. App. 3d 605 (1st Dist. 1999).

220. *Hader v. St. Louis Sw. Ry. Co.*, 566 N.E.2d 736, 740, 207 Ill. App. 3d 1001, 1008 (5th Dist. 1991).

221. *Comm’rs of Drainage Dist. v. Goembel*, 50 N.E.2d 444, 447, 383 Ill. 323, 328 (1943) (characterizing such action as “highly improper”).

222. *See supra* Part I.B.2 (describing development and application of the doctrine under the Venue Act).

223. *See supra* Part II.A (describing amendments and functionality of the modern substitution statute).

the Venue Act.<sup>224</sup> The policy concerns underlying the doctrine's role have not changed.<sup>225</sup> Consequently, there is no reason for courts to change their traditional application of the doctrine, as the Fourth District has proposed. In this appellate split, the weight of appellate authority has the right of it: the Fourth District's rejection in *Schnepf* is not well-founded, and should be reconsidered and rejected.<sup>226</sup>

### C. *The Doctrine Is Most Effective in the Procedural Context*

The “testing the waters” doctrine has a place in barring substitutions where the trial judge has tipped his or her hand, but it can also be applied in a highly effective manner to curtail unconventional abuses, where the waters have been effectively tested *on behalf of* the party seeking substitution. This type of “procedural” abuse is exemplified by the issue before the court in *Bowman*: the statute had been satisfied on its face, but the situation—a previously voluntarily dismissed case before the same judge—rendered a new substitution inequitable.<sup>227</sup> Testing the waters in such cases looks not to the attitude of the trial judge, but instead to the actions of the party seeking substitution, in order to determine whether an implicit waiver has occurred.

Applying the doctrine in this manner is best described through examples, which fall into one of two categories: first, identity of parties, in that the party seeking substitution has the same legal interests as a party otherwise barred from seeking substitution on the face of the statute; and second, actions by the party seeking substitution that constitute clear abuse of the statute.

It should be noted that none of the following situations, if presented,

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224. See *supra* Part III.A.1 (discussing interaction between versions of statute); *Bowman v. Ottney*, 2015 IL 119000, ¶ 16 (purpose remained the same).

225. See *supra* Part III.A.3 (discussing mechanisms of abuse under the statute). Note that the means and mechanisms of abuse remain the same under both the Venue Act and the substitution statute; the statutory text is largely irrelevant.

226. Preferably by the Fourth District itself, because the Illinois Supreme Court has signaled its unwillingness to get involved. Barring that, the doctrine would surely benefit from a well-reasoned affirmation by one of the other four appellate districts. As it stands, the other districts' rejection of *Schnepf* is quite short on rhetoric; no court has yet engaged *Schnepf* on anything resembling its level of detail. See *supra* Part II.B.2 (summarizing contemporary appellate district rulings on the doctrine).

227. The Fifth District solved this inequity by applying the “testing the waters” doctrine, and the Illinois Supreme Court did so by looking at the a priori question of whether the matter was part of the same case, but in both instances neither court questioned that interpreting the statute the way the petitioner wished it to be interpreted would be flagrantly abusive. See *Bowman v. Ottney*, 2015 IL App (5th) 140215, ¶ 19, 25 N.E.3d 733, 738; *Bowman v. Ottney*, 2015 IL 119000, ¶ 26.

would necessarily justify denial of a requested substitution under the “testing the waters” doctrine.<sup>228</sup> Rather, they are presented as examples that could signal abuse of the statute. A good-faith substitution request in these scenarios ought to be granted. If the request does not appear to be brought in good faith, the “testing the waters” doctrine may provide a tool with which courts can rein in statutory abuse.

### 1. Identity of Interests

The right to a substitution attaches to each individual party directly, regardless of how formal the distinction may be.<sup>229</sup> And, once a judge has issued a substantial ruling on a decision, each affected party is barred from moving to substitute.<sup>230</sup> But consider: the statute further provides that substantial rulings do not “count” against a party, so long as that party has not appeared or been defaulted.<sup>231</sup> Two (or more) parties may share the same legal interest, but might *not* both be treated the same way under the statute, based on whether they appeared. This split is necessary, to ensure that each party’s right is retained, but it is also an open avenue for abuse.

In its simplest form, two codefendants might share the same legal interest in proceedings, yet only one of them might appear to defend. The first codefendant might then proceed to test the judge with regards to a substantial issue, perhaps on a threshold issue such as a motion to quash service or a section 2-619 motion to dismiss.<sup>232</sup> Having determined the judge’s stance on the issue, the second codefendant might then choose to appear, move for a substitution of judge, and bring the same defense before the new judge. All this would be proper, as the second codefendant’s motion would *not* be barred by the ruling as to the substantial issue before the first codefendant alone.<sup>233</sup>

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228. See *supra* note 218 (discussing effects of a judge improperly *granting* substitution).

229. *Behringer v. Hardee’s Food Sys.*, 668 N.E.2d 614, 615, 282 Ill. App. 3d 600, 601 (5th Dist. 1996); see *supra* Part II.A.2 (discussing to whom the right attaches).

230. 735 ILL. COMP. STAT. 5/2-1001(a)(2)(ii) (2016).

231. 735 ILL. COMP. STAT. 5/2-1001(a)(2)(iii) (2016).

232. 735 ILL. COMP. STAT. 5/2-619 (2016). Though any motion to dismiss, including a section 2-615 motion, would involve a substantial ruling, a section 2-619 motion grants the court discretion to decide questions of fact, which would likely be more practically significant to the parties than disputes over law. See *Consumer Elec. Co. v. Cobelcomex, Inc.*, 501 N.E.2d 156, 159, 149 Ill. App. 3d 699, 703 (1st Dist. 1986) (“Although similar to a summary judgment motion, a section 2-619 motion differs in that the court may, in its discretion, decide questions of fact ‘upon the hearing of the motion.’” (internal citation omitted)).

233. Judges in this situation, knowing that the first judge ruled a certain way on the issue, may well be inclined to adopt the first judge’s reasoning and issue substantially the same ruling. But, the mere fact that the codefendant had a second bite at the apple is problematic—and, of course,

In this scenario, the “testing the waters” doctrine might serve to bar the second codefendant’s motion to substitute judge. This is not because the codefendant does not have a right to the substitution (he or she does), or that the first codefendant’s actions affected the second codefendant’s right (he or she could not). Rather, the second codefendant himself or herself implicitly *waived* the right by waiting until the first codefendant tested the waters before deciding whether the waters were sufficiently friendly and then appearing.<sup>234</sup>

This analysis requires that the second codefendant have knowledge of the action, knowledge of the potential for a substantial ruling, and took no action. Such knowledge can most easily be inferred where there is identity of parties, legal interests, or both.

Consider a married couple. It is not hard to imagine that a legal Bonnie and Clyde might work together, staggering appearances as to maximize their chances of finding a favorable judge. They could coordinate their strategy through a single attorney, to ensure the most technical of compliances with the law;<sup>235</sup> their own personal discussions on the matter would be shielded by the marital privilege.<sup>236</sup>

Consider further a situation with a large number of coplaintiffs—perhaps seventeen local taxpayers, all joining in the same declaratory judgment action challenging a municipality.<sup>237</sup> Each of those seventeen coplaintiffs would have the same right to a substitution of judge. As

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reasonable minds can (and do) differ on a regular basis.

234. Quick-draw plaintiffs could curtail this by simply defaulting all non-appearing defendants at the earliest possible opportunity, and pushing out hearings on substantial issues until after the defaults were entered. Given that even the tightest of briefing schedules usually takes longer than the thirty-day default window, this is certainly a viable strategy—provided that plaintiffs request the default be entered before ruling on the contested motion, and that the orders make the timing of the motions expressly clear. *See Gay v. Frey*, 905 N.E.2d 333, 333–336, 338–339, 388 Ill. App. 3d 827, 827–30, 833–34 (5th Dist. 2009) (clerk’s office used correction fluid to change dates of orders; because substitution was actually entered *before* dismissal, dismissal and orders stemming therefrom were void). This, of course, requires that a default motion be brought as soon as possible, which might not be feasible in some cases. *See, e.g.*, Circuit Court of Cook County, Chancery Division, General Administrative Orders Nos. 2012-09, 2012-10 (codifying the “sixty-day rule,” under which plaintiffs in residential mortgage foreclosure cases may not even spindle a motion for default until sixty days from service).

235. For—and rightly—merely having the same attorney as another party has no bearing on a party’s right to seek a substitution of judge. *Behringer v. Hardee’s Food Sys.*, 668 N.E.2d 614, 615, 282 Ill. App. 3d 600, 601 (5th Dist. 1996).

236. Which would of course be waived in cases of fraud. Even assuming the right against self-incrimination does not come into play, however, without subpoena access to their discussions, how could any external party learn of the conspiracy?

237. Consider, in other words, *Aussieker v. City of Bloomington*, 822 N.E.2d 927, 355 Ill. App. 3d 498 (4th Dist. 2005).

plaintiffs, they could not “stagger” their appearances like our married couple could, but with enough substitutions on the table, they could mill through judges until the case reached a judge they wanted. If a hundred plaintiffs banded together—again, likely through a single attorney so as to simplify things on their end<sup>238</sup>—they could run through every judge in a county; the “testing the waters” doctrine provides a ready remedy for such a situation.<sup>239</sup>

Such scenarios might seem exceptional, but it is easy to imagine much more common versions. A complaint names both a one-member, single-purpose LLC and its one member in his or her individual capacity: suddenly one person has all the incentive in the world to take as many swings at the plaintiff’s case as possible. A slip-and-fall occurs on land owned by tenants in common: the insurer might now have an additional way to kick the case around for a bit, raising the plaintiff’s costs and pushing for settlement. Just as the “testing the waters” doctrine provides a clean solution to cases on the margins, where statutory restrictions become ineffective and abuse is almost trivially apparent, so too might it provide courts with a tool to cut down on more conventional improper substitutions.

## 2. Actions by the Party Seeking Substitution

Whereas applying the doctrine in the identity context might find a testing of the waters through inaction, the party seeking a substitution may also be construed to have tested the waters through some affirmative action. Again, this is best understood by looking to specific actions.

First and foremost is the fact pattern of *Bowman*: a party voluntarily dismisses his or her case, refiles it, and thereby effectively gains both a new judge and a new right to substitute judge. As the Fifth District recognized, that strategy in *Bowman* was “thwarted by chance,” as the judge for the refiled matter happened to be the same judge as in the voluntarily dismissed matter.<sup>240</sup> Though the Illinois Supreme Court

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238. Which, again, would be proper. *Behringer*, 668 N.E.2d at 615, 282 Ill. App. 3d at 601.

239. One of two partial dissents in *Aussieker* raises this exact argument, calling the implication of the majority’s ruling “an open invitation to mischief,” and that such a construction would turn the courts into “an endless game of roulette where the wheel forever spins with no winner established.” *Aussieker*, 822 N.E.2d at 931, 355 Ill. App. 3d at 503 (Appleton, J., specially concurring in part and dissenting in part). Judge Appleton is perhaps hyperbolic, but though such a situation is unlikely, the fact that such mechanisms for abuse exist is problematic *ab initio*.

240. *Bowman v. Ottney*, 2015 IL App (5th) 140215, 25 N.E.3d 733, *aff’d on other grounds*, 2015 IL 119000.

eventually affirmed the denial of a substitution on different grounds,<sup>241</sup> the Fifth District’s rhetoric remains compelling: this would be a perfect scenario in which to apply the “testing the waters” doctrine so as to bar a substitution of the same judge upon refiling.<sup>242</sup>

The voluntary dismissal gives plaintiffs other mechanisms with which to circumvent the substitution statute. Consider a plaintiff who splits his or her claims across multiple *suits*: two cases, stemming from the same facts, between the same parties, are ripe for consolidation, but the process is not automatic. By filing two—or more—separate cases, the plaintiff has what amounts to the same matter pending before two separate judges, and can effectively choose the judge before whom he or she wishes to proceed. To get both matters on the lower-numbered docket, all the plaintiff must do is consolidate. This is a predictable operation—in Cook County, for instance, consolidated cases are always assigned to the judge hearing the lowest-numbered case.<sup>243</sup> To get both matters on the higher-numbered docket, he or she can voluntarily dismiss the lower-docketed case and amend the complaint in the higher-numbered docket.

By choosing between judges, the plaintiff can be said to have tested the judge’s waters and affirmatively chosen that judge, and can therefore be “locked in” to that judge—the doctrine could not bar the voluntary dismissals or amendments, but it *could* bar a *subsequent* motion to substitute the selected judge.

The number of ways in which wily parties can abuse procedural mechanisms is unfortunately limited only by creative lawyering. The Illinois Code of Civil Procedure is complex—as it must be, to handle modern civil cases—but it is that complexity which gives rise to opportunities for abuse. The “testing the waters” doctrine gives courts a powerful tool to, if not prevent, at least mitigate the consequences of such statutory abuse when it implicates substitutions of judge.

#### *D. A Continuing Admonishment to Pragmatic Considerations*

Regardless of the reasoning behind or method of application of the “testing the waters” doctrine in the future, judges and litigants alike should at all times keep a number of pragmatic considerations in mind. First and foremost of these is the fact that a wrongfully denied

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241. *Bowman*, 2015 IL 119000.

242. *Bowman*, 2015 IL App (5th) 140215, ¶ 19, 25 N.E.3d at 738.

243. See Circuit Court of Cook County, General Order No. 3.1, 1.6: Consolidation of Cases, in 3 ILLINOIS COURT RULES AND PROCEDURE 118 (2015).

substitution of judge has grave consequences: all subsequent orders are void.<sup>244</sup> In most instances, the effect of a substitution would be to spindle the matter before the new judge; while that is a loss of time, it is not overly grave. Parties seeking to hurry things along during motion practice could request that the substituted judge enter a briefing schedule on pending contested matters before granting the substitution—permissible, as scheduling orders do not bar the substitution itself<sup>245</sup>—such that, once the new judge reaches the case, the matter at hand is briefed and ready for hearing.

Second and more subtly, parties opposing a substitution should think carefully before objecting to it with the “testing the waters” doctrine. Setting aside the question of the doctrine’s validity,<sup>246</sup> there might not be too much of a benefit in keeping the presiding judge. There is certainly value in the judge’s institutional knowledge of a matter, but there is also cost to the objection, and a perhaps nontrivial risk of voidness. The extra litigation costs of objecting to the motion might well be outweighed by accepting the substitution and spending a bit more time bringing a new judge up to speed.<sup>247</sup>

When the “testing the waters” doctrine may be applied to bar a substitution of judge, all parties involved should think twice about opposing it for practical reasons. That having been said, if a judge or a party should find it necessary to oppose the substitution, the “testing the waters” doctrine gives them a viable means to do so. It is a procedural tool, and though it may not see frequent use, it should remain at the court’s disposal.

## CONCLUSION

The “testing the waters” doctrine has been good law in Illinois for the

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244. *In re Estate of Wilson*, 939 N.E.2d 426, 455, 238 Ill. 2d 519, 568 (2010) (explaining risk of voidness gives judges “a powerful incentive to err on the side of caution”); *see also supra* note 81 (discussing appealability of substitutions of judge).

245. *See supra* notes 56–57 and accompanying text (discussing substantiality of scheduling orders and continuances); *see also* *Becker v. R.E. Cooper Corp.*, 550 N.E.2d 236, 239, 193 Ill. App. 3d 459, 463 (3d Dist. 1990) (scheduling orders are not substantial issue).

246. For, though the doctrine remains valid in four districts, a party would be ill-advised to attempt to bring such a defense in the Fourth District, whose thoroughly reasoned stance on the matter is quite firm.

247. One further ironic cost-benefit consideration: the more favorably disposed a judge is toward a party—and therefore the more likely that party is to want to keep the judge—the more likely it is that the judge could be subject to a substitution for cause, due to actual prejudice. Such substitutions face a very high burden, *see Eychaner v. Gross*, 779 N.E.2d 1115, 1146–48, 202 Ill. 2d 228, 280–81 (2002), but even if the substitution attempt were not successful, it still represents an additional loss of time and effort.

past hundred years, and nothing in the 1993 statutory amendments to the substitution statute indicates otherwise. The Fourth District in *Schnepf* rejected the doctrine in an extensive critique, but its criticisms are contradicted by a historical analysis of the statute's origins and application. The 1993 amendments affected the statute's form, but not its function, and affected neither the operative mechanism of the doctrine nor its underlying policy rationale.

Not only is the "testing the waters" doctrine still viable for its traditional uses, but it also proves quite effective at curtailing abuses of the substitution statute based on the totality of the circumstances surrounding a substitution. It provides courts with a powerful tool to fill the gaps at the margin of the substitution statute, and is particularly effective in curtailing abuse of other procedural mechanisms. The "testing the waters" doctrine was and remains niche, but there still is, and should be, a place for it in Illinois civil proceedings.