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Small Town Law

ISBA's Rural Practice Initiative encourages law students and recent graduates to settle down in a small town.

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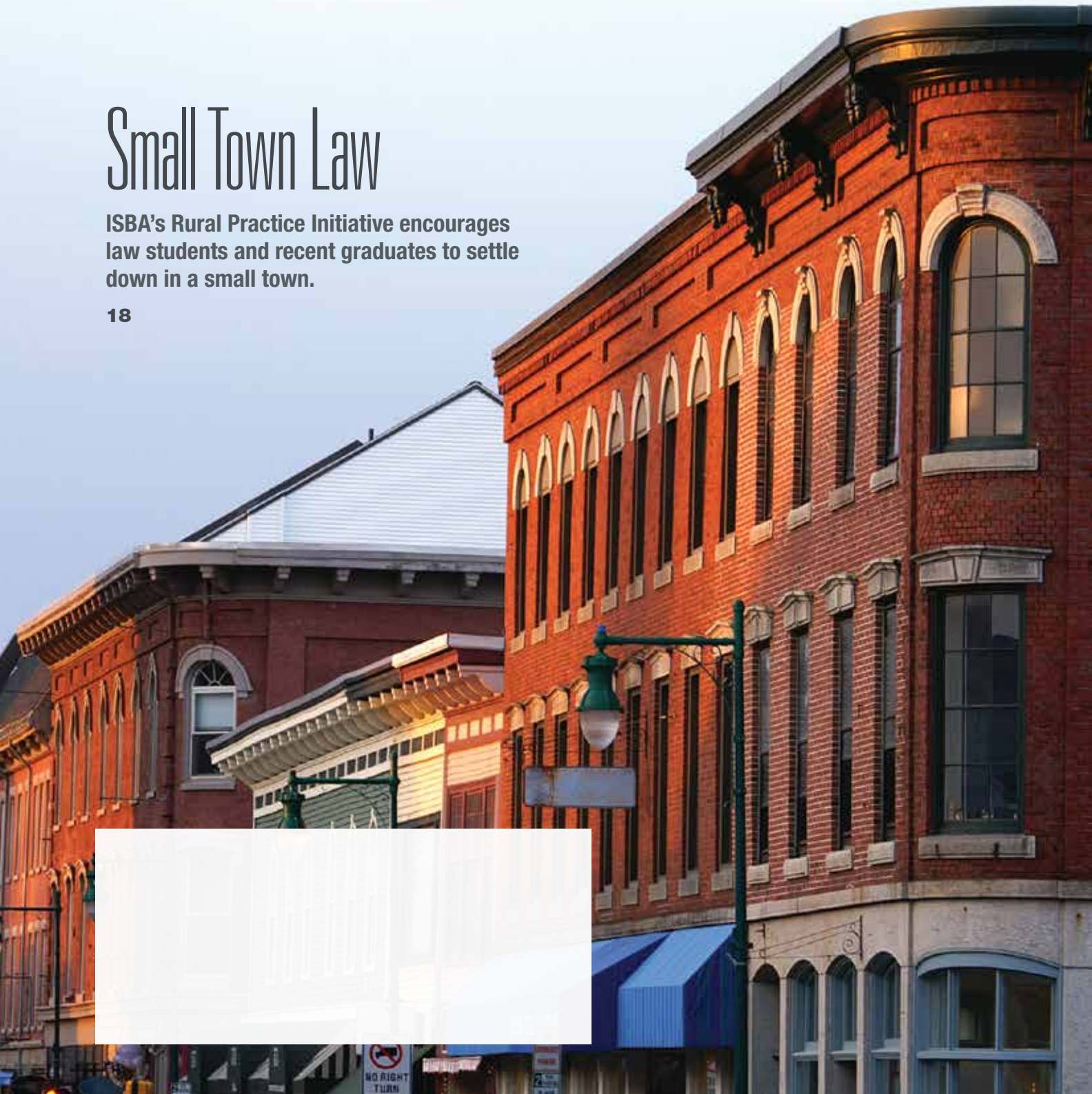

"IN *DAMERON*, THE SUPREME COURT PRECISELY OUTLINED WHAT BOTH SIDES MUST DO WHEN A PARTY SEEKS TO CONVERT HIS OR HER EXPERT."

—Shawn Kasserman, trial lawyer with Chicago-based Tomasik Kotin Kasserman, LLC., and ISBA Third Vice-President

Know Thy Witness

Illinois Supreme Court outlines witness redesignation parameters in *Dameron v. Mercy Hospital & Medical Center*.

IN 2017, AN ATTORNEY REPRESENTING a plaintiff in a medical malpractice lawsuit informed the defendants that she was redesignating a controlled-expert witness as a nontestifying-expert consultant. Along with the change, the attorney would be withholding all information provided by the consultant, a nontreating physician who had examined the plaintiff.

The move set off a separate legal battle that ended when the Illinois Supreme Court ruled this past November in the plaintiff's favor allowing the redesignation and protecting any information the physician had shared with the plaintiff before and after.

Up until the Court's Nov. 19 opinion in *Dameron v. Mercy Hospital & Medical Center*, as the Court stated in its 6-0 opinion (Justice Neville did not participate), Illinois Supreme Court Rules "do not expressly permit or prohibit a party from changing a witness's designation. As observed by the appellate court, Illinois caselaw is likewise silent on the precise issue." (The opinion is available at law.isba.org/35GdFF8. A summary of the opinion also appears on page 14 of this issue.)

The ruling clarified expectations regarding witness designation, timing, and what information an attorney is required to share with opposing counsel.

"In *Dameron*, the Supreme Court precisely outlined what both sides must do when a party seeks to convert his or her expert," says ISBA Third Vice-President Shawn Kasserman, a trial

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lawyer with Chicago-based Tomasik Kotin Kasserman, LLC. "It also clarified issues of timing and 'exceptional circumstances,'" says Brian Baloun of the same firm, "by placing those issues in the context of a more important question: Does converting the expert back to a consultant unfairly surprise the opposing party at trial?"

Accidental witness

In the plaintiff's favor, the physician was redesignated from a witness to a consultant more than a year before trial. Also, the plaintiff stated she only wanted to redesignate the witness because she had inadvertently designated the physician as a Rule 213(f)(3) witness in the first place and was merely correcting the mistake. The defense didn't buy the excuse and pressed for access to the physician's electromyography (EMG) study.

In its opinion, the Court declined to "speculate as to Dameron's motive in redesignating [the physician] as a consulting expert." Instead, the Court granted that even if the plaintiff was attempting to conceal information, the defense had no right to the witness/consultant absent a report, deposition, or exceptional circumstance.

"There is a big difference between abandoning an expert witness and redesignating one. However, the Supreme Court has never addressed this difference. If you abandon an expert witness, it allows the other side to use him or her as its expert. If you redesignate, it takes that expert off the table, barring 'exceptional circumstances' and timing," says Ronald Menna, with Chicago-based Fischel Kahn.

"If you read between the lines, something happened with the expert, and the plaintiff wanted to keep the physician away from the defense. That is fair if time is on your side and opposing counsel has time to find a rebuttal expert," Menna says. "But you are stuck with an expert witness for whom a report has been disclosed or who has been deposed. The first takeaway is you do your darndest to have your expert opinions lined up before the disclosure date. If you can't, make sure the disclosure date is long in advance of the trial date."

Menna says that it appears as if the plaintiff was in a bind and did the right thing by redesignating the expert as early as possible to show good faith. (The circuit court had held the plaintiff's counsel in contempt for withholding the physician's EMG study and initially fined her $100 before reducing it to $1. The Supreme Court vacated the fine and ruled the study was a privileged work product.)

Timing is almost everything

The Supreme Court dismissed the defendant's contention that the plaintiff had employed gamesmanship and strategies "designed to circumvent" discovery rules. Trial attorneys say that while some discovery tactics might invite trouble, *Dameron* asserts that the foul lines are clear, but the playing field is broad.

"When the redesignation is a tactical move intended to conceal an expert's opinion, it is more likely the matter will become contested," says Samantha Salvi of Lake Zurich-based Salvi, Salvi & Wifler, P.C. "If counsel discloses a 213(f)(3) witness before having a full understanding of the expert's opinions, problems for the disclosing attorney will arise."

"Obviously, in *Dameron*, the plaintiffs were allowed to change the witness's designation because it was done early in the litigation. But this case should not be seen as a *carte blanche* to alter the designation of witnesses at any time before trial," says Michael Salvi, also of Salvi, Salvi & Wifler. "This ruling should cause litigants to retain prospective 213(f)(3) witnesses by first confirming their retention as a consultant without an initial expectation of a report. Then, only after the consultant has fully developed her opinion—and presuming it is favorable—should the expert be disclosed to opposing counsel as a 213(f)(3) witness."

Know thy witness

But taking advantage of Illinois Supreme Court Rules that do not require that certain experts provide written reports comes with risks, says Michael Salvi.

He recalled a case of his in which the defense disclosed an expert's opinion in a letter instead of in a report. But the expert changed his mind during discovery in favor of the plaintiff.

"*Dameron* stands for the proposition that parties are not committed to an early designation of an expert and also gives counsel an extra incentive to tell the expert not to draft a report," Salvi says. "However, the disclosing attorney must be sure to have a thorough understanding of the Rule 213(f)(3) expert's opinions before making a disclosure, such as in the form of a writing authored by counsel. Disclosing an (f)(3) expert without fully understanding his or her opinion is a dangerous practice." IBJ

–By Pete Sherman