

## A primer on motions to vacate in traffic cases

By Lisa Dunn

Imagine, or perhaps this has already happened to you, a client comes into your office distraught because he just received notice that his driving privileges are going to be suspended for having too many moving violations. The client proceeds to tell you that he failed to appear in court for the traffic violations because either a) he forgot; b) did not think that it was required; c) put the wrong date on his calendar; or d) "the dog ate it." The client said that he went on with his life ignoring the consequences of not appearing in court. The client comes to you because you are the "expert." What do you do?

Do you take action with the Secretary of State? Do you take action in the Circuit Court that once had jurisdiction of the traffic violations? This author suggests that to correct the client's suspended license, a Motion to Vacate should first be filed in the Circuit Court.

When your client missed court, most likely an *ex parte* Judgment of Conviction was entered against him without further notice pursuant to Supreme Court Rule 556. When a conviction is entered and no cash or

a surety bond is posted, it will be reported to the Secretary of State as an unsatisfied judgment pursuant to 625 ILCS 5/6-306.6(a). This will prohibit the renewal, reissuance or reinstatement of driving privileges until fines and costs are paid in full. If a valid driver's license was posted as bond, the Secretary of State will immediately suspend the driver's license pursuant to 625 ILCS 5/6-306.3.

Most likely, by the time the client walks into your office, more than 30 days have passed since the entry of the Judgment of Conviction. If, however, less than 30 days have passed, your Motion should be based upon 735 ILCS 5/2-1203(a); §5/2-1203(a) is not the subject of this article. Once 30 days have passed after the entry of the original *ex parte* Judgment, the Court loses jurisdiction and the only relief available is a properly written petition to vacate pursuant to 735 ILCS 5/2-1401. Section 5/2-1401 of the Illinois Code of Civil Procedure provides for relief from both civil and criminal judgments after 30 days from the entry of the Judgment. The likelihood of success of this motion largely depends on your client and your ability to

## TRAFFIC LAWS & COURTS

Published at least four times per year.

Annual subscription rate for ISBA members: \$20.

To subscribe, visit [www.isba.org](http://www.isba.org) or call 217-525-1760

### OFFICE

Illinois Bar Center  
424 S. Second Street  
Springfield, IL 62701  
Phones: 217-525-1760 OR 800-252-8908  
[www.isba.org](http://www.isba.org)

### EDITORS

Sarah E. Toney  
George G. Livas

MANAGING EDITOR/  
PRODUCTION  
Katie Underwood  
[kunderwood@isba.org](mailto:kunderwood@isba.org)

## TRAFFIC LAWS & COURTS SECTION COUNCIL

Sarah E. Toney, Chair  
Thomas Speedie, Jr., Vice Chair  
David B. Franks, Secretary  
Ava M. George Stewart, Ex-Officio

Robert Bonjean, III	Alan E. Jones
Juliet E. Boyd	Laura L. Malinowski
Anthony A. Bruno	Edward M. Maloney
Larry A. Davis	Donald J. Ramsell
Hon. John T. Doody	Jeremy J. Richey
Lisa L. Dunn	Steven Sims
Hon. Mark W. Dwyer	Mollie M. Townsend
Nancy G. Easum	J. Brick Van Der Snick
Ted P. Hammel	

Lynne Davis, Staff Liaison  
J. Brick Van Der Snick, CLE Coordinator  
J. Randall Cox, CLE Committee Liaison  
Stephen M. Komie, Board Liaison

Disclaimer: This newsletter is for subscribers' personal use only; redistribution is prohibited. Copyright Illinois State Bar Association. Statements or expressions of opinion appearing herein are those of the authors and not necessarily those of the Association or Editors, and likewise the publication of any advertisement is not to be construed as an endorsement of the product or service offered unless it is specifically stated in the ad that there is such approval or endorsement.

Articles are prepared as an educational service to members of ISBA. They should not be relied upon as a substitute for individual legal research.

The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

## ORDER YOUR 2013 ISBA ATTORNEY'S DAILY DIARY TODAY!

*It's still the essential timekeeping tool for every lawyer's desk and as user-friendly as ever.*

**A**s always, the 2013 Attorney's Daily Diary is useful and user-friendly. It's as elegant and handy as ever, with a sturdy but flexible binding that allows your Diary to lie flat easily.

The Diary is especially prepared for Illinois lawyers and as always, allows you to keep accurate records of appointments and billable hours. It also contains information about Illinois courts, the Illinois State Bar Association, and other useful data.

The ISBA Daily Diary is an attractive book, with a sturdy, flexible sewn binding, ribbon marker, and elegant gold-stamped, dark brown cover.

Order today for \$27.95 (includes tax and shipping)

The 2013 ISBA Attorney's Daily Diary  
**ORDER NOW!**

Order online at

<https://www.isba.org/store/merchandise/dailydiary>  
or by calling Janice at 800-252-8908.

persuade the court.

What are the basic pleading elements of the §5/2-1401 petition to vacate?

- **Writing:** The petition must be written. Without a written petition, the law is very clear that the court is without jurisdiction to act, even absent an objection or "by agreement" with the prosecutor.
- **Affidavit:** The petition must be supported by an affidavit or "other appropriate showing." An affidavit means that your client must sign, under oath, and have his signature notarized.
- **Factual elements:** The petition must set forth the factual allegations in support of the existence of a meritorious defense or claim. This should not be a regurgitation of the statute, but rather specific, articulable facts supporting why the client should not be convicted of the underlying offense. *People v. Smith*, 188 Ill.App.3d 387 393, 544 N.E.2d 413 at 416 (Ill.App.2d 1989).
- **Due diligence presenting the claim:** The drafter of the petition must include specific language about the client's due diligence in presenting this defense or claim to the circuit court in the original action.
- **Due diligence in filing:** The drafter of the petition must include facts demonstrating that the client was not negligent in failing to raise his proffered defense or claim in the original proceeding resulting in the entry of the judgment.

A §5/2-1401 petition to vacate is the proper vehicle to correct such matters as the death of a party before judgment, infancy where the party was not properly represented, incompetency at the time of the judgment, and a valid defense which was not made due to duress, fraud, or excusable mistake. *People v. Smith*, 188 Ill.App.3d 387, 392 N.E.2d 413 (Ill.App. 2 Dist. 1989).

A petition that merely asserts that a meritorious defense exists without also pleading the specific facts supporting that alleged defense may be reversed if raised on appeal. *People v. Mogilles*, 136 Ill.App.3d 67, at 73, 482 N.E.2d 1114 at 1118. Thus, it is extremely important for the drafter to set forth the specific facts of the defense rather than reciting that the client has a meritorious defense.

In addition to your properly pled petition to vacate, you must remember that there is a filing fee. Section 705 ILCS 105/27.1a. requires that the petitioner/movant pay a fil-

ing fee to the clerk of the circuit court when the petition is filed or motioned in court. The amount of the filing fee differs by county, so please remember to the check with the clerk's office of the county in which you intend to file the petition.

Proper notice must be given to all parties affected by the petition. If you are unsure whether the case was prosecuted by a local prosecutor or the State's Attorney, it is always a good practice to give both entities notice of the petition.

When will the suspension of your client's driver's license be removed by the Secretary of State?

Please note that the mere filing of the petition does not affect the Secretary of State's action to suspend the driver's license. The suspension will only be removed if a) the Court grants your petition; and b) the Court imposes a disposition of something other than a conviction. Thereafter, a "transcript" of the proceeding should be obtained and delivered to the Secretary of State. In some counties, the clerk's office will do this automatically and in others, the petitioner/movant is offered the opportunity to deliver it to the Secretary of State. The practitioner is well advised to inquire about the local procedure

prior to appearing in court.

Once the Secretary of State receives the record vacating the conviction, it usually takes one to two weeks for the suspension to be lifted. Please remember that the suspension will not be automatically removed if your client has to pay a fee to the Secretary of State. You or your client can check the status of driving privileges by calling the Secretary of State at 217-785-8619. You will need your client's driver's license number.

A properly pled §5/2-1401 petition to vacate can be a highly effective and expeditious means to "correct" your client's actions from failing to appear in court and the resulting suspension of his driver's license. If successful, your client will perceive you as a smooth and successful attorney who was well-equipped to help him regain his driving privileges. ■

Lisa L. Dunn is an attorney with an office in Arlington Heights. She represents clients in criminal and traffic matters in Lake and Cook County. She is also a former Hearing Officer with the Secretary of State, Department of Administrative Hearings, and has extensive experience with DUI license reinstatement hearings, BAID violations, and interpretation of the rules and regulations of the Secretary of State.



**A+ DUI Services, LLC**

A+ DUI Services is a privately owned outpatient substance abuse treatment facility. We are licensed by the Illinois Department of Human Services, Division of Alcohol and Substance Abuse.

*Our Services include:*

- Evaluations (DUI and non-DUI)
- Risk Education
- Counseling & Treatment for all levels
- Assistance in preparing for Secretary of State Hearings

Call us today at 217.698.3900 or visit us on the web to find out how we can help your clients.

**Info@aplusDUIservices.com**  
**www.aplusDUIservices.com**

1305 W. Wabash, Ste. E, Springfield, IL 62704

**PRIVATE • PROFESSIONAL • PROMPT**